238 N.C. App.—No. 2 Pages 202-364

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 1, 2016

MAILING ADDRESS: The Judicial Department
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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 31 DECEMBER 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

APPEAL AND ERROR—Continued

Appeal and Error—unpublished opinion—persuasive authority—cited in published opinion—Even though unpublished opinions from the Court of Appeals do not constitute controlling legal authority, an unpublished case held that prior acts may provide support for and be incorporated by reference into orders renewing DVPOs. That reasoning was found to be persuasive here and was applied to the facts of this case. **Forehand v. Forehand, 270.**

ATTORNEY FEES

Attorney Fees—alimony—within trial court's discretion—The trial court did not abuse its discretion by denying plaintiff wife's claim for attorney fees in an action for alimony. Under N.C.G.S. § 50-16.4, the decision to award attorney fees is within the trial court's discretion. Furthermore, the trial court found that plaintiff was not entitled to attorney fees because she did not act in good faith during the course of the litigation and acted contrary to the custody terms in the interim order. **Ellis v. Ellis, 239.**

Attorney Fees—underlying judgment upheld—award upheld—An award of attorney fees was upheld where the argument against the award was premised on the reversal of the underlying judgment, which was upheld. **Carolina Marlin Club Marina Ass'n, Inc. v. Preddy, 215.**

BANKS AND BANKING

Banks and Banking—aiding and abetting—breach of fiduciary duty—insufficient specificity—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for aiding and abetting a breach of fiduciary duty. The only North Carolina case with precedential value recognizing such a cause of action, *Blow v. Shaughnessy*, 88 N.C. App. 484, was abrogated by the United States Supreme Court. Even assuming the cause of action existed in North Carolina, plaintiffs' complaint made only conclusory allegations and did not state the claim with sufficient specificity. **Bottom v. Bailey, 202.**

Banks and Banking—Bank Secrecy Act—no private cause of action—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of 31 U.S.C. § 5311, the Bank Secrecy Act, based on acts committed by one of its customers. While plaintiffs argued that the Act and related regulations required Morgan Stanley to "implement and maintain a program to detect known or suspected federal crimes," the Act does not create a private cause of action. **Bottom v. Bailey, 202.**

Banks and Banking—negligence—no duty of care owed to non-customer—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for negligence based on acts committed by one of its customers. When a customer of Morgan Stanley perpetrated a check kiting scheme by writing checks between a HomeTrust Bank account that held plaintiffs' money and a Morgan Stanley account not owned by plaintiffs, Morgan Stanley did not owe plaintiffs a duty of care because plaintiffs were not its customers. **Bottom v. Bailey, 202.**

Banks and Banking—withdrawal by fiduciary from principal's account—account not in principal's name—The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley

CHILD ABUSE, DEPENDENCY, AND NEGLECT

CHILD CUSTODY AND SUPPORT

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.

DAVID BOTTOM AND KRYSTAL DAWN SANCHEZ BOTTOM, PLAINTIFFS
v.
JAMES W. BAILEY, JR., 1031 EXCHANGE SERVICES, LLC, HOMETRUST BANK, A FEDERALLY CHARTERED MUTUAL SAVINGS BANK, AND MORGAN STANLEY SMITH BARNEY, DEFENDANTS

No. COA14-564

Filed 31 December 2014

1. Banks and Banking—negligence—no duty of care owed to non-customer

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for negligence based on acts committed by one of its customers. When a customer of Morgan Stanley perpetrated a check kiting scheme by writing checks between a HomeTrust Bank account that held plaintiffs' money and a Morgan Stanley account not owned by plaintiffs, Morgan Stanley did not owe plaintiffs a duty of care because plaintiffs were not its customers.

2. Banks and Banking—withdrawal by fiduciary from principal's account—account not in principal's name

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of N.C.G.S. § 32-9 based on acts committed by one of its customers. N.C.G.S. § 32-9 applies when a fiduciary makes fraudulent withdrawals on the account of his or her principal. Because the Morgan Stanley account was not in plaintiffs' names, plaintiffs had no claim against Morgan Stanley under the statute.

3. Banks and Banking—Bank Secrecy Act—no private cause of action

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for violation of 31 U.S.C. § 5311, the Bank Secrecy Act, based on acts committed by one of its customers. While plaintiffs argued that the Act and related regulations required Morgan Stanley to "implement and maintain a program to detect known or suspected federal crimes," the Act does not create a private cause of action.

4. Banks and Banking—aiding and abetting—breach of fiduciary duty—insufficient specificity

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley

for aiding and abetting a breach of fiduciary duty. The only North Carolina case with precedential value recognizing such a cause of action, *Blow v. Shaughnessy*, 88 N.C. App. 484, was abrogated by the United States Supreme Court. Even assuming the cause of action existed in North Carolina, plaintiffs' complaint made only conclusory allegations and did not state the claim with sufficient specificity.

5. Conspiracy—civil conspiracy—failure to state a claim

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for civil conspiracy. Plaintiffs' complaint failed to allege one of the elements of civil conspiracy—an agreement between two or more individuals. Moreover, plaintiffs' complaint made only conclusory allegations without offering any supporting factual allegations.

6. Unfair Trade Practices—civil conspiracy—claim predicated upon properly dismissed claim

The trial court did not err by dismissing with prejudice plaintiffs' complaint against financial services corporation Morgan Stanley for unfair and deceptive practices. Plaintiffs' claim for unfair and deceptive practices was predicated upon their claim for civil conspiracy, which the Court of Appeals held was properly dismissed. Therefore, their claim for unfair and deceptive practices was also properly dismissed.

Appeal by plaintiff from order entered 7 February 2014 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2014.

Fisher Stark Cash, P.A., by W. Perry Fisher, II, Brad A. Stark and Colin A. McCormick, for plaintiff-appellants.

Moore & Van Allen PLLC, by Mark A. Nebrig and M. Cabell Clay, and Greenberg Traurig, P.A., by Bradford D. Kaufman (pro hac vice) and Joseph C. Coates, III (pro hac vice), for defendant-appellee Morgan Stanley Smith Barney.

STEELMAN, Judge.

Where plaintiffs' complaint, viewed as admitted, failed to state a claim against defendant upon which relief may be granted, the trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, with prejudice.

I. Factual and Procedural History

David Bottom and Krystal Bottom (plaintiffs) owned real property in Buncombe County. On 11 November 2010, plaintiffs contracted with 1031 Exchange Services, LLC (1031) to provide intermediary services for a tax-deferred exchange pursuant to 26 U.S.C. § 1031. On 19 November 2010, plaintiffs sold the property, and the proceeds from the sale, $224,529.75, were deposited by 1031 into a fiduciary account at HomeTrust Bank (HomeTrust). Without plaintiffs' knowledge or permission, HomeTrust automatically transferred approximately $204,529.75 of the deposited funds into a separate sweep account in the name of 1031 at HomeTrust. HomeTrust comingled these monies with other accounts of James W. Bailey (Bailey), sole owner and manager of 1031, and various entities controlled by him. Funds in this separate account were then transferred back and forth between HomeTrust and Morgan Stanley Smith Barney (Morgan Stanley).

On 1 February 2011, Bailey was indicted in federal court for engaging in a 10-year check-kiting scheme involving the transfer of funds between HomeTrust and Morgan Stanley. Pursuant to this scheme, which involved more than $13,000,000, Bailey would write and deposit checks issued from accounts at HomeTrust into Morgan Stanley accounts, and vice versa, even though the accounts lacked sufficient funds to cover the transfers.

Morgan Stanley's parent company made numerous inquiries to its Asheville office over the 10-year period. Morgan Stanley generated one or more reports indicating suspicious or wrongful activities involving Bailey's Morgan Stanley accounts. On one or more occasions, representatives of Morgan Stanley questioned Bailey regarding his account activities. Morgan Stanley did not file Suspicious Activity Reports (SARs) with federal law enforcement or the Department of the Treasury as to Bailey's activities.

On 30 November 2010, Bailey, on behalf of 1031, attempted to deposit three non-certified checks drawn upon a HomeTrust account with Morgan Stanley in the total amount of $4,800,000. Plaintiffs' funds were a portion of the funds used to cover the $4,800,000. Morgan Stanley requested that the checks be certified. Bailey subsequently obtained three certified checks from HomeTrust in the amount of $4,800,000, and deposited them with Morgan Stanley.

On 13 December 2010, HomeTrust informed 1031 that there were insufficient funds to cover the 30 November 2010 certified checks. A hold was subsequently placed on 1031's account. On 26 December 2010,

plaintiffs received notice that 1031's account had been frozen; the next day, plaintiffs went to HomeTrust seeking the return of their funds. HomeTrust declined to disburse plaintiff's funds.

On 9 February 2011, the federal government executed a seizure warrant upon HomeTrust for all of 1031's accounts, including the sweep account. This warrant was served on 16 February 2011. On 22 August 2011, HomeTrust sent 10 checks to the United States government totaling $44,231.58, from various accounts controlled by Bailey and his controlled entities. None of those funds came from the sweep account.

On 16 July 2013, plaintiffs filed an amended complaint against Bailey, 1031, Hometrust, and Morgan Stanley. The amended complaint alleged breach of contract, negligence, negligent misrepresentation, and breach of fiduciary duty by Bailey and 1031; breach of implied contract, negligence, breach of fiduciary duty, violation of N.C. Gen. Stat. § 32-9, conversion, violation of 31 U.S.C. § 5311 *et seq.*, and aiding and abetting a breach of fiduciary duty by HomeTrust; and negligence, violation of N.C. Gen. Stat. § 32-9, violation of 31 § U.S.C. 5311 *et seq.*, and aiding and abetting a breach of fiduciary duty by Morgan Stanley. The complaint also alleged unfair and deceptive practices and civil conspiracy, and sought equitable tracing or constructive trust, and an equitable lien, against all defendants.

On 17 September 2013, Morgan Stanley moved to dismiss plaintiffs' complaint against it, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, on the grounds that plaintiffs were not customers of Morgan Stanley, that Morgan Stanley owed no duty to plaintiffs, fiduciary or otherwise, and that therefore plaintiffs "fail to allege the ultimate facts necessary to establish the essential elements of their claims[.]" On 7 February 2014, the trial court granted Morgan Stanley's motion to dismiss plaintiffs' complaint, with prejudice.

Plaintiffs appeal.

II. Standard of Review

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's

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

"[T]o prevent a Rule 12(b)(6) dismissal, a party must . . . state enough to satisfy the substantive elements of at least some legally recognized claim. Additionally, we are not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (citations and quotations omitted).

III. Analysis

Although plaintiffs make ten different arguments, they all concern a single issue: that the trial court erred in granting Morgan Stanley's motion to dismiss. We disagree.

Plaintiffs' complaint alleged that Morgan Stanley was negligent, that it violated N.C. Gen. Stat. § 32-9 and 31 U.S.C. § 5311, and that it aided and abetted Bailey and 1031 in their breach of fiduciary duty. Plaintiffs also alleged civil conspiracy and unfair and deceptive practices.

A. Negligence

[1] "To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010). "The sine qua non of a negligence claim is a legal duty owed by defendant to the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2003). Plaintiffs contend that, despite not being customers of Morgan Stanley, they were owed a duty by Morgan Stanley.

In *Sterner*, we addressed the issue of "whether a securities broker/dealer has a legal duty to 'supervise' and 'monitor' the investments ordered by its customer on behalf of that customer's client." *Id.* In that case, the plaintiff, Sterner, brought an action against brokerage firms. Sterner, who was not a customer of the defendants, entrusted her money to Penn, a person who was a customer of defendants; Penn invested and subsequently lost her money. Sterner brought suit against defendants, alleging that they were negligent in failing to oversee the investments made by Penn, who was their customer. The trial court granted the defendants' motion to dismiss. On appeal this Court held, after extensive analysis, that defendants were not investment advisors to Penn, nor to Sterner, that defendants had no duty to supervise and monitor Penn's actions to protect Sterner, and that Sterner's claim for negligence

failed because defendants owed no duty to Sterner. *Id.* at 631, 583 S.E.2d at 674.

In reaching our decision in *Sterner*, we relied upon *Eisenberg v. Wachovia Bank*, 301 F.3d 220 (4th Cir. 2002). *Eisenberg* was a North Carolina case in which the plaintiff was "the victim of a fraudulent investment scheme" perpetrated by a person named Reid. *Id.* at 222. At Reid's direction, plaintiff transferred $1,000,000 into Reid's account at Wachovia Bank in North Carolina. Reid took the money, and plaintiff brought action against Wachovia, alleging negligence, specifically contending that Wachovia breached its duty in permitting Reid to open a fraudulent account and failing to discover Reid's improper use of the account. The federal district court granted Wachovia's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On appeal, the United States Court of Appeals for the Fourth Circuit held that:

> We consider whether a bank owes a duty of care to a noncustomer who is defrauded by the bank's customer through use of its services. We cannot find an applicable precedent from a North Carolina court and look to case law from other jurisdictions. We conclude that the North Carolina Supreme Court, if it were to decide this issue, would hold that Wachovia did not owe Eisenberg a duty of care under the facts presented.
>
> Whether Wachovia owes a duty of care to Eisenberg depends on the relationship between them. *See* W. Page Keeton et al., *Prosser and Keeton on Torts* § 53 at 356 (5th ed. 1984) ("It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other ...."); *cf. Newton v. New Hanover Co. Bd. of Educ.*, 342 N.C. 554, 467 S.E.2d 58, 63 (1996) (holding nature and scope of duty owed by owner of land depends upon status of injured person as invitee, licensee or trespasser). Eisenberg had no direct relationship with Wachovia. He was not a Wachovia bank customer and, so far as the allegations indicate, has never conducted business with Wachovia. Eisenberg instead transacted with Reid, a Wachovia bank customer.

Id. at 225. The Court noted that a bank has no duty to anyone but its own customers, and that despite the fact that a bank account may have been used in the course of perpetrating a fraud, the bank's only duty was to

its customers, not to those with whom its customers had dealings. *Id.* at 225-26. The Fourth Circuit Court of Appeals concluded that since there was no relationship between Wachovia and plaintiff, that Wachovia did not owe plaintiff a duty of care, and that plaintiff's claim was properly dismissed. *Id.* at 227.

In the instant case, we hold the precedent of *Eisenberg* and *Sterner* to be both controlling and persuasive. Morgan Stanley had no relationship with plaintiffs, and therefore owed them no duty. The trial court did not err in dismissing plaintiffs' claim of negligence with respect to Morgan Stanley.

This argument is without merit.

B. N.C. Gen. Stat. § 32-9

[2] N.C. Gen. Stat. § 32-9 provides that:

> If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

N.C. Gen. Stat. § 32-9 (2013).

In the instant case, plaintiffs alleged that Morgan Stanley had actual knowledge of either 1031's breach of fiduciary duty or Bailey's misconduct. However, N.C. Gen. Stat. § 32-9 does not address the factual situation recited in plaintiffs' complaint. The language of the statute, on its face, applies to the fiduciary's fraudulent mishandling of the principal's account. In the instant case, the Morgan Stanley account was not in the names of plaintiffs. While the complaint is unclear, it seems to suggest that the account or accounts with Morgan Stanley were in Bailey's name. The language of N.C. Gen. Stat. § 32-9 is clear: it applies when the fiduciary makes fraudulent withdrawals *on the account of his principal*, of which the bank should be aware. Because the complaint does not allege that the account with Morgan Stanley was in the name of plaintiffs, no

claim arises under that statute. The trial court did not err in dismissing plaintiff's claim against Morgan Stanley based upon a violation of N.C. Gen. Stat. § 32-9.

This argument is without merit.

C. 31 U.S.C. § 5311

[3] 31 U.S.C. § 5311 *et seq.*, known as the Bank Secrecy Act, are federal laws requiring "certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311 (2001). We note in passing that the instant action concerns none of these things; the action at issue is neither criminal nor regulatory, does not involve intelligence nor counterintelligence, and does not, based upon the allegations in plaintiff's complaint, concern international terrorism. The instant action is a civil claim, between private parties, for breach of contract, negligence, and other assorted civil wrongs. Although the question has not been addressed within our jurisdiction, other courts have held that the Bank Secrecy Act does not create a private cause of action. *See e.g. El Camino Res., LTD. V. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 923 (W.D. Mich. 2010) *aff'd*, 712 F.3d 917 (6th Cir. 2013) (holding that "it is now well settled that the anti-money-laundering obligations of banks, as established by the Bank Secrecy Act, obligate banks to report certain customer activity to the government but do not create a private cause of action permitting third parties to sue for violations of the statute"); *see also Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517, 531 (2001) (holding that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not").

In plaintiffs' amended complaint, they contend that the Bank Secrecy Act required HomeTrust and Morgan Stanley to "establish, implement, and maintain programs designed to detect and report suspicious activity indicative of financial crimes as further set forth herein." Rather than citing to the Bank Secrecy Act itself for a basis for this contention, however, plaintiffs cite to Title 12 of the Code of Federal Regulations, specifically a subsection concerning compliance with the Bank Secrecy Act. The regulation in question requires:

(b) *Establishment of a BSA compliance program—*

> (1) *Program requirement.* Each bank shall develop and provide for the continued administration of a program reasonably designed to assure and monitor compliance with the recordkeeping and reporting requirements set forth in subchapter II of chapter 53 of title 31, United States Code and the implementing regulations issued by the Department of the Treasury at 31 CFR Chapter X. The compliance program must be written, approved by the bank's board of directors, and reflected in the minutes of the bank.
>
> (2) *Customer identification program*. Each bank is subject to the requirements of 31 U.S.C. 5318(1) and the implementing regulations jointly promulgated by the OCC and the Department of the Treasury at 31 CFR 1020.220, which require a customer identification program to be implemented as part of the BSA compliance program required under this section.
>
> (c) *Contents of compliance program.* The compliance program shall, at a minimum:
>
> (1) Provide for a system of internal controls to assure ongoing compliance;
>
> (2) Provide for independent testing for compliance to be conducted by bank personnel or by an outside party;
>
> (3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and
>
> (4) Provide training for appropriate personnel.

12 C.F.R. § 21.21 (2014). Plaintiffs contend, without citing further legal basis, that this regulation required Morgan Stanley to "implement and maintain a program to detect known or suspected federal crimes[,]" and that Morgan Stanley's failure to file a SAR concerning Bailey or 1031 constituted a failure to "take appropriate actions to prevent [] Bailey's crimes." We are not persuaded.

The intent of the Bank Secrecy Act, as expressed therein, is to aid in "criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311. Plaintiffs impute an intent to this statute, and to 12 C.F.R. § 21.21, to protect third party non-customers of banks. Plaintiffs offer no legal authority for this

assertion. We readily acknowledge that the purpose of the Bank Secrecy Act is to require banks to produce reports where they may be of value in federal criminal investigations. The instant case, however, is not a criminal investigation. Despite Bailey having been indicted in federal court, the instant case involves private state claims, not a federal criminal charge.

Even assuming *arguendo* that plaintiffs' allegations were sufficient on their face, the statutes upon which plaintiffs rely do not explicitly create a private cause of action. Absent such language, no private cause of action exists. We hold that plaintiffs' allegations are insufficient to support a claim. The trial court did not err in dismissing plaintiffs' claim of violation of 31 U.S.C. § 5311 *et seq.* with respect to Morgan Stanley.

This argument is without merit.

D. Aiding and Abetting a Breach of Fiduciary Duty

[4] With respect to plaintiffs' claim of aiding and abetting a breach of fiduciary duty:

> The court finds that no such cause of action exists in North Carolina. It is undisputed that the Supreme Court of North Carolina has never recognized such a cause of action. The only North Carolina Court of Appeals decision recognizing such a claim, *Blow v. Shaughnessy*, 88 N.C. App. 484, 489, 364 S.E.2d 444, 447–48 (1988), involved allegations of securities fraud, and its underlying rationale was eliminated by the United States Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

Laws v. Priority Tr. Servs. of N.C., 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009) *aff'd sub nom. Laws v. Priority Tr. Servs. of N. Carolina, LLC*, 375 F. App'x. 345 (4th Cir. 2010). We recognize that the United States Supreme Court, in *Cent. Bank of Denver*, abrogated the rationale of *Blow*, and that *Blow* is no longer valid precedent. *See e.g. Land v. Land*, ___ N.C. App. ___, 729 S.E.2d 731 (2012) (unpublished).

Plaintiffs nonetheless contend that case law exists in support of their claim. Plaintiffs cite to *Greensboro Rubber Stamp Co. v. Southeast Stamp & Sign, Inc.*, 212 N.C. App. 691, 718 S.E.2d 736 (2011) (unpublished) in support of this position. However, that case is not controlling precedent for two reasons: first, it is unpublished, and thus not binding upon this Court, N.C. R. App. P. 30(e)(3); and second, it relies upon *Blow*, the operative holding of which was abrogated by the United States

Supreme Court. Plaintiffs also cite to two cases from the North Carolina Business Court, and one case from the United States Bankruptcy Court for the Middle District of North Carolina, in support of this claim. The North Carolina Business Court "is a special Superior Court, the decisions of which have no precedential value in North Carolina." *Estate of Browne v. Thompson*, ___ N.C. App. ___, ___, 727 S.E.2d 573, 576 (2012) *disc. review denied*, 366 N.C. 426, 736 S.E.2d 495 (2013). Neither do the decisions of the United States Bankruptcy Court constitute precedent binding upon this Court. *In re Bass*, 217 N.C. App. 244, 254, 720 S.E.2d 18, 26 (2011) *rev'd on other grounds*, 366 N.C. 464, 738 S.E.2d 173 (2013).

While we need not address whether a claim for aiding and abetting a breach of fiduciary duty exists at law in North Carolina, we note that plaintiffs' amended complaint does not state such a claim with the required specificity. Plaintiffs allege that Morgan Stanley provided substantial assistance to Bailey's alleged breach of fiduciary duty "by, including but not limited to allowing [] Bailey and 1031 [] to engage in the acts and omissions set forth herein and by failing to recognize or take action to end the [] scheme." The tort of aiding and abetting a breach of fiduciary duty, according to *Blow*, requires "(1) the existence of a securities law violation by the primary party; (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation." *Blow*, 88 N.C. App. at 490, 364 S.E.2d at 447. Even assuming *arguendo* that this cause of action was still valid, plaintiffs only offer conclusory allegations, without more, that Morgan Stanley was aware of Bailey's fraudulent acts and rendered substantial assistance to Bailey. We hold that the trial court did not err in dismissing plaintiffs' claim of aiding and abetting a breach of fiduciary duty with respect to Morgan Stanley.

This argument is without merit.

E. Civil Conspiracy

[5] In their amended complaint, plaintiffs contend that Morgan Stanley conspired with the other defendants to injure plaintiffs, or alternatively that defendants collectively aided and abetted one another.

"The elements of a civil conspiracy are: (1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme." *Strickland v. Hedrick*, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008) (quoting *Privette v. Univ. of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989)).

In the instant case, plaintiffs offer nothing but bare allegations of this misconduct. Specifically, plaintiffs allege:

> 176. Defendants combined to injure Plaintiffs without reasonable or lawful excuse and conspired, assisted and facilitated the fraudulent scheme upon Plaintiffs as set forth herein.
>
> 177. In the alternative, the Defendants aided and abetted one another in committing the acts and omissions set forth herein with reckless disregard for the rights of the Plaintiffs.
>
> 178. As a direct and proximate result of this conspiracy or aiding and abetting, Plaintiffs have been damaged and will be damaged in the amount of $224,529.75, plus interest and all associated tax consequences for Plaintiffs' inability to complete their agreed upon 1031 exchange.

This sparsely worded claim attempts to allege the existence of a conspiracy, but fails to allege one of the vital elements of a conspiracy, an agreement between two or more individuals. The claim suggests that defendants – Bailey, 1031 and Morgan Stanley – conspired, but fails to allege how this conspiracy came to be, or when, or where, or why. The complaint asserts mere conclusions concerning the elements of civil conspiracy, without offering a scintilla of factual allegation in support of the claim.

The alternative claim asserted in paragraph 177 is nothing more than a thinly disguised attempt to bring in through a back door the aiding and abetting claim previously rejected in section III D of this opinion. Alternatively, it is an attempt to assert a conspiracy without an agreement. Both of these theories fail.

We hold that the trial court did not err in dismissing plaintiffs' claim of civil conspiracy with respect to Morgan Stanley.

This argument is without merit.

F. Unfair and Deceptive Practices

[6] In their amended complaint, plaintiffs contend that Morgan Stanley's "acts and omissions . . . were in or affecting commerce and constitute unfair and deceptive [] practices as prescribed by Chapter 75 of the North Carolina General Statutes." Plaintiffs' claims consist entirely of conclusory statements that Morgan Stanley "engaged in a conspiracy

to defraud Plaintiffs[,]" and that this alleged conspiracy "proximately caused actual injury and damages to Plaintiffs."

As we have already stated, the allegations contained in plaintiffs' complaint are insufficient to support a claim for conspiracy. Inasmuch as plaintiffs' claim for unfair and deceptive practices is predicated upon the existence of a conspiracy, we hold that the trial court did not err in dismissing that claim.

This argument is without merit.

IV. Conclusion

Plaintiffs' complaint, taken as true, failed to establish a duty incumbent upon Morgan Stanley, and therefore failed to establish a cause of action for negligence. The complaint failed to make sufficient allegations that any private civil actions arose under state or federal statute. The complaint failed to establish all of the elements of aiding and abetting a breach of fiduciary duty. The complaint failed to allege the existence of an agreement, and therefore failed to establish a claim for civil conspiracy. The complaint failed to allege unfair and deceptive practices arising from a conspiracy.

The trial court did not err in dismissing plaintiffs' complaint as to Morgan Stanley.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER concur.

CAROLINA MARLIN CLUB MARINA ASSOCIATION, INC. D/B/A MOREHEAD-BEAUFORT YACHT CLUB, PLAINTIFF

v.

HARRY PREDDY AND VALERIE PREDDY, DEFENDANTS

No. COA14-377

Filed 31 December 2014

1. Waters and Adjoining Lands—dredging of marina—description of boat slip—bottom not included

In an action between condominium owners and a condominium association concerning the dredging of a marina, the trial court's finding that the description of a boat slip in the Declaration of Unit Ownership was two dimensional only and did not include the bottom was supported by competent evidence and was therefore binding.

2. Waters and Adjoining Lands—dredging of marina—public waters—public trust doctrine not applicable—common property of association

In an action between condominium owners and a condominium association concerning the dredging of a marina, the trial court did not err by concluding that the entire marina basin, including the boat slips, was common property. The marina was navigable, and the waters in the marina were public trust waters subject to defendants' riparian rights, but the public trust doctrine was of little significance because the inquiry concerned control of the submerged land rather than an allegation of trespass. While there was evidence that members owned the submerged land beneath their boat slips as private parties, the trial court considered that evidence and found that the boat slips were in a common area.

3. Waters and Adjoining Lands—marina dredging—ownership of docks, pilings and bottom—conclusion supported by findings and evidence

In an action between condominium owners and a condominium association concerning the dredging of the marina, the trial court's conclusion that the docks, pilings, and bottom under the each boat slip were community property was supported by the findings and the evidence.

4. Waters and Adjoining Lands—marina dredging—assessment—individual maintenance of boat slips

In an action between condominium owners and a condominium association concerning the dredging of a marina, certain owners unsuccessfully argued against paying the assessment based on their maintenance of their boat slips. The description of a "slip" did not encompass the submerged land beneath the slips; moreover, there was both evidence and findings that the defendants benefitted from the dredging.

5. Waters and Adjoining Lands—marina dredging—approval of assessment

In an action between condominium owners and a condominium association concerning the dredging of the marina, the trial court did not err by concluding that a dredge assessment was properly approved where there was insufficient notice of an initial meeting, but the assessment was approved at a subsequent special members meeting. The fact that some members had already paid the assessment and dredging had already occurred was of no consequence.

6. Attorney Fees—underlying judgment upheld—award upheld

An award of attorney fees was upheld where the argument against the award was premised on the reversal of the underlying judgment, which was upheld.

Appeal by defendants from judgment entered 14 August 2013 by Judge L. Walter Mills in Carteret County District Court. Heard in the Court of Appeals 8 September 2014.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Claud R. Wheatly, III, for plaintiff-appellee.

Amie M. Huber, Attorney at Law, PLLC, by Amie M. Huber, for defendants-appellants.

McCULLOUGH, Judge.

Harry Preddy and Valerie Preddy ("defendants") appeal from a judgment entered in favor of Carolina Marlin Club Marina Association, d/b/a Morehead Beaufort Yacht Club (the "Association"). For the following reasons, we affirm.

I. Background

On 11 April 1988, the Department of Natural Resources and Community Development and the Coastal Resources Commission issued a permit to Gene McClung ("declarant") "authorizing development [of private property] in Carteret County at Newport River, adjacent to Ware and Runsel Creeks[.]" Thereafter, in accordance with the permit, declarant constructed an upland marina on the private property by excavating a basin with channel to the Newport River.

In connection with the construction of the marina, on 22 June 1989, declarant made and entered into a Declaration of Unit Ownership (the "Declaration") subjecting the marina to the North Carolina Condominium Act, Chapter 47C of the North Carolina General Statutes (the "Condominium Act"), as a condominium development known as Carolina Marlin Club Marina. Additionally, as provided in the Declaration, declarant created the Association as a non-profit corporation charged with maintaining and administering the common facilities; performing maintenance on buildings, docks, the basin, and other improvements; administering and enforcing covenants and restrictions in the Declaration; and levying, collecting, and disbursing assessments and charges allowed by the Declaration. The Declaration, along with the bylaws of the Association, was recorded in the Carteret County Register of Deeds office on 23 June 1989.

As originally recorded, the Declaration described the marina as common areas and docking facilities, referred to as units or slips, for forty-four vessels. However, shortly after the Declaration was recorded, declarant, in accordance with Article VI of the Declaration, constructed additional docking facilities so as to increase the total number of slips to seventy-four. An amendment to the Declaration entered into on 8 December 1989 and recorded on 15 December 1989 subjected the additional slips to the terms and conditions of the Declaration.

By General Warranty Deed made and entered into on 15 June 1992 and recorded on 22 June 1992, defendants acquired from declarant "Slip #46, Carolina Marlin Club Marina, a condominium as described in [the] Declaration . . . together with the undivided interest in the common areas appurtenant to each such slip or unit[.]" At all times relevant to this appeal, defendants had a 1/73 undivided interest in the Association as the Association owned one slip.

Since the time defendants acquired Slip #46, the Association has levied assessments for numerous maintenance projects. This case concerns

the validity of a special assessment levied against members for dredging in 2010.

In 2009, the Association determined extensive dredging was needed in the access channel and marina basin, including the areas beneath individual slips. At that time, the Association held a Coastal Area Management Act ("CAMA") permit allowing it to maintain a water depth of six feet. In preparation for dredging, at the December 2009 annual members meeting, the members voted and passed an assessment of $2,750.00 per slip (the "spoils assessment") to cover the estimated $200,750.00 cost of modifying and enlarging the dredge spoils area to accommodate future dredging spoils. However, bids for the spoils rebuild were less than expected, resulting in excess funds upon completion of the project.

In January 2010, a newly elected board called a special meeting for 6 February 2010. Two proposals were to be submitted for member approval: (1) approval of the 2010 operating budget and (2) use of the excess funds from the spoil assessment and an additional $500.00 special assessment (the "dredge assessment") to cover the balance of the dredging costs.

Notice of the 6 February 2010 special members meeting was included in the Association's "Smooth Sailing Newsletter," which was emailed to defendants on 17 January 2010. Around the same time, Mr. Preddy, the webmaster for the Association, posted notice on the website indicating "there was going to be a special meting . . . on February 6th at 1:00." A second notice that the time of the 6 February 2010 special members meeting had been changed to 3:00 was later sent to defendants by email on 26 January 2010.

Additionally, Mr. Preddy received a call from the Association's President, Mr. Joseph Barwick, on 1 February 2010 informing him that Mr. Barwick had been designated as his representative. During their conversation, Mr. Preddy raised his concern over not receiving notice of the special meeting in the mail. Mr. Preddy recalled that Mr. Barwick informed him that the emails were his notice.

Despite Mr. Preddy's concerns regarding the notice provided by email, defendants attended the meeting on 6 February 2010. At the meeting, Mr. Preddy orally objected to the notice of the meeting and submitted a written objection, joined by other members, to the board. Defendants, however, remained at the meeting and Mr. Preddy voted against the assessment as the owner of Slip #46.

The minutes from the 6 February 2010 special members meeting indicate the dredge assessment was approved.

Following approval of the dredge assessment, several members, including defendants, sent letters to the N.C. Department of Environment and Natural Resources, Division of Coastal Management (the "NCDENR-DCM") disputing the Association's authority to dredge the submerged lands beneath their slips by claiming that they owned the property. Upon reviewing the objections, the NCDENR-DCM, based on an opinion from the N.C. Attorney General's office that the submerged lands under the slips in question were privately owned by the members, revoked the Association's permit to dredge the marina by letter dated 5 March 2010. However, on 20 October 2010, a modified CAMA permit was issued allowing the Association to dredge the marina basin, including the submerged land under those slips owned by members granting the Association permission to dredge. Defendants and five other members refused to allow the Association to dredge beneath their slips.

Dredging of the marina pursuant to the modified CAMA permit took place late in 2010. The access channel and all portions of the marina basin, except those six slips owned by members who objected, were dredged.

At a special members meeting of the Association on 22 May 2010, the Association put to a vote certain amendments to the bylaws. An amendment to allow electronic notice of meetings was passed by the members. Thereafter, on 11 January 2011, notice of a special meeting to be held 5 February 2011 was sent to members by US mail and email. As stated in the notice, "[t]he purpose of the meeting [was] to **revote** a proposal to (1) use remaining funds from the dredge spoils project for the dredging project and (2) to assess the members $500 per slip for the purpose of dredging the channel, basin and slips." Sixty-three members voted in favor of the dredge assessment at the special members meeting.

Following approval of the dredge assessment, defendants were billed for $500.00. When defendants refused to pay, the Association commenced this suit against defendants by means of the issuance of a summons and the filing of a complaint in Carteret County District Court on 16 March 2011. In the complaint, the Association sought to collect the dredge assessment, interest, attorneys' fees, and costs.

Defendants responded to the complaint by filing an answer and counterclaim on 16 May 2011. In their response, defendants asserted each slip was private property and the dredge assessment could not be

used to maintain private property. Following an arbitration decision in favor of the Association, defendant filed a request for a trial *de novo* on 12 August 2011. The case came on for a bench trial in Carteret County District Court before the Honorable L. Walter Mills on 21 February 2013. The trial carried over to 22 February 2013, was continued, and later tried to its conclusion on 17 April 2013. Upon the consideration of the evidence, on 14 August 2013, the trial court entered judgment in favor of the Association. Defendants filed notice of appeal to this Court on 9 September 2013.

II. Discussion

On appeal, defendants challenge specific findings of fact and conclusions of law made by the trial court.

> When reviewing a judgment from a bench trial, "our standard of review 'is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 668–69, 646 S.E.2d 851, 854 (2007) (citation omitted). The trial court's " '[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.' " *Id.* at 669, 646 S.E.2d at 854 (citation omitted). This Court reviews the trial court's conclusions of law *de novo*. *Id.*

Southern Seeding Service, Inc. v. W.C. English, Inc., 217 N.C. App. 300, 303-04, 719 S.E.2d 211, 214 (2011).

Finding of Fact #9

[1] In the first issue on appeal, defendants challenge the trial court's finding of fact number nine, which provides, "[t]he description of a slip, as set forth [in the Declaration], is two-dimensional only. The slip is the area between the pilings and the dock and would not include the bottom. That all boat slips subject to the Declaration are in the basin which constitutes common area." Specifically, defendants argue there is no evidence in the record that the description of a slip is two-dimensional only and does not include the bottom. Defendants argue the testimony of Mr. Preddy and Mr. Barwick, together with the description of a slip in the Declaration, support the proposition that the slips are three-dimensional, including the bottom. We are not persuaded.

The terms "unit" and "slip" are used interchangeably throughout the Declaration. Article I of the Declaration provides that the terms "shall

mean and refer to an individual docking space, or slip, designated for separate ownership or occupancy, the boundaries of which are described pursuant to [the] Declaration." Article II of the Declaration then provides for the identification of slips and common areas. Concerning slips, the Declaration describes the boundaries as follows: "Each unit, or slip, is bounded by the dock running longitudinally with the shoreline at its shoreward end; on either side by the centerlines of its adjoining finger piers, extended to the centers of the mooring pilings on either side of the slip opening; and at its outer end by a line connecting the centers of said two mooring pilings."

During the trial, Mr. Preddy testified using an aerial diagram of the marina to identify different portions of the marina. When questioned specifically about the boundaries of his slip, Mr. Preddy read through the description of a slip in the Declaration and used the diagram to plot the boundaries of Slip #46. In plotting the boundaries described in the Declaration, Mr. Preddy never indicated that the slip extended to the submerged land.

Mr. Barwick also testified concerning the description of a slip in the Declaration. Despite defendants' insinuations on appeal, Mr. Barwick never stated that the description of a slip encompassed the submerged land. Although Mr. Barwick acknowledged that the slips were bounded by lines running through the center of the mooring pilings, which are placed into the bottom, Mr. Barwick maintained that the slip is described in the Declaration longitudinally with the shoreline. When questioned whether he contends the Association owned the submerged land beneath the individual slips, Mr. Barwick responded, "[y]es, because the declaration makes no reference to the bottom whatsoever. The only thing the declaration does is provide the longitudinal parameters of a slip which they define very clearly as a docking space."

Although there is evidence to the contrary, based on the description of the slip boundaries in the Declaration and the testimony of Mr. Preddy and Mr. Barwick concerning the boundaries of Slip #46, we hold the trial court's ninth finding is supported by competent evidence and, therefore, is binding on appeal.

Defendants do not specifically challenge any of the trial court's other findings of fact. As a result, the remaining findings are binding on appeal. *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal.")

Conclusion of Law #1

[2] Defendants next challenge conclusion of law number one. In conclusion one, the trial court concluded "[t]he marina basin and the slips located therein contain public trust waters subject to the riparian rights of the [Association] and, as such, all areas in the marina basin including slips are common area properties subject to the control of the Association . . . ." Defendants break this issue down into two parts: whether (1) the marina basin and the slips contain public trust waters subject to the Association's riparian rights; and (2) all areas in the marina basin including the slips are common area properties subject to the Association's control.

Concerning part one, defendant claims the public trust doctrine is inapplicable to this case because each slip is private property.

North Carolina has long applied the common law to recognize that "[t]itle to public trust waters is 'held in trust for the people of the State[.]' " *RJR Technical Co. v. Pratt*, 339 N.C. 588, 592, 453 S.E.2d 147, 150 (1995) (quoting *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 526, 44 S.E. 39, 42 (1903)). As codified in N.C. Gen. Stat. § 1-45.1 (2013), the public's rights in public trust waters "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State[.]" When determining whether certain waters are public trust waters, the determinative inquiry is navigability. As our Supreme Court recognized in *Gwathmey v. State*, 342 N.C. 287, 301, 464 S.E.2d 674, 682 (1995), "if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose." Pursuant to this Court's decision in *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 693 S.E.2d 208 (2010), the test for navigability applies equally to natural and manmade waterways.

In *Fish House*, the plaintiff and the defendant owned adjacent tracts of land, upon which each operated a fish house along a manmade canal situated on the western border of the plaintiff's property and to the east of the defendant's property. *Id.* at 131-32, 693 S.E.2d at 210. After the defendant had used the canal for years, the plaintiff commenced a trespass action to enjoin the defendant from entering the canal. *Id.* at 132, 693 S.E.2d at 210. On appeal by the plaintiff from the trial court's dismissal of the action, this Court affirmed the trial court, holding "the [c]anal, although manmade, [was] a navigable waterway held by the state in trust for all citizens of North Carolina." *Id.* at 134, 693 S.E.2d at 211. In so holding, the Court addressed the question of "whether the test

for navigability is different when applied to a manmade canal." *Id.* at 134, 693 S.E.2d at 211. Relying on our Supreme Court's *Gwathemy* decision, the South Carolina case of *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990), which this Court found instructive, and portions of the NCDENR-DCM's CAMA Handbook for Development in Coastal Carolina that define navigable waters and identify various public trust areas, this Court held "the controlling law of navigability concerning the body of water in its natural condition reflects only upon the manner in which the water flows without diminution or obstruction." *Id.* at 135, 693 S.E.2d at 212. Thus, this Court held "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes navigable water under the public trust doctrine of this state." *Id.* at 135, 693 S.E.2d at 212.

Subsequent to *Fish House*, this Court has addressed whether those owning property bounded or traversed by manmade waterways have riparian rights in those waterways. In *Newcomb v. County of Carteret*, 207 N.C. App. 527, 701 S.E.2d 325 (2010), this Court explained the following:

> Riparian rights are vested property rights that arise out of ownership of land bounded or traversed by navigable water. All watercourses are regarded as navigable in law that are navigable in fact. For that reason, riparian rights are available to the owners of property that are adjacent to or encompass bodies of water that are navigable in fact.

Id. at 541, 701 S.E.2d at 337 (quotation marks and citations omitted). Recognizing the holding in *Fish House* and "that the concept of 'navigability' as used in the 'public trust' and the riparian rights contexts is identical," in *Newcomb* this Court held the extent to which the plaintiffs had riparian rights in a manmade harbor did not hinge upon whether the harbor was natural or manmade. *Id.* at 542, 701 S.E.2d at 325. Thus, "given that [the harbor was] clearly 'capable of navigation by watercraft,' the owners of property bordering the harbor clearly [had] riparian rights in its waters." *Id.*

In the present case, it is clear that the marina is navigable; thus, as the trial court found and concluded, the waters in the marina are public trust waters. Moreover, as the Association owns all lands bounded or traversed by the public trust waters, it has riparian rights in the waters. Thus, we hold conclusion of law number one is an accurate statement of the law as applied to this case and the trial court did not err in concluding that the waters in the marina are public trust waters subject to defendants' riparian rights.

Nevertheless, we agree with defendants that the public trust doctrine has little significance in this case. As both parties acknowledge on appeal, there is no allegation of trespass by the Association; in fact, the Association concedes that defendants have the right to enter the marina, dock their boat at their private slip, and use the common areas. The critical inquiry in this case is whether the entire marina basin, including the submerged land under defendants' privately owned slip, is common property subject to the control of the Association, or whether the submerged land under defendants' slip was transferred by declarant to defendants by the 15 June 1992 deed, which incorporates the Declaration.

Similar to defendants' contention regarding the description of a slip addressed in the first issue on appeal, in part two of defendants' challenge to conclusion one, defendants claim not all areas in the marina basin are common area subject to the control of the Association. Specifically, defendants argue their slip extends to the basin floor and encompasses the submerged land under their slip. In support of their argument, defendants again cite to the description of a slip in the Declaration and point out that Article III of the Declaration provides that each slip "shall be conveyed and treated as an individual property interest capable of independent use and fee simple ownership[.]" Defendants further cite testimony by Mr. Barwick indicating that members own their own slip; the 5 March 2010 letter to the Association by James H. Gregson, Director of the NCDENR-DCM, revoking the CAMA permit to dredge the marina based on an opinion of the N.C. Attorney General's office that the submerged lands under the slips are owned by the slip owners; testimony by Betty Gray, owner of Slip #62, concerning dredging in 2001, when less than all slips were dredged and the owners of individual slips covered the costs of dredging their own slips without an assessment against all members; and testimony by Ms. Gray concerning a 2008 letter sent by the Association to members indicating "[d]redging of privately owned slips is not included in permissible uses of the assessment."

Upon review, we acknowledge that the evidence cited by defendants tends to show members own the submerged land under their slips as private property. However, we are also cognizant that this same evidence was presented to and considered by the trial court; and upon consideration of the evidence, the trial court found the description of a slip in the Declaration to be two-dimensional, encompassing the area defined as a docking space between the finger piers and mooring pilings that does not include the submerged land underneath a slip. Thus, as the trial court further found, "all boat slips subject to the Declaration are in

the basin which constitutes common area." Because evidence supports the trial court's finding, it is binding on appeal and confines our analysis of conclusion one.

Accepting the trial court's finding, we hold the submerged land underneath defendants' slip is not defendants' private property, but is part of the marina basin, which is a common area. As the trial court concluded in uncontested conclusion of law number two, "[d]efendants own a 1/73 undivided interest in the Association and its property and the exclusive right to utilize [Slip #]46, subject to the Declaration . . . and the Amendments thereto." Thus, the trial court did not err in concluding the entire marina basin is common property subject to the control of the Association.

Conclusion of Law #3

[3] Defendants also take issue with the trial court's third conclusion of law, "[a]ll the docks, pilings and bottom (soil) under each slip are common property." Defendants' contentions with this conclusion are essentially the same as those advanced in opposition to conclusion of law one – "defendants['] boat slip and bottom soil under each slip is private property." For the reasons discussed above, we hold conclusion three is supported by the trial court's findings and the evidence.

Conclusion of Law #4

[4] In the fourth issue on appeal, defendants contend the trial court erred by making conclusion of law four, which provides "[t]he Association, by a 2/3 vote of its membership at a properly called meeting, had the right to create assessments for the dredging and maintenance of all of the marina facilities, including the slips and the land or silt under them." Defendants raise three separate challenges to conclusion four: whether (1) the 6 February 2010 special members meeting was properly noticed; (2) the Association had the right to create assessments for the dredging and maintenance of all the marina facilities, including the slips; and (3) whether the assessment was passed by a 2/3 vote.

Although defendants raise these challenges in regards to conclusion four, conclusion four does not conclude there was proper notice or that the assessment was approved by a two-thirds vote. Conclusion four merely provides that "the Association . . . had the right to create assessments[,]" such as the one at issue in this case, "by a 2/3 vote of its membership at a properly called meeting[.]" Defendants' first and third challenges to conclusion four are more properly asserted in regards to conclusion of law number five, which provides "[t]he assessment of

$500.00 was properly approved." Therefore, we only address defendants' second challenge to conclusion four and address defendants' remaining challenges in response to defendants' attack on conclusion five.

Defendants argue the Association does not have the right to create assessments for dredging and maintenance of all the marina facilities, including the slips. In support of their argument, defendants cite provisions in the Condominium Act and the Declaration.

Under the Condominium Act, "[e]ach unit owner is responsible for maintenance, repair and replacement of his unit." N.C. Gen. Stat. § 47C-3-107(a) (2013). Additionally, "[a]ny common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited[.]" N.C. Gen. Stat. § 47C-3-115(c)(2) (2013).

Considering these statutes in conjunction with the provisions of the Declaration defining a "unit" or "slip" as "an individual docking space . . . designated for separate ownership or occupancy," indicating a "unit" or "slip" is to be conveyed and treated as "an individual property interest capable of independent use and fee simple ownership[,]" and identifying the different elements of the condominium and defining "common elements" as "all of the condominium with the exception of [u]nits[,]" defendants assert they are solely responsible for maintaining Slip #46. In defendants' own words, "[b]ecause . . . [d]efendants did not agree to have their slip dredged and did not benefit by having the other individual slips dredged, fewer than all of the units must be assessed; therefore, in accordance with the above statutes, [d]efendants are not required to pay for the dredging of other slips."

While we agree with defendants that members are responsible for maintaining their own slips, defendants' argument against paying the assessment at issue in this case fails for two reasons.

First, as found by the trial court and already discussed above, the description of a "slip" does not encompass the submerged land underneath individual slips. The submerged land is part of the marina basin, which is common area controlled by the Association.

Article IX of the Declaration provides, "[t]he common expenses of the condominium shall be shared by the slip owners in the same proportion that the undivided interest in the common areas appurtenant to each owner's slip bears to the total of all undivided interest in the common areas appurtenant to all condominium slips." As found by the trial court, "Article X of the Declaration provides for [a]ssessments."

Defendants acknowledge Article X on appeal but claim the only provision allowing for an assessment for dredging, Section 2, does not list an individual slip as part of the maintenance and upkeep allowed in an assessment. Citing *Armstrong v. Ledges Homeowners Association*, 360 N.C. 547, 633 S.E.2d 78 (2006), defendants further assert that the final statement in Article X, Section 2, that assessments shall be used for "such other needs as may arise[]" is ambiguous, unclear, indefinite, and uncertain and raises the issue of the reasonableness of the Declaration. We disagree.

Given the trial court's finding that the description of a slip does not include the submerged land beneath the slip, defendants' arguments are misguided. Among the identified uses for assessments, Section 2 of Article X expressly provides that an assessment shall be used for "the maintenance and upkeep of all streets, roadways, parking areas, docks, piers, bulkheads, pilings, *and maintenance of water depths in the basin, the access channel and in the channel to the Intracoastal Waterway*[.]" (Emphasis added). The Declaration further provides that "the Association may levy special assessments for the purpose of defraying in whole or in part, the cost of any construction reconstruction, repair, or replacement of capital improvements upon the marina area" and "[t]he Association, at its expense, shall be responsible for the maintenance, repair, and replacement of all the project areas, including those portions thereof which are contained within the area defined as a unit[.]"

Accepting the trial court's finding that the slip does not include the submerged land underneath the slip, we hold the provisions discussed above allow the Association to levy assessments for the maintenance of the common areas, including those portions of the marina basin beneath the slips.

Second, contrary to defendants' argument that they did not benefit from dredging, the trial court considered evidence and made findings that "the members of the Association and the [d]efendants benefitted from the dredging" and "the marina will be unable to function as a marina without proper dredging and the removal of spoil material within the marina is to the benefit of all members." Furthermore, the trial court found in finding of fact number forty-four that "[t]he $500.00 assessment was the balance due from [d]efendants for the dredging of the entire basin and access channel and was not that portion to be allocated for the slip of the [d]efendants." Defendants did not specifically challenge any of these findings.

Where the assessment owed by defendants was for the dredging of the entire basin and access channel, defendants' argument that they did not benefit from the dredging because the submerged land beneath their slip was not dredged fails.

Conclusion of Law #5

[5] In the fifth issue on appeal, defendants challenge the trial court's conclusion that "[t]he assessment of $500.00 was properly approved by the Association (Plaintiff) and the [d]efendants are obligated to pay said assessment to the [Association] plus eighteen percent (18%) interest through date of filing of judgment."

As noted above, defendants first argue they did not receive proper notice of the 6 February 2010 special members meeting. Defendants further assert that they did not waive the notice required by the bylaws and the substance of the notice provided was inadequate. Apart from defendants' challenge to the notice, defendants also argue the dredge assessment was not properly approved by two-thirds of the members. As a result of these alleged failures, defendants contend they are not bound by the action taken at the meeting, namely, the obligation to pay the dredge assessment.

Concerning the notice of the 6 February 2010 special meeting to members, the trial court made the following findings:

> 29. A newsletter advising that a meeting would be had on February 6, 2010 was emailed to the [d]efendants eleven (11) days prior to said meeting.
>
> 30. Later, a separate email was sent to the [d]efendants more than ten (10) days prior to said meeting, advising the [d]efendants of the meeting.
>
> 31. On or about February 1, 2010 the [d]efendant, Harry Preddy, called Joe Barwick, the new president and commodore of the Association, and complained about the notice not being mailed to him. The [d]efendants had actual notice of said meeting.
>
> 32. The special meeting was held on February 6, 2010 and the [d]efendant, Harry Preddy, prior to the meeting, presented an opinion that the meeting was not properly noticed yet stayed at the meeting and participated in the same. . . .

> 33. The February 6, 2010 meeting was held . . . . The [d]efendants voted no during said meeting for the assessment and yes for the budget.
>
> 40. On February 4, 2011, the Plaintiff called for another special meeting concerning the dredge assessments. Notice of such meeting was sent via US mail and through email. At said meeting, 63 members of the Association voted for the assessment with no votes cast against. The Defendants protested but did not vote.

In order to determine whether this notice was proper, we look to both the Condominium Act and the North Carolina Nonprofit Corporation Act, Chapter 55A of the North Carolina General Statutes (the "NCA"). The Condominium Act provides in pertinent part:

> Not less than 10 nor more than 50 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner, or sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

N.C. Gen. Stat. § 47C-3-108(a) (2013). Under the NCA, N.C. Gen. Stat. § 55A-1-41 specifies general principles governing notice. It provides that "[n]otice may be communicated in person; by electronic means; or by mail or private carrier." N.C. Gen. Stat. § 55A-1-41(b)(2013). Yet, "[i]f [the NCA] prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements not inconsistent with this section or other provisions of [the NCA], those requirements govern." N.C. Gen. Stat. § 55A-1-41(h). "Written notice need not be provided in a separate document and may be included as part of a newsletter, magazine, or other publication regularly sent to members if conspicuously identified as a notice." N.C. Gen. Stat. § 55A-1-41(i). Specifically regarding notice of special meetings, the NCA provides, "[a] corporation shall give notice

of meetings of members by any means that is fair and reasonable and consistent with its bylaws." N.C. Gen. Stat. § 55A-7-05(a)(2013).

While both the Condominium Act and the NCA provide electronic email is an option for notice, the NCA makes clear that the bylaws control when they are not inconsistent with the statutes.

In this case, at the time notice of the 6 February 2010 special meeting was sent electronically, Article III, Section C, of the Association's bylaws provided that:

> Notice of all member's meetings[, both annual and special,] shall be given in writing by the Secretary to each member, unless waived in writing, such notice to state the time and place of the meeting, and the purpose of the meeting. Such notice shall be given not less than 10, nor more than 60, days prior to the meeting date. Such notice shall be delivered personally, or mailed in the U.S. Mails, postage prepaid, to the last known address of such member.

It is obvious to this Court that the electronic notices of the 6 February 2010 special members meeting to defendants did not comply with the requirements in the bylaws.

What is more, the Association does not even argue electronic notice was proper. Instead the Association responds to defendants' arguments that defendants did not waive the notice requirements in the bylaws and the content of the notice in the newsletter was inadequate. Without citing supporting authority, the Association argues that because defendants had actual notice of the special members meeting, defendants have waived notice or should be estopped from challenging the notice as improper. The association further argues the substance of the notice was adequate and, in any event, defendant cannot challenge the validity of the Association action as *ultra vires*. *See* N.C. Gen. Stat. § 55A-3-04 (2013).

Yet, we need not address these issues in the present case. Assuming arguendo that the 6 February 2010 meeting was not properly noticed and defendants are not bound by the actions taken by the Association, we hold defendants are bound by the approval of the assessment at the subsequent special members meeting held on 5 February 2011.

Prior to the 5 February 2011 meeting, a special meeting was held on 22 May 2010, at which members of the Association approved an amendment to the bylaws allowing for electronic notice of meetings. Thereafter, on 11 January 2011, a special members meeting was called for 5 February 2011 to revote the proposals to use the excess funds from

the spoil assessment and impose the dredge assessment on members. As the trial court found, this meeting was properly noticed via US Mail and through email. Members of the Association then approved the dredge assessment with sixty-three votes in favor of the assessment; there were zero votes against. It was not until after the dredge assessment was approved at the 5 February 2011 meeting that the Association took legal action to collect the dredge assessment from defendants and began assessing interest.

In their reply brief, defendants argue the Association cannot cure defects in the 6 February 2010 meeting by revoting at a subsequent special members meeting called for the same purpose. As defendants state it, the Association cannot "retroactively ratify . . . improper actions." In support of their argument, defendants cite *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (1982), for the definition of ratification and other cases standing for the propositions that statutes do not apply retroactively and are presumed to be prospective only. We are not persuaded by defendants' argument.

It seems to this Court that if notice of the 6 February 2010 meeting was improper, the only corrective action that the Association could take would be to hold another, properly noticed, special members meeting to revote the assessment. The fact that some members had already paid the assessment and dredging had already occurred is of no consequence. In this case, the Association is seeking to collect the assessment from defendants, who have refused to pay.

In regard to approval of the assessment by two-thirds vote, defendants argue certain proxy votes at the 6 February 2010 special members meeting should not have counted under Roberts Rules of Order. Assuming arguendo that defendant's assertion is correct, as noted above, the dredge assessment was approved at the subsequent 5 February 2011 special members meeting by sixty-three members. Thus, defendant's argument is overruled.

Considering the above, we hold the trial court did not err in concluding the dredge assessment was properly approved in conclusion five.

Conclusion of Law #6

[6] Defendant's last challenge on appeal is to the trial court's conclusion of law number six, which provides "[p]ursuant to the Declaration, the [d]efendants are entitled to pay to the [Association] interest, reasonable attorney's fees and the cost of this action." Specifically, defendants contend the award of attorney's fees for the Association should be stricken.

As defendants acknowledge, the Condominium Act provides that "[t]he court may award reasonable attorney's fees to the prevailing party." N.C. Gen. Stat. § 47C-4-117 (2013). "It is left to the sound discretion of the trial court whether attorney fees will be granted." *Rosenstadt v. Queens Towers Homeowners' Ass'n., Inc.*, 177 N.C. App. 273, 276, 628 S.E.2d 431, 433 (2006).

On appeal, defendants' argument against the award of attorney's fees is premised on the reversal of the trial court's judgment. Having upheld the trial court's judgment, we find no abuse of discretion in the award of attorney's fees for the Association.

III. Conclusion

For the reasons discussed above, we affirm the trial court's judgment in favor of the Association.

Affirmed.

Judges ERVIN and BELL concur.

CHARLES CLARK, Employee, Plaintiff
v.
SUMMIT CONTRACTORS GROUP, INC., Employer, AMERICAN INTERSTATE INSURANCE COMPANY, Carrier, Defendants

No. COA14-698

Filed 31 December 2014

Workers' Compensation—erroneous denial—timely filing of claim—medical compensation—other compensation

The Industrial Commission erred by denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina under N.C.G.S. § 97-24(a). It was filed before defendants' last payment of "medical compensation" in Florida, plaintiff had been paid no "other compensation" since the Florida workers' compensation benefits did not qualify as "other compensation," and defendant's liability had not otherwise been established under the North Carolina's Workers' Compensation Act.

Appeal by plaintiff from order entered 10 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2014.

The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr. and W. Chad Winebarger, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Nicholas P. Valaoras, for defendants-appellees.

HUNTER, Robert C., Judge.

Plaintiff Charles Clark appeals from the order of the North Carolina Industrial Commission denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina under N.C. Gen. Stat. § 97-24(a).

After careful review, based on *McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 618 S.E.2d 833 (2005), we reverse the Full Commission's order because plaintiff timely filed his claim under section 97-24(a)(ii) and remand for further proceedings.

Background

The facts of this case are largely undisputed. Plaintiff is a resident of Florida, and defendant-employer Summit Contractors Group, Inc. ("Summit") is a Florida company doing business in North Carolina. American Interstate Insurance Company ("AIIC") is Summit's carrier on the risk (collectively, Summit and AIIC are referred to as "defendants"). In 2009, plaintiff was employed by Summit as a superintendent to supervise the construction of apartment complexes in Greensboro, North Carolina. While on the job on 5 August 2009, plaintiff injured his shoulder; he reported his injury to defendants the next morning. Plaintiff initially received medical care from a chiropractor in Greensboro, and, sometime thereafter returned to his home in Florida where he continued to receive medical treatment. On 12 August 2009, a "First Report of Injury or Illness" was filed on behalf of plaintiff with the Florida Department of Financial Services Division of Workers' Compensation. Plaintiff received indemnity benefits for his injury under Florida law until 25 August 2011.

On 20 January 2012, more than two years after he was injured, plaintiff filed a Form 18 "Notice of Accident to Employer" with the North Carolina Industrial Commission for the 5 August 2009 injury. Defendants consequently filed a Form 61 "Denial of Workers' Compensation Claim" on 1 March 2012, asserting that the North Carolina Industrial Commission did not have jurisdiction over the matter because plaintiff did not file his claim with the Commission within two years from the date of the alleged incident pursuant to N.C. Gen. Stat. § 97-24.

The matter came on for hearing before the Full Commission on 9 December 2013. The Full Commission entered an order denying plaintiff's claim for compensation based on his failure to timely file a claim in North Carolina. Specifically, the Full Commission concluded that because plaintiff failed to file a claim within two years after "the last payment of compensation 'under this Article,' i.e., the North Carolina Workers' Compensation Act[,]" the Industrial Commission lacked jurisdiction over his claim. Plaintiff timely appealed.

Standard of Review

"Appellate review of a decision by the Industrial Commission is limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Heatherly v. The Hollingsworth Co.*, 211 N.C. App. 282, 285, 712 S.E.2d 345, 348-49 (2011) (internal quotation marks omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.* at 285, 712 S.E.2d at 349.

Analysis

Appellant's sole argument on appeal is that the Full Commission erred by concluding that plaintiff's claim was not timely filed. We agree.

"Dismissal of a claim is proper where there is an absence of evidence that the Industrial Commission acquired jurisdiction by the timely filing of a claim or by the submission of a voluntary settlement agreement[.]" *Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86-87, 401 S.E.2d 138, 140 (1991). "[T]he timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." *Id.* at 86, 401 S.E.2d at 140.

N.C. Gen. Stat. § 97-24 (2013) establishes the timeframe within which a claim for compensation must be filed with the North Carolina Industrial Commission. Section 97-24(a) provides that

> [t]he right to compensation under [North Carolina's Workers' Compensation Act] shall be forever barred unless
>
> (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or
>
> (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years

> after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C. Gen. Stat. § 97-24(a). On appeal, plaintiff does not allege that he filed his claim in North Carolina within two years after the accident, as set out in subsection (i); instead, he contends that his claim was timely filed under subsection (ii) because he filed the North Carolina claim within two years after defendants last provided "medical compensation" in Florida.

Under section 97-24(a)(ii), a plaintiff must show that: (1) his claim was filed within two years after the last payment of "medical compensation," (2) no "other compensation" was paid, and (3) the employer's liability has not otherwise been established under the Act. *Id.* Here, the record clearly shows that defendant's liability had not otherwise been established under the Act because defendants had not been held liable for plaintiff's injuries pursuant to a North Carolina workers' compensation claim; defendants' liability had only been established under Florida's workers' compensation laws. Thus, the third element is satisfied. Accordingly, whether plaintiff can satisfy the remaining two elements of N.C. Gen. Stat. § 97-24(a)(ii) turns on this Court's understanding of the terms "medical compensation" and "other compensation" as they are contemplated within the North Carolina Workers' Compensation Act.

A. "Medical Compensation"

While it is clear that, pursuant to plaintiff's Florida workers' compensation claim, defendants made payments for his medical treatment in Florida, the issue is whether those payments constituted "medical compensation" under the Act.

N.C. Gen. Stat. § 97-2(19) states that:

> [t]he term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original

> artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

Defendants contend that "[n]one of plaintiff's medical payments were made 'in the judgment of' the North Carolina Industrial Commission or in a matter before the North Carolina Industrial Commission." Thus, according to defendants, plaintiff did not receive any payments of "medical compensation" and subsection (ii) is inapplicable. In contrast, plaintiff contends that defendants' last payment of "medical compensation" was on 14 November 2012, eleven months after he filed his Form 18; therefore, he satisfied section 97-24(a)(ii) because he filed his North Carolina claim within two years after that last payment.

There is no basis for defendants' contention that "medical compensation" only includes payments made in a matter pending before the North Carolina Industrial Commission. In contrast, our caselaw establishes that an employee's claim is timely filed under section 97-24(a)(ii) if it is filed within two years after the defendant's last payment of "medical compensation" to the plaintiff regardless of where the medical treatment occurs and regardless of whether that payment was ordered as a result of a pending workers' compensation action in North Carolina. *See McGhee v. Bank of America Corp.*, 173 N.C. App. 422, 427-27, 618 S.E.2d 833, 836 (2005). In *McGhee*, the plaintiff-employee lived and worked in Richmond, Virginia, and the employer's home office was in North Carolina. *Id.* at 424, 618 S.E.2d at 835. While returning from a business trip, the plaintiff got into a car accident in Wilmington, North Carolina on 1 August 1998. *Id.* The plaintiff did not file a Form 18 with the North Carolina Industrial Commission until 9 August 2001, more than two years after the accident. *Id.* at 426, 618 S.E.2d at 836. However, the Full Commission concluded that plaintiff had timely filed a claim within two years after the last payment of medical compensation pursuant to N.C. Gen. Stat. § 97-24(a)(ii) because the employer paid medical providers in Virginia in August 2000 to treat the plaintiff's medical condition that arose as a result of the car accident. *Id.*

On appeal, this Court agreed, concluding that the employer's payments to medical providers in Virginia constituted "medical compensation" under section 97-2(19). *Id.* Specifically, this Court noted that "[n]othing in the definition [of 'medical compensation'] limits the geographical locale of the medical treatment to North Carolina[.]" *Id.* Furthermore, at the time those payments were made, the defendants "had paid no other compensation pursuant to the Workers'

Compensation Act, nor had their liability been otherwise established." *Id.* There is no indication that the defendants' payments to the Virginia medical providers were ordered by the Industrial Commission; in fact, the plaintiff's Form 18 "Notice of Accident" had not been filed with the Industrial Commission at the time that "[the] defendants last paid medical compensation for [the] plaintiff's compensable injuries[.]" *Id.* Consequently, defendants' contention that "medical compensation" only includes payments for medical treatment "made pursuant to the judgment or umbrella of the North Carolina Industrial Commission" is without merit.

Here, as in *McGhee*, defendants admitted, and the Full Commission found as fact, that they paid plaintiff's out-of-state medical expenses on 14 November 2012 pursuant to plaintiff's Florida workers' compensation claim, months after plaintiff filed his Form 18 in North Carolina. Furthermore, as in *McGhee*, those payments had not been ordered as a result of a pending workers' compensation claim in North Carolina. Therefore, defendants' payment of medical expenses in 14 November 2012 constituted "medical compensation" as set out in section 97-2(19). Since plaintiff filed his Form 18 before this last payment of "medical compensation," he met the first element under section 97-24(a)(ii).

B. "Other Compensation"

The next issue is whether the benefits plaintiff received under Florida law constitute "other compensation" for purposes of section 97-24(a)(ii). If they do, plaintiff would be unable to satisfy the second element under section 97-24(a)(ii).

" 'Compensation' under the Workers' Compensation Act means 'the money allowance payable to an employee or to his dependents *as provided for in this Article*, and includes funeral benefits provided herein.' " *McGhee*, 173 N.C. App. at 427, 618 S.E.2d at 836 (citing N.C. Gen. Stat. § 97–2(11) (2003)) (emphasis added). In *McGhee*, this Court interpreted the term "other compensation" and determined that any benefits "paid . . . in lieu of workers' compensation benefits and not made payable . . . pursuant to [North Carolina's] Workers' Compensation Act" did not qualify as "other compensation," *id.*, and we are bound by that definition, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). In *McGhee*, 173 N.C. App. At 427, 618 S.E.2d at 836, the plaintiff received short-term disability benefits from the employer. On appeal, the defendants argued that the short-term disability benefits constituted "other compensation," making section 97-24(a)(ii) inapplicable. *Id.* However, this Court disagreed, concluding that because the short-term

disability benefits were "paid to [the] plaintiff in lieu of workers' compensation benefits and not made payable to [the] plaintiff pursuant to the Workers' Compensation Act[,]" they did not quality as "other compensation" under section 97-24(a)(ii). *Id.* at 427, 618 S.E.2d at 836-37.

Based on *McGhee*, since the workers' compensation benefits plaintiff received in Florida were also "not made payable to [him] pursuant to [North Carolina's] Workers' Compensation Act," *id.*, they do not qualify as "compensation," as defined in section 97-2(11) (2013), or "other compensation," as defined in *McGhee*, for purposes of N.C. Gen. Stat. § 97-24(a)(ii). Accordingly, plaintiff has also satisfied the second element under section 97-24(a)(ii).

Conclusion

In sum, plaintiff timely filed his Form 18 because: (1) it was filed before defendants' last payment of "medical compensation" in Florida; (2) based on *McGhee*, which we are bound by, *see In re Civil Penalty*, 342 N.C. at 384, 379 S.E.2d at 37, plaintiff has been paid no "other compensation" since the Florida workers' compensation benefits do not qualify as "other compensation"; and (3) defendant's liability has not otherwise been established under North Carolina's Workers' Compensation Act. Therefore, we reverse the Full Commission's order denying plaintiff's claim for compensation and remand for further proceedings.

REVERSED.

Chief Judge McGEE and Judge BELL concur.

ELLIS v. ELLIS

[238 N.C. App. 239 (2014)]

LIANE ELLIS, PLAINTIFF
v.
WILLIAM D. ELLIS, DEFENDANT

No. COA14-451

Filed 31 December 2014

1. Divorce—alimony—condoned marital misconduct—no abuse of discretion

The trial court did not abuse its discretion by awarding plaintiff wife only two years of alimony. In its order, the trial court addressed all of the factors prescribed by N.C.G.S. § 50-16.3A(b). Specifically, the trial court properly considered plaintiff's extramarital affair and the "resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony."

2. Divorce—alimony—condoned marital misconduct

The trial court did not err by considering plaintiff wife's extramarital affair when it awarded her two years of alimony. N.C.G.S. § 50-16.3A(b) allows the trial court to consider acts of condoned marital misconduct in determining awards of alimony.

3. Attorney Fees—alimony—within trial court's discretion

The trial court did not abuse its discretion by denying plaintiff wife's claim for attorney fees in an action for alimony. Under N.C.G.S. § 50-16.4, the decision to award attorney fees is within the trial court's discretion. Furthermore, the trial court found that plaintiff was not entitled to attorney fees because she did not act in good faith during the course of the litigation and acted contrary to the custody terms in the interim order.

Appeal by plaintiff from order entered 23 September 2013 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 22 October 2014.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for defendant-appellee.

BRYANT, Judge.

Where the trial court made findings of fact to support its award of alimony for a specific period, and properly considered condoned acts of marital misconduct by a dependent spouse in making its decision regarding alimony, we affirm the order of the trial court. Awarding of attorneys' fees in a claim for alimony is within the discretion of the trial court.

Plaintiff Liane Ellis and defendant William D. Ellis, both Canadian citizens, were married on 29 December 1996. Two minor children were born of the marriage.

In 2007, defendant was transferred by his employer to England with his family. Two years later, while residing in England, defendant discovered that plaintiff had engaged in an extra-marital affair with a hockey player beginning in 2006. Plaintiff and defendant agreed not to separate and underwent marital counseling to repair their marriage.

In 2010, defendant was promoted by his employer and transferred to Charlotte, North Carolina with his family. On 21 December 2011, plaintiff filed a complaint against defendant for child custody, child support, equitable distribution, post-separation support and alimony, divorce from bed and board, and interim distribution. Defendant filed an answer and counterclaim seeking a temporary parenting arrangement, a forensic examination, child custody, child support, and equitable distribution. An order adopting the parties' interim agreement was entered 6 March 2013.

On 21 May 2013, plaintiff and defendant agreed to a permanent custody and visitation consent order. On 26 May, plaintiff filed a motion alleging defendant was in contempt for violating the interim order. A trial was held on 31 May concerning the parties' claims for equitable distribution, child support, alimony, attorneys' fees, and contempt. On 23 September, the trial court entered an order regarding the claims for equitable distribution, child support, alimony, and attorneys' fees, and denying plaintiff's motion for contempt. Plaintiff appeals.

Plaintiff raises three issues on appeal addressing whether the trial court erred in: (I) awarding plaintiff only two years of alimony; (II) considering plaintiff's marital misconduct in calculating its award of alimony; and (III) not awarding attorneys' fees to plaintiff.

I.

[1] Plaintiff argues the trial court erred in awarding plaintiff only two years of alimony. We disagree.

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citation omitted), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted).

Plaintiff contends the trial court erred in its award of alimony because the trial court failed to make specific findings of fact addressing why it awarded only two years of alimony when other findings of fact made by the trial court indicated plaintiff was entitled to more than two years of alimony. Pursuant to North Carolina General Statutes, section 50-16.3A, "[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." N.C. Gen. Stat. § 50-16.3A(b) (2013). "In determining the amount, duration, and manner of payment of alimony," the trial court must consider sixteen relevant factors, including marital misconduct, duration of marriage, and earning capabilities of the parties. *Id.*

In its order awarding alimony, the trial court made findings of fact addressing all sixteen statutory factors before concluding plaintiff was entitled to an award of alimony lasting for two years. Plaintiff's argument that the trial court failed to make any findings of fact concerning why it limited its award of alimony to two years is without merit, since the trial court clearly stated in its first finding of fact that:

> Plaintiff/Mother engaged in illicit sexual misconduct during the marriage and prior to the [date of separation]. Specifically, she engaged in sexual intercourse with a professional hockey player that she met while working at the arena in Canada. Plaintiff/Mother was not separated from Defendant/Father at the time and engaged in the behavior without his knowledge or approval. Plaintiff/Mother felt she was entitled to have this extramarital affair because she was a "bored housewife" and she felt she gave up the right to pursue her career goals to support Defendant/Father's career goals.

> The Court finds that Defendant/Father did condone the illicit sexual misconduct of Plaintiff/Mother so the behavior cannot act as a bar to alimony. *However, the Court considers the nature of the behavior and Plaintiff/Mother's resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony.*

(emphasis added). It is well-established by this Court that "a trial court's failure to make *any* findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c)." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522-23 (2003) (emphasis added) (citation omitted); *see also* N.C. Gen. Stat. § 50-16.3(A)(c) (2013) (holding that where a trial court decides, in its discretion, to award alimony, the trial court must give its reasons for the award's amount, duration, and manner of payment).

Here, the trial court clearly stated that it had considered plaintiff's "resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony." As such, this finding of fact is sufficient to explain the trial court's reasoning in awarding plaintiff alimony for a duration of two years. Further, we note that the trial court made other findings of fact that could also support its decision to award alimony for only two years, including finding of fact eight ("Plaintiff/Mother was a spendthrift who consistently and regularly lived above the family's means."), and fifteen ("Plaintiff/Mother has not participated in this litigation in good faith. Her actions have resulted in the depletion of her own savings and share of the marital estate. She has contributed to her own poor economic circumstances. Additionally, she has not been diligent about finding a job or contributing [to] the family's overall economics."). Accordingly, plaintiff's argument is overruled.

II.

[2] Plaintiff next argues the trial court erred in considering plaintiff's marital misconduct in calculating its award of alimony. We disagree.

As discussed above in *Issue I*, pursuant to N.C. Gen. Stat. § 50-16.3A(b), the trial court must, in deciding whether to award alimony, consider sixteen statutory factors including marital misconduct. Where the trial court determines that "the dependent spouse has engaged in uncondoned 'illicit sexual behavior' during the marriage and prior to the date of separation, the trial court cannot award alimony[.]" *Romulus v. Romulus*, 215 N.C. App. 495, 522, 715 S.E.2d 308, 325 (2011) (citing N.C.G.S. § 50-16.3A(a) (barring an award of alimony to a dependent

spouse where that spouse engaged in illicit sexual behavior during the marriage)).

Here, both parties acknowledged that plaintiff had had an affair beginning in 2006 while married to defendant, and that rather than pursue a divorce, defendant and plaintiff underwent marriage counseling beginning in 2009. The parties remained married until plaintiff separated from defendant in December 2011. We disagree with plaintiff's contention that the trial court could not consider plaintiff's marital misconduct in determining her award of alimony for, although N.C.G.S. § 50-16.3A(a) clearly bars alimony for a dependent spouse who has engaged in uncondoned marital misconduct, here defendant condoned plaintiff's actions and sought to salvage his marriage. Indeed, the trial court noted in its first finding of fact concerning marital misconduct that defendant "did condone the illicit sexual misconduct of [plaintiff] so the behavior cannot act as a bar to alimony[,]" and ultimately awarded plaintiff alimony for two years. Further, there is nothing in N.C.G.S. § 50-16.3A(b) to indicate that the trial court cannot consider a spouse's condoned marital misconduct in calculating its award of alimony to the dependent spouse. Rather, N.C.G.S. § 50-16.3A(b) indicates that the trial court can consider acts of condoned marital misconduct as part of its determination of an award of alimony. *See* N.C.G.S. § 50-16.3A(b)(1) (noting that the trial court can consider instances of marital misconduct by either or both spouses as one of the sixteen statutory factors relevant to whether alimony should be awarded). Therefore, plaintiff's contention that the trial court could not consider plaintiff's condoned acts of marital misconduct in its decision to award alimony, albeit for only a two-year period, to plaintiff is without merit.

III.

[3] Finally, plaintiff contends the trial court erred in failing to award plaintiff attorneys' fees. We disagree.

"[T]he award of . . . attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court." *McKinney v. McKinney*, ___ N.C. App. ___, ___, 745 S.E.2d 356, 361 (2013), *review denied*, 2014 N.C. LEXIS 46 (Jan. 23, 2014), *review dismissed as moot*, 2014 N.C. LEXIS 50 (Jan. 23, 2014).

North Carolina General Statutes, section 50-16.4, states that:

> At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post[-]separation support pursuant to G.S. 50-16.2A, the court *may*, upon

> application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. § 50-16.4 (2013) (emphasis added).

Plaintiff argues that the trial court erred in denying her claim for attorneys' fees because the trial court's findings of fact contained elsewhere in the order indicated that plaintiff was a dependent spouse who was currently unemployed and lacked the financial means to cover the costs of litigation and, therefore, plaintiff was entitled to an award of attorneys' fees.

Here, the trial court made the following findings of fact regarding both parties' claims for attorneys' fees:

> 44. Plaintiff/Mother asserted a claim for attorney's fees with respect to her claim for child custody and child support and her claim for post-separation support and alimony.
>
> 45. The Court finds that Plaintiff/Mother is not entitled to a recovery of attorney's fees with respect to her claim for child custody and child support because she is not an interested party acting in good faith with insufficient means to defray the costs and expenses of suit as required by statute.
>
> 46. Specifically, the Court finds that Plaintiff/Mother has acted contrary to the custody terms outlined in the Interim Order since it was entered and she has continually acted with a conscious disregard to and in defiance of Defendant/Father's rights with regard to the children.
>
> 47. The Court finds that Plaintiff/Mother is not entitled to a recovery of attorney's fees with respect to her claim for post-separation support and alimony because Defendant/Father has paid his spousal support voluntarily, acted in good faith at all times with this process, and that as a result of the equitable distribution Plaintiff/Mother has sufficient means to defray the costs and expenses associated with her claims for spousal support.
>
> 48. Defendant/Father made a request that the Court award him attorney's fees associated with his claim for child custody.

> 49. Despite the ultimate resolution by consent, the issue of child custody, both temporary and permanent was a very contentious issue and required a significant amount of legal resources to address by both parties. Specifically, the children are estranged from their father due to no fault of their father. Neither the court-appointed therapist nor the involvement of the Council for Children's Rights ("CFCR") could repair the relationship. All reasonable efforts were made in this regard by everyone but Plaintiff/Mother. Plaintiff/Mother, both intentionally and unintentionally, supported the continued estrangement between the children and their father. Defendant/Father's request for attorney's fees as related to child custody was made as a result of how much time, attention and cost had to be devoted to the issue of child custody, either because of or in spite of Plaintiff/Mother.
>
> 50. While the Court finds that Defendant/Father was an interested party acting in good faith, the Court cannot find that Defendant/Father has insufficient means with which to defray the costs and expenses of suit.

Plaintiff's argument that the trial court erred in denying her claim for attorneys' fees is without merit, since under N.C.G.S. § 50-16.4, the trial court's decision to award attorneys' fees is clearly discretionary rather than mandatory. *See id.* Moreover, the trial court made specific findings of fact that plaintiff was not entitled to attorneys' fees because plaintiff failed to act in good faith during the litigation. As such, the trial court acted within its discretion when it denied plaintiff's claim for attorneys' fees. Plaintiff's argument is, therefore, overruled.

Affirmed.

Judges ELMORE and ERVIN concur.

FELTMAN v. CITY OF WILSON

[238 N.C. App. 246 (2014)]

FRANCES L. FELTMAN, Plaintiff
v.
CITY OF WILSON, a North Carolina Municipal Corporation; GRANT GOINGS, in his official Capacity as City Manager of City of Wilson and in his individual capacity; HARRY TYSON, in his individual capacity as Deputy City Manager of City of Wilson and in his individual capacity; AGNES SPEIGHT, in her official capacity as Assistant City Manager of City of Wilson and in her individual capacity; DATHAN SHOWS, in his official capacity as Assistant City Manager of City of Wilson and in his individual capacity; and, SUZANNE ALLEN, in her individual capacity; Defendants

No. COA14-585

Filed 31 December 2014

1. Appeal and Error—interlocutory orders—jurisdictional issue—final judgment and certification

Whether an appealed order is interlocutory presents a jurisdictional issue; here the Court of Appeals had jurisdiction because the trial court judgment was final on two of plaintiff's claims and the trial court certified that there was no just reason for delay.

2. Constitutional Law—freedom of speech—freedom of assembly—motion to dismiss—no heightened requirement

The trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss two constitutional claims arising from her employment termination. The trial court's order had the effect of imposing a heightened pleading requirement for freedom of speech or freedom of assembly claims under the North Carolina Constitution that is not recognized by North Carolina courts and is inconsistent with notice pleading.

3. Pleadings—failure to state a claim—weight of evidence—inappropriate argument

The trial court erred by granting defendants motion Rule 12 (b)(6) to dismiss an action arising from things plaintiff said and her employment termination on the theory that she did not adequately plead causation. The detailed fact-based arguments defendants made in their brief as to the weight that should be accorded to the evidence in this case are inappropriate at this early stage of the litigation.

Appeal by plaintiff from order entered 14 January 2014 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 21 October 2014.

The Leon Law Firm, P.C., by Mary-Ann Leon, for plaintiff-appellant.

Cauley Pridgen, P.A., by James P. Cauley, III and Timothy P. Carraway, for defendants-appellees.

DAVIS, Judge.

Frances L. Feltman ("Plaintiff") appeals from the trial court's order granting the motion to dismiss of Defendants City of Wilson ("the City"), Grant Goings, Harry Tyson ("Tyson"), Agnes Speight ("Speight"), Dathan Shows, and Suzanne Allen ("Allen") (collectively "Defendants") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure as to two of the claims for relief asserted by Plaintiff. On appeal, Plaintiff contends that the trial court failed to apply the proper standard of review under Rule 12(b)(6) in granting Defendants' motion. After careful review, we reverse the trial court's order and remand for further proceedings.

Factual Background

We have summarized the pertinent facts below using Plaintiff's own statements from her amended complaint, which we treat as true in reviewing the trial court's order granting a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true.").

Plaintiff was employed as a Benefits Administrator with the City's Human Resources and Risk Services Department. Throughout her tenure as an employee, Plaintiff met and often exceeded the job-related expectations of her employer. In 2009, Allen became Plaintiff's supervisor. In December 2011, Plaintiff and several other employees became aware that Allen was improperly assigning certain City employees to babysit her children at her home during their regular working hours for the City. In late 2011, Plaintiff also learned that Allen had terminated another employee, Shannon Davis, while Davis was on leave pursuant to the Family Medical Leave Act, and had hired a personal friend of Allen's to replace Davis.

Plaintiff informed Tyson, the Deputy City Manager, about Allen's actions. Tyson investigated Plaintiff's allegations along with Speight, the Assistant City Manager, and determined that Plaintiff's accusations against Allen were false.

Plaintiff then procured and presented to "city administrators" date-stamped photographs of an automobile belonging to one of her fellow

employees, Bonnie Fulgham ("Fulgham"), parked in front of Allen's house at a time of day when Fulgham's attendance records indicated she was at work for the City. At some point thereafter, Allen learned that Plaintiff — along with another employee, Jessica Cervantes — had been responsible for reporting Allen's improper actions.

Allen then began a "campaign of retaliation" against Plaintiff. Specifically, Allen (1) isolated Plaintiff from employee meetings in the department; (2) generally refused to speak with Plaintiff; (3) told other employees that she was determined to get rid of employees that she described as "old school," making specific reference to Plaintiff; and (4) applied different standards to Plaintiff than those used for other similarly situated employees concerning absences from work for medical appointments.

Plaintiff complained about Allen's treatment of her to other City officials and, in response, Speight assigned Fulgham to be Plaintiff's immediate supervisor. Plaintiff soon discovered, however, that Allen was, in fact, continuing to supervise Plaintiff's job performance and had directed Fulgham to demand that Plaintiff record every action she took during the day, which other similarly situated employees were not required to do.

In May 2012, Plaintiff voiced her concerns regarding Allen to "other citizens of the City[.]" Plaintiff also participated in writing and transmitting a letter concerning Allen's improper conduct to the mayor, the members of the city council, and to candidates seeking elected office within the City. Shortly thereafter, Allen's employment with the City was terminated.

After Allen's termination, Speight became the head of Plaintiff's department and subjected Plaintiff's work to increased scrutiny. Plaintiff was prohibited from opening any mail that was directed to her or her office, her computer files were searched, records of all telephone calls made from her office were reviewed, her personnel file was scrutinized, and she was never permitted to be alone in the office. In addition, at a meeting of department employees, Speight stated that "some people will be here to work as a team and some of you will not." Speight looked directly at Plaintiff when she stated the words "some of you will not."

Approximately three weeks later, Plaintiff was terminated from her employment with the City as part of an alleged reduction in force, which Plaintiff asserts was a pretext designed to prevent her from appealing her termination through the City's grievance procedure. Plaintiff was told that her job was being eliminated and that reemployment with the City

was not an option for her. However, almost immediately after her departure, her former job duties were assumed by one new employee and one existing employee. Also, a new full-time employee was later hired for a newly created position that was substantially the same as Plaintiff's former position. Plaintiff's attempts to obtain alternative employment with the City have been unsuccessful, and the City has hired less qualified candidates than Plaintiff for positions to which she has applied.

On 3 September 2013, Plaintiff filed a complaint against Defendants in Wilson County Superior Court and subsequently filed an amended complaint. In her amended complaint, Plaintiff asserted claims for (1) violation of her right to freedom of speech under the North Carolina Constitution; (2) violation of her right to assemble under the North Carolina Constitution; (3) civil conspiracy; and (4) wrongful discharge in violation of North Carolina public policy. On 15 October 2013, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6).

On 6 January 2014, the motion to dismiss was heard by the Honorable Quentin T. Sumner in Wilson County Superior Court. On 14 January 2014, Judge Sumner entered an order granting the motion as to Plaintiff's first and second causes of action alleging violations of her constitutional right to freedom of speech and freedom of assembly.[1] Plaintiff filed a notice of appeal to this Court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we note that the present appeal is interlocutory. "[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, internal quotation marks, and brackets omitted). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

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1. While Defendants' motion to dismiss appears to have been intended to encompass all of the claims asserted by Plaintiff, the trial court's order does not specifically mention any of Plaintiff's remaining claims and apparently treated the motion as a partial motion to dismiss that was addressed solely to Plaintiff's first and second claims for relief.

Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, __ N.C. App. __, __, 745 S.E.2d 69, 72 (2013). The prohibition against appeals from interlocutory orders "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C .Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted). Rule 54(b) of the North Carolina Rules of Civil Procedure provides that

> [w]hen more than one claim for relief is presented in an action . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C.R. Civ. P. 54(b).

In the present case, the trial court's order contains the following certification:

> Pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, the Court finds that there is no just reason for delay of entry as to the final Judgment as to Plaintiff's First and Second Claims for Relief and therefore enters FINAL JUDGMENT as to Plaintiff's First and Second Claims for Relief.

Based on this certification and the fact that the trial court's order serves as an adjudication of two of the claims asserted in the amended complaint, we are satisfied that we possess jurisdiction over the present

appeal. *See Raybon v. Kidd*, 147 N.C. App. 509, 511, 555 S.E.2d 656, 658 (2001) ("The trial court in the instant case entered a final judgment on fewer than all of the claims and certified [the case for immediate appeal under Rule 54(b)]. . . . We may therefore properly review the instant case on its merits.").

II. Motion to Dismiss

[2] Plaintiff's sole argument on appeal is that the trial court erred in granting Defendants' motion to dismiss.

> The standard of review of an order granting a Rule 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 appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Gilmore v. Gilmore, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (internal citations, quotation marks, and brackets omitted).

"The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. The function of a motion to dismiss is to test the law of a claim, not the facts which support it. This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Warren v. New Hanover Cty. Bd. of Educ.*, 104 N.C. App. 522, 525, 410 S.E.2d 232, 234 (1991) (internal citations, quotation marks, and ellipses omitted).

In its order, the trial court stated the basis for its ruling:

> As to Plaintiff's First and Second Claims for Relief, the Court specifically determines that Plaintiff's Complaint and Amended Complaint have failed to affirmatively plead the requisite "but for" standard necessary to state a claim for violation of Plaintiff's constitutional rights and, therefore, Plaintiff has failed to state a claim upon which relief can be granted.

In her appeal, Plaintiff argues that the trial court's order is inconsistent with the concept of notice pleading embodied in Rule 8(a) of the North Carolina Rules of Civil Procedure, which requires only that a pleading contain "[a] short and plain statement of the claim sufficiently

particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C.R. Civ. P. 8(a)(1).

> By enacting section 1A–1, Rule 8(a), our General Assembly adopted the concept of notice pleading. Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim.

Wake Cty. v. Hotels.com, L.P., __ N.C. App. __, __, 762 S.E.2d 477, 486 (2014) (internal citations and quotation marks omitted).

It is well settled that "one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision." *Bigelow v. Town of Chapel Hill*, __ N.C. App. __, __, 745 S.E.2d 316, 326 (citation omitted), *disc. review denied*, 367 N.C. 223, 747 S.E.2d 543 (2013). With regard to Plaintiff's first claim for relief, we have held that

> [t]o establish a cause of action for wrongful discharge or demotion in violation of [her] right to freedom of speech, [a] plaintiff must forecast sufficient evidence that the speech complained of qualified as protected speech or activity[2] and that such protected speech or activity was the motivating or but for cause for [her] discharge or

2. In the public employment context, "speech is constitutionally protected only if it relates to matters of public concern and if the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Warren*, 104 N.C. App. at 526, 410 S.E.2d at 234 (citation, internal quotation marks, and brackets omitted). In the present case, Defendants do not argue that the speech at issue failed to involve a matter of public concern. Instead, Defendants limit their argument to the contention that "[Plaintiff's] Complaint fails to set forth facts sufficient to establish 'but for' causation between her alleged 'speech' and 'assembly' and the adverse employment action." Therefore, we do not address the issue of whether the speech at issue in this case related to matters of public concern.

> demotion. The resolution of these two critical issues is a matter of law and not of fact.

Swain v. Elfland, 145 N.C. App. 383, 386-87, 550 S.E.2d 530, 533 (internal citations, quotation marks, and brackets omitted), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001).

Plaintiff's second claim for relief was based on Article I, section 12 of the North Carolina Constitution, which states, in pertinent part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12. The right to freedom of assembly is similar to the right to freedom of association embodied within our federal Constitution. *See Libertarian Party of N.C. v. State*, 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011) (noting that free speech and assembly provisions of North Carolina Constitution protect associational rights). The United States Court of Appeals for the Fourth Circuit has discussed the link between freedom of speech and freedom of association.

> [Plaintiff's] freedom of association claim parallels his free speech claim. Indeed, we have recognized the right to associate in order to express one's views is inseparable from the right to speak freely. . . . An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Edwards v. City of Goldsboro, 178 F.3d 231, 249 (4th Cir. 1999).

Defendants concede in their brief that they "do not dispute that the Complaint alleged facts sufficient to put Defendants on notice that Plaintiff was advancing constitutional claims of violation of freedom of speech and violation of right of assembly[.]" They likewise concede that "Plaintiff is correct that she was not required to use 'magic words' such as 'but for' in setting forth her claims for relief[.]"

We rejected in an analogous context the notion that any such "magic language" was necessary in order to adequately plead causation. In

Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), *overruled on other grounds by Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997), the plaintiff, a nurse anesthetist, brought an action against Duke University Hospital and several of her supervisors based on her allegations that she was discharged for refusing to testify falsely or incompletely in a malpractice lawsuit. The trial court granted the defendants' motion to dismiss pursuant to Rule 12(b)(6) based, in part, on their argument that the plaintiff had failed to allege that her damages would not have occurred "but for" their actions and that her complaint was therefore fatally defective. *Id.* at 346, 328 S.E.2d at 829.

We reversed that portion of the trial court's ruling, holding that our caselaw contained

> no mandate for the use of the magic words "but for[]" . . . . Rather, we read those cases to say that the complaint . . . must clearly allege that the actions of the defendant were the cause of the plaintiff's damages . . . [Our case-law] requires only that the [defendant's] act *caused* the plaintiff actual damages. . . . While the words "but for" are in wide usage and undoubtedly meet the requirements for sufficiently pleading this cause of action, they are not the exclusive means of doing so. Plaintiff's complaint clearly alleges that [defendants] maliciously undertook to have her discharged from her job because she would not be intimidated into testifying favorably to them . . . and leaves no ground for supposing that she was fired for any other reason. If plaintiff can prove her allegations the defendants should not be allowed to escape liability because plaintiff's attorneys did not say "but for." To hold otherwise would be to return to the type of hypertechnical pleading that our Rules of Civil Procedure, G.S. 1A–1, and Rule 1 *et seq.* replaced.

Id. at 346-47, 328 S.E.2d at 829 (internal citations and quotation mark omitted). The same reasoning applies here.

In *Warren*, the plaintiff was a teacher who alleged, in part, that he was denied a promotion based on a violation of his constitutional right to free speech after he publicized the results of a survey conducted by the North Carolina Association of Educators to the Board of Education. *Warren*, 104 N.C. App. at 525, 410 S.E.2d at 234. The defendants filed a motion to dismiss under Rule 12(b)(6), and the trial court granted the motion. *Id.*

On appeal, we recognized that in order to establish the causation element of his free speech claim, the plaintiff was required to show that the speech he engaged in "was the 'motivating' or 'but for' cause" of the adverse employment action he suffered. *Id.* (citation omitted). We noted that in his complaint the plaintiff had alleged that before he disclosed the results of the survey he had consistently received positive evaluations, the school principal had warned him not to give his report to the Board of Education, and the plaintiff was shortly thereafter given a substandard evaluation preventing him from receiving a promotion. *Id.* at 527, 410 S.E.2d at 235. Therefore, we held that "[t]aking plaintiff's allegations as true, we conclude that the complaint was sufficient to withstand defendants' Rule 12(b)(6) motion to dismiss." *Id.*

In the present case, Plaintiff's amended complaint included the following allegations that, as in *Warren*, were sufficient to satisfy the pleading requirements regarding the causation elements of her constitutional claims:

> 1. . . . Because Plaintiff spoke out against [unlawful] practices, she was terminated from her employment position[.]
>
> . . . .
>
> 35. Plaintiff's protected speech was a substantial factor in Defendants' decision to take adverse action against her.
>
> . . . .
>
> 39. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by . . . Article I, Section 14 of the North Carolina Constitution.
>
> . . . .
>
> 45. Defendants' adverse action against the Plaintiff was in retaliation for her exercise of rights guaranteed by . . . Article I, Section 12 of the North Carolina Constitution.

We cannot agree with Defendants that Plaintiff's allegations were insufficient to adequately plead freedom of speech or freedom of assembly claims under the North Carolina Constitution so as to survive Defendants' motion to dismiss. The trial court's order had the effect of imposing a heightened pleading requirement as to these claims that is not recognized by North Carolina courts and is inconsistent with the concept of notice pleading as provided for in our Rules of Civil Procedure. The trial court therefore erred in granting Defendants' motion on the

theory that she did not adequately plead the causation element of her constitutional claims.

[3] Finally, Defendants also assert that their motion to dismiss was properly granted because Plaintiff did not

> conclusively establish that *despite* [her] efforts to maintain anonymity [while engaging in the speech described in her amended complaint], the defendant[s] nevertheless knew that the plaintiff was the author of said speech. To fail to establish that connection is to fail to establish the necessary causal connection between the speech and the alleged retaliation.

Defendants' argument reflects a misunderstanding both of notice pleading and the appropriate standard of review applicable to a motion to dismiss pursuant to Rule 12(b)(6). In order to overcome such a motion, a plaintiff is not required to "conclusively establish" *any* factual issue in the case. Rather, the only question properly before a court reviewing a Rule 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." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428, *appeal dismissed and disc. review denied*, 361 N.C. 425, 647 S.E.2d 98 (2007).

The detailed fact-based arguments Defendants make in their brief as to the weight that should be accorded to the evidence in this case are inappropriate at this early stage of the litigation. For purposes of Defendants' motion to dismiss, all that matters is whether Plaintiff has adequately pled claims for violation of the freedom of speech and freedom of assembly provisions of the North Carolina Constitution based on the doctrine of notice pleading as set out in Rule 8(a)(1). Based on our review of the amended complaint, we are satisfied that Plaintiff's allegations in support of these claims were legally sufficient. Thus, because this case is before us on appeal from a ruling on a Rule 12(b)(6) motion, our inquiry ends there. As such, the trial court's order must be reversed.

Conclusion

For the reasons stated above, the order of the trial court is reversed, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges HUNTER, Robert C., and DILLON concur.

FERGUSON v. FERGUSON

[238 N.C. App. 257 (2014)]

THOMAS E. FERGUSON, PLAINTIFF
v.
WENDY R. FERGUSON, DEFENDANT

No. COA14-355

Filed 31 December 2014

1. Child Custody and Support—support modification—reasonable needs of children—relative ability to pay—additional findings of fact required

The trial court erred in a child support modification case by failing to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support. The trial court's order was reversed and remanded for additional findings of fact to address the parties' request for modification of the existing child support arrangement and the validity of defendant's request for a deviation from the child support guidelines.

2. Child Custody and Support—support modification—private school education—extraordinary expenses

The trial court erred in a child support modification case by failing to make adequate findings of fact in support of its determination that the cost of the children's private school education constituted an extraordinary expense. The trial court's order was reversed and remanded for entry of a new order containing sufficient findings of fact addressing the issue of defendant's ability to pay.

3. Jurisdiction—child support modification—amended withholding order—appeal already perfected

The trial court lacked jurisdiction in a child support modification case to enter an amended withholding order in light of the fact that defendant had noted, and subsequently perfected, an appeal from the 29 October 2013 order.

Judge BELL concurring in part and dissenting in part.

Appeal by defendant from orders entered 29 October 2013 and 9 December 2013 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 8 September 2014.

Hamilton Moon Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for Plaintiff (no brief).

The Law Offices of Kenneth T. Davies, by Kenneth T. Davies and Alyssa V. Andrew, for Defendant.

ERVIN, Judge.

Defendant Wendy R. Ferguson appeals from an order denying her motion to deviate from the child support guidelines and ordering Defendant to pay Plaintiff Thomas E. Ferguson child support in the amount of $919 per month, to make payments intended to reduce a child support-related arrearage in the amount of $191.43 per month, and to pay Plaintiff's attorney's fees and from an amended order requiring income withholding in connection with her child support and arrearage obligation.[1] On appeal, Defendant argues that the trial court erred by refusing to deviate from the child support guidelines, by including private school tuition costs as an extraordinary expense in calculating Defendant's child support obligation, and by entering the amended withholding order after an appeal had been noted from the trial court's child support order. After careful consideration of Defendant's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's child support and amended income withholding orders should be reversed and vacated, respectively, and that this case should be remanded to the Mecklenburg County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

Plaintiff and Defendant were married on 20 August 1994, separated on 28 October 2003, and divorced on 6 April 2005. The parties are the parents of two minor children, Carrie and Brian.[2] On 7 January 2005, Judge Ben S. Thalheimer entered a consent judgment addressing equitable distribution, child custody, child support, and visitation issues that provided, in pertinent part, that Plaintiff would have primary physical custody of the children; that Defendant would have visitation with the children at designated times; that Defendant would pay the tuition and daycare expenses associated with the children's attendance at Northside

1. Although the $191.43 monthly arrearage amount to be paid by Defendant was determined in Finding of Fact No. 23 of the 29 October 2013 order and properly reflected in the 9 December 2013 wage withholding order, decretal paragraph No. 2 of the 29 October 2013 order reflects the monthly arrearage payment to be $100.00, an apparent typographical error that the trial court should address on remand.

2. "Carrie" and "Brian" are pseudonyms used for ease of reading and to protect the children's privacy.

Christian Academy; and that Plaintiff would pay the children's healthcare and all other expenses.

On 11 January 2008, Defendant filed a motion seeking to have the existing custody and support arrangements modified on the grounds that there had been substantial and material changes in circumstances affecting the welfare of the children, including a reduction in the amount of time that Defendant had been able to spend with the children and changes in the expenses that needed to be incurred on behalf of the children. On 28 January 2009, Plaintiff filed a response to Defendant's motion in which he denied the material allegations of Defendant's motion and sought the entry of an order providing for a modification of the existing child support arrangement. On 17 September 2009, the trial court entered an order awarding Plaintiff primary physical custody of the children, establishing a schedule pursuant to which Defendant was entitled to visitation with the children, and indicating that a separate order modifying the existing child support arrangements would be entered.

On 27 October 2010, Defendant filed a motion seeking to obtain the entry of a child support order that deviated from the child support guidelines. At a hearing held on 25 April 2012 and 6 June 2012, Defendant presented evidence regarding her net monthly income, shared family expenses, debts, and other monthly expenses affecting herself and the children and asserted that her father sometimes helped her make her mortgage payments when she needed financial assistance. In addition, Plaintiff presented evidence regarding his monthly income, shared family expenses, the cost of the children's attendance at Northside Christian Academy, and other monthly expenses for the children, including amounts associated with the purchase of food and the cost of recreational activities.

On 29 October 2013, the trial court entered an order denying Defendant's motion to deviate from the child support guidelines, ordering Defendant to pay child support in the amount of $919 per month, requiring Defendant to pay a $15,314 child support-related arrearage at the rate of $191.43 per month, compelling Defendant to pay Plaintiff's attorney's fees, and imposing a wage withholding requirement to ensure the making of the required support and arrearage reduction payments. On 15 November 2013, Defendant noted an appeal from the 29 October 2013 order to this Court. On 9 December 2013, the trial court entered an amended wage withholding order. On 19 December 2013, Defendant noted an appeal from the 9 December 2013 order to this Court.

II. Substantive Legal Analysis

A. Motion to Deviate from Child Support Guidelines

[1] In her first challenge to the trial court's order, Defendant contends that the trial court erred by refusing to deviate from the child support guidelines in calculating the amount of child support that she owed Plaintiff. More specifically, Defendant asserts that the trial court erred by failing to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support. Defendant's argument has merit.

1. Standard of Review

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Similarly, "[a] trial court's deviation from the [child support] [g]uidelines is reviewed under an abuse of discretion standard." *Beamer v. Beamer*, 169 N.C. App. 594, 597, 610 S.E.2d 220, 223 (2005). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Ludlam v. Miller*, __ N.C. App. __, __, 739 S.E.2d 555, 558 (2013) (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.* (quotations and citations omitted).

2. Sufficiency of the Trial Court's Findings

"Child support is to be set in such amount 'as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties.' " *Buncombe Cnty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000) (quoting N.C. Gen. Stat. § 50-13.4(c)). "Child support set consistent with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Id.*

"If the trial court imposes the presumptive amount of child support under the Guidelines, it is not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of

each parent to [pay or] provide support.' " *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). "However, upon a party's request that the trial court deviate from the Guidelines . . . or the court's decision on its own initiative to deviate from the presumptive amounts . . . [,] the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." *Id.* at 297, 524 S.E.2d at 581; *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993) (stating that "[t]he second paragraph of N.C. [Gen. Stat. §] 50–13.4(c) provides that[,] when a request to deviate is made and such evidence is taken, the court should hear the evidence and 'find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support' "). In other words, "evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay." *Brooker v. Brooker*, 133 N.C. App. 285, 291, 515 S.E.2d 234, 239 (1999) (quoting *Norton v. Norton*, 76 N.C. App. 213, 218, 332 S.E.2d 724, 728 (1985)). In the course of making the required findings, "the trial court must consider 'the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.' " *Beamer*, 169 N.C. App. at 598, 610 S.E.2d at 224 (quoting *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 645, 507 S.E.2d 591, 594 (1998)). "These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685 (quoting *Gowing*, 111 N.C. App. at 618, 432 S.E.2d at 914). As a result, given that Defendant requested the trial court to deviate from the child support guidelines, the trial court was required to "hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." *Biggs*, 136 N.C. App. at 297, 524 S.E.2d at 581.

The trial court's order contained the following findings of fact, among others:

> 16. The Court finds that [Plaintiff] is employed full-time with the Mecklenburg County Police Department and part-time as head of security for Northside Christian Church. Throughout the time period in question, [Plaintiff] has enjoyed earnings from sporadic contract jobs.
>
> 17. The Court finds that [Defendant] is employed full-time with the Charlotte- Mecklenburg County School system.

Throughout the time period in question[,] [Defendant] has enjoyed earnings from sporadic summer jobs and tutoring.

. . . .

19. The Court heard evidence regarding the reasonable needs of the children for support and the relative ability of each parent to provide support based upon [Defendant's] request to deviate from the North Carolina Child Support Guidelines.

20. The Court finds by the greater weight of the evidence that the application of the Guidelines would in fact meet the reasonable needs of the children considering the relative ability of each parent to provide support and there should be no deviation.

21. Specifically, the Court finds that any inability of [Defendant] to balance a reasonable monthly budget (sufficient to meet the children's reasonable expenses) is as a result of [Defendant's] own actions, her refusal to obtain summer employment, or to work on alternate weeks, and her choices with regard to incurring debt. The Court finds she is intentionally underemployed and depressing her income as a result.

22. [In this finding of fact, the trial court provided a chart reflecting the parties' actual monthly incomes, Plaintiff's payments of the children's health insurance premiums, Plaintiff's work-related child care costs, and "extraordinary expenses" from 2008 to 2012.]

23. The total amount that [Defendant] owes is $2,600.00 in child support arrears and $600.00 in attorneys' fees per the Contempt Order plus . . . $11,814 . . . =$15,314. There are 80 months until the youngest child turns 18 so [Defendant] will repay these arrears in the amount of $191.43 per month until the full amount is paid. This amount shall be paid by wage withholding.

24. The amount of child support which [Defendant] will owe beginning September 1, 2013 and continuing until the earlier of the date that child support is modified or terminated by a court of law is Nine Hundred Nineteen Dollars and no/100 ($919) per month. This amount shall be paid by

> automatic wage withholding. Until the wage withholding process is activated [Defendant] shall pay the child support amount directly to [Plaintiff].

A careful examination of these findings establishes that the trial court failed to make specific findings regarding the relative ability of each parent to provide support as required by N.C. Gen. Stat. § 50–13.4(c).[3] Aside from the parties' monthly incomes from 2008 to 2012, the amount of which is set forth in the chart contained within Finding of Fact. No. 22, we are unable to determine from an examination of the trial court's findings whether the trial court gave any consideration to the relative ability of each parent to provide support. In addition, there is no indication that the trial court considered "the accustomed standard of the living of the child[ren] and the parties" as required by N.C. Gen. Stat. § 50-13.4(c). *Spicer*, 168 N.C. App. at 294, 607 S.E.2d at 686 (stating that, "[w]ithout findings regarding the child's or parties' accustomed standard of living and the reasonableness of the expenses in light of that standard of living, we cannot determine whether the trial court considered the standard of living factor and whether the trial court's finding of reasonable needs . . . is supported by the evidence"). As a result, given the absence of findings of fact concerning the reasonable needs of the children and the relative ability of each party to pay child support, we have no way to evaluate the correctness of the trial court's determination "that the application of the Guidelines would in fact meet the reasonable needs of the children considering the relative ability of each parent to provide support" so that there should be "no deviation" from the Guidelines.

At the hearing before the trial court, Plaintiff and Defendant presented extensive evidence concerning the cost of caring for the children, including the amounts deemed appropriate for the children's healthcare, maintenance, education, food, and recreational activities. In addition, both parties introduced evidence concerning their incomes and expenses and Defendant described the amount of the debts that she

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3. Although our dissenting colleague has concluded that "the trial court's findings demonstrate that the court determined the presumptive amount of child support, heard evidence regarding the children's needs and the ability of the parents to provide support, including the cost of the extraordinary expense, and determined that the presumptive Guidelines provided reasonable support for the children," we do not believe, for the reasons outlined in the text of this opinion, that a trial court is entitled to simply state, without further explanation or the making of specific findings concerning the level of income reasonably available to each party and the amount of expenses that must reasonably be incurred for the benefit of the children, that an application of the guidelines results in the establishment of an appropriate amount of child support in a case in which a party has requested the trial court to deviate from the guidelines.

owed. "It is not enough[, however,] that there [is] evidence in the record sufficient to support findings which *could have been made*"; instead, "[t]he trial court must itself determine what pertinent facts are actually established by the evidence before it[.]" *Beamer*, 169 N.C. App. at 599, 610 S.E.2d at 224 (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)) (emphasis in original). In other words, the fact that the record contains evidence from which the necessary findings could have been made does not have the effect of absolving the trial court from the obligation to actually make the required findings concerning the needs of the children and the parties' relative abilities to pay in a case in which a deviation from the guidelines has been requested. As a result, given that a trial court's failure to make findings of fact addressing the relative ability of the parents to provide support and the expenses that are needed to meet the children's needs requires a reviewing court to remand the relevant case to the trial court for the entry of a new order containing additional findings of fact, *Brooker*, 133 N.C. App. at 291, 515 S.E.2d at 239, we hold that the trial court's order must be reversed and this case must be remanded to the Mecklenburg County District Court for the entry of a new order addressing the parties' request for a modification of the existing child support arrangement and the validity of Defendant's request for a deviation from the child support guidelines that contains adequate findings of fact concerning reasonable needs of the children and the parties' relative ability to pay support.[4]

B. Extraordinary Expenses

[2] Secondly, Defendant contends that the trial court erred by concluding that the cost of the children's attendance at a private school constituted an extraordinary expense and by requiring Defendant to pay the cost of their attendance at a specific private school. More specifically, Defendant argues that the trial court erred by failing to make adequate findings of fact in support of its determination that the cost of the children's private school education constitutes an extraordinary expense and abused its discretion by requiring Defendant to pay the cost of their attendance at the Northside Christian Academy based on the religious benefits of the education that the children would receive at that educational institution. Once again, we conclude that Defendant's argument has merit.

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4. As part of this process, the trial court is, of course, entitled to reconsider and make appropriate findings of fact and conclusions of law concerning the extent, if any, to which Defendant has inappropriately depressed her income in an attempt to reduce her child support payment obligation.

1. Standard of Review

"The trial court is vested with discretion to make adjustments to the guideline amounts for extraordinary expenses, and the determination of what constitutes such an expense is likewise within its sound discretion." *Doan v. Doan*, 156 N.C. App. 570, 574, 577 S.E.2d 146, 149 (2003) (citing *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581). "It is well established that[,] where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). As a result, we will review the trial court's determination that the cost of the children's private school constituted an extraordinary expense and should be included in calculating Defendant's child support obligation under the guidelines utilizing an abuse of discretion standard of review.

2. Validity of Court's Exgtraordinary Expense Decision

According to the child support guidelines, the trial court "may make adjustments for extraordinary expenses and order payments for such term and in such manner as the [c]ourt deems necessary." *Mackins v. Mackins*, 114 N.C. App. 538, 548, 442 S.E.2d 352, 358, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994). The "extraordinary expenses [contemplated by the child support guidelines] include . . . [a]ny expenses for attending any special or private elementary or secondary schools to meet the particular educational needs of the child(ren)," *Mackins*, 114 N.C. App. at 549, 442 S.E.2d at 359, with a trial court having the authority to "add [these expenses] to the basic child support obligation and order [them to be] paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest." *Ludlam*, __ N.C. App. at __, 739 S.E.2d at 563. However, "incorporation of such adjustments into a child support award does *not* constitute deviation from the Guidelines," so that, "absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the noncustodial parent's ability to pay extraordinary expenses. *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581-82. As a result of the fact that Defendant requested a deviation from the child support guidelines, however, the trial court was obligated to make such findings regarding the extraordinary expense request at issue here.

In determining that the cost of the children's private school education constituted an appropriate extraordinary expense, the trial court found that:

> 18. The Court finds that the cost for the children to attend Northside Christian Academy is an extraordinary expense to be considered when applying the North Carolina Child Support Guidelines. Specifically[,] the Court finds, that such expenses are justified because the children have grown up with Northside Christian Academy, it is where the entirety of their educational experience has occurred. The Court finds that this private school can supply something that public school cannot. Public schools cannot provide God. That is what the children have grown up with. God is a part of their lessons.

Although Finding of Fact No. 18 describes in detail the reasoning process underlying the trial court's determination that the cost of the children's attendance at Northside Christian Academy constituted an appropriate extraordinary expense for purposes of calculating the amount of child support that Defendant owed under the guidelines, the trial court, despite the existence of a request for a deviation from the guidelines, did not make any findings addressing the issue of the parties' relative abilities to pay the cost of the children's attendance at Northside Christian Academy, particularly given the fact that Defendant presented evidence tending to show that she lacked the ability to pay the cost of the children's matriculation at that institution. In the absence of sufficient factual findings addressing the issue of Defendant's ability to pay for the children's education at Northside Christian Academy, we are unable to determine whether the trial court abused its discretion by requiring Defendant to pay for the cost of the children's private school education.[5] As a result, the trial court's order must be reversed and this case must be remanded to the trial court for the entry of a new order that contains sufficient findings of fact addressing the issue of Defendant's ability to pay the cost of the children's education at Northside Christian Academy.[6]

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5. As should be obvious, the trial court would have been under no obligation to make findings of fact concerning Defendant's ability to pay the educational expenses discussed in the text of this opinion in the event that Defendant had not requested a deviation from the child support guidelines. *Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581-82.

6. In light of our determination that the trial court's order must be reversed and that this case must be remanded to the trial court for the making of findings relating to Defendant's ability to pay the extraordinary expense of the children's private school tuition, we need not address and should not be understood to have commented upon the merits of Defendant's remaining challenges to the trial court's decision to require Defendant to pay the cost of privately educating the children at Northside Christian Academy.

C. Jurisdiction to Enter Amended Withholding Order

[3] Finally, Defendant argues that the trial court lacked the authority to enter the amended withholding order. More specifically, Defendant argues that the trial court lacked jurisdiction to enter the amended withholding order in light of the fact that Defendant had noted, and subsequently perfected, an appeal from the 29 October 2013 order. Once again, we conclude that Defendant's argument has merit.

1. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981).

2. Trial Court's Jurisdiction

According to well-established North Carolina law, "once an appeal is perfected, the lower court is divested of jurisdiction." *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422, *disc. review denied in part*, 334 N.C. 162, 432 S.E.2d 358, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993); N.C. Gen. Stat. § 1–294. "An appeal is not 'perfected' until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction." *Romulus v. Romulus*, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011).

As the record clearly reflects, Defendant noted an appeal from the 29 October 2013 order on 15 November 2013 and perfected her appeal by filing a record on appeal on 28 March 2014. For that reason, the trial court lost jurisdiction over this case as of 15 November 2013. Thus, given that the amended withholding order was entered after the date upon which Defendant noted her appeal from the 29 October 2013 order, the amended withholding order is "void for lack of jurisdiction." *Romulus*, 216 N.C. App. at 33, 715 S.E.2d at 892. As a result, the amended withholding order must be vacated.[7]

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7. As an aside, we note that N.C. Gen. Stat. § 50–13.4(f)(9) authorizes the enforcement of a child support obligation through the use of the contempt power during the course of the appellate process. However, as the record clearly reflects, the entry of the amended withholding order did not constitute an exercise of the trial court's contempt power.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenges to the trial court's orders have merit. As a result, the trial court's child support order should be, and hereby is, reversed; the trial court's amended withholding order should be, and hereby is, vacated; and this case should be, and hereby is, remanded to the Mecklenburg County District Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge McCULLOUGH concurs.

BELL, Judge, concurring in part, dissenting in part.

Although I agree with my colleagues that the trial court lacked the authority to enter the amended withholding order, I respectfully dissent from the majority's position that the trial court failed to make adequate findings of fact concerning the reasonable needs of the children and the relative ability of each party to provide support or the cost of private school tuition as an extraordinary expense.

As noted by the majority, here, the trial court made findings regarding the parties' incomes and payments made by Plaintiff for health insurance, work-related child care, and extraordinary expenses. It then made the following relevant findings of fact:

> 19. The Court heard evidence regarding the reasonable needs of the children for support and the relative ability of each parent to provide support based upon Defendant/Mother's request to deviate from the North Carolina Child Support Guidelines.
>
> 20. The Court finds by the greater weight of the evidence that the application of the Guidelines would in fact meet the reasonable needs of the children considering the relative ability of each parent to provide support and there should be no deviation.
>
> 21. Specifically, the Court finds that any inability of Defendant/Mother to balance a reasonable monthly budget (sufficient to meet the children's reasonable expenses) is as a result of Defendant/Mother's own actions, her refusal to obtain summer employment, or to work on

> alternate weeks, and her choices with regard to incurring debt. The Court finds she is intentionally underemployed and depressing her income as a result.

Further, the trial court's order includes as Finding of Fact number 22 a detailed spreadsheet reflecting the parties' respective incomes, the costs of health insurance and childcare expenses, and the extraordinary expense.

I would conclude that the trial court's findings demonstrate that the court determined the presumptive amount of child support, heard evidence regarding the children's needs and the ability of the parents to provide support, including the cost of the extraordinary expense, and determined that the presumptive Guidelines provided reasonable support for the children. The findings noted above relate to the ability of each parent to provide support. I believe these findings of fact adequately satisfy N.C. Gen. Stat. § 50-13.4(c) and support the trial court's decision not to deviate from the Guidelines.

Further, "[c]hild support set in accordance with the Guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Beamer v. Beamer*, 169 N.C. App. 594, 596, 610 S.E.2d 220, 222-23 (2005) (citation and internal quotation marks omitted). Because the trial court applied the presumptive guidelines in calculating Defendant's child support obligation, its "determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, *i.e.* only if manifestly unsupported by reason." *Row v. Row*, 185 N.C. App. 450, 461, 650 S.E.2d 1, 8 (2007) (citation and internal quotation marks omitted). After thoroughly reviewing the record, I cannot conclude that the trial court's decision not to deviate from the Guidelines was manifestly unreasonable.

Accordingly, because the record does not support a conclusion that the trial court's adherence to the presumptive guidelines was "so arbitrary that it could not have been the result of a reasoned decision," *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002), I respectfully dissent. I would affirm the trial court's order denying Defendant's request for a deviation from the Child Support Guidelines and including the private school tuition as an extraordinary expense.

FOREHAND v. FOREHAND

[238 N.C. App. 270 (2014)]

SARAH A. FOREHAND, PLAINTIFF
v.
JASON A. FOREHAND, DEFENDANT

No. COA14-772

Filed 31 December 2014

1. Domestic Violence—protective order—subjective fear—exchange of drug test results

The trial court did not err by renewing plaintiff's domestic violence protective order. Although defendant disputed that he was a danger to plaintiff, plaintiff's testimony was adequate to support a finding that she was in subjective fear of defendant and, as to the finding that there was a "poor exchange" of the drug test results, there was also competent evidence to support the finding.

2. Domestic Violence—protective order—renewal—facts reused

The trial court did not err by concluding that good cause existed to renew a domestic violence prevention order (DVPO) where the order renewing the DVPO rested, in large part, on acts by defendant that served as the basis for the original DVPO. There is nothing in N.C.G.S. § 50B-3 or North Carolina case law prohibiting the renewal of a DVPO based on acts that happened in the past that served as the basis for issuance of the original DVPO.

3. Appeal and Error—unpublished opinion—persuasive authority—cited in published opinion

Even though unpublished opinions from the Court of Appeals do not constitute controlling legal authority, an unpublished case held that prior acts may provide support for and be incorporated by reference into orders renewing DVPOs. That reasoning was found to be persuasive here and was applied to the facts of this case.

Appeal by defendant from order entered 3 February 2014 by Judge Anna Worley in Wake County District Court. Heard in the Court of Appeals 17 November 2014.

No brief filed on behalf of plaintiff-appellee.

The Law Corner, by Betsy Gold, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jason Forehand appeals the order renewing plaintiff Sarah Forehand's domestic violence protective order. On appeal, defendant challenges several findings of fact and ultimate conclusion of law that there was "good cause" to renew the domestic violence protective order ("DVPO").

After careful review, we affirm the order.

Background

On 8 October 2012, plaintiff filed a complaint and motion for a DVPO against defendant, her husband. The parties have three minor children born of the marriage. In the complaint and motion, plaintiff alleged that defendant attempted to cause or intentionally caused her and her children bodily injury and placed them in fear of imminent serious bodily injury. Specifically, plaintiff stated that, on 5 October 2012, defendant stole the family dog from the family residence with the children watching. Plaintiff additionally claimed that defendant put her and their newborn child in danger when she tried to open the car door to get the dog out. During defendant's hospitalization for a suicide attempt on 26 September 2012 and while plaintiff was ten months pregnant, defendant allegedly told her: "Bitch, I want to smash your teeth in and slam you to the floor you dirty cunt." Based on this threat, plaintiff claimed that she went into early labor. In the complaint, plaintiff also asserted that her children were at substantial risk of physical or emotional injury based on defendant's issues with substance abuse. Specifically, plaintiff stated that defendant was addicted to heroin and prescription drugs and has overdosed several times. Finally, plaintiff claimed that defendant had made threats to commit suicide and had been institutionalized for attempted suicide on two occasions. Based on these allegations, the trial court granted plaintiff an *ex parte* DVPO that same day.

On 15 October 2012, a hearing was held to determine whether plaintiff was entitled to a one-year DVPO. At the hearing, the parties consented to a continuance based on defendant's claim that he was entering a 90-day inpatient treatment facility for heroin abuse. The trial court continued the existing *ex parte* DVPO until 25 January 2013. At the next hearing, on 19 February 2013, the trial court granted plaintiff a one-year DVPO (the "2013 DVPO"); however, a copy of it is not included in the record on appeal.

On 14 January 2014, plaintiff filed a motion to renew the DVPO. She claimed that defendant had sent her "harassing emails, using vulgar words, to describe [her]" and was using drugs again. Furthermore, citing his "hateful attitude," plaintiff alleged that she is "fearful of physical harm."

The matter came on for hearing on 4 February 2014. At the hearing, plaintiff testified that defendant was supposed to submit to monthly drug screenings as required by the temporary custody order entered in their Chapter 50 domestic action. She claimed that defendant has failed to provide her with copies of the screenings; however, she did admit into evidence a copy of one screening from 5 November 2013 where defendant tested positive for cocaine. Plaintiff also admitted into evidence two emails from defendant. The first was dated 20 December 2013 and was in reference to the visitation schedule for the children's Christmas holiday. In it, plaintiff stated that she did not want the children to have an overnight visit with defendant; instead, she wanted them to have a supervised Christmas Eve visit with defendant at his parents' house. After telling plaintiff he had to work Christmas Eve, defendant called plaintiff a "stupid cunt[.]" In another email from January 2014 to his attorney, which he copied to plaintiff, defendant called plaintiff a "conniving bitch" and said that no one "wants her form of 'Christian love.' " As a result of these emails, plaintiff contended that

> I have no track record of anything except for his attitude toward me still being hateful and negative. That's the only thing that I have seen consistent in the past year and a half. That's the only thing is his hatred and his anger and resentment and his vulgarity towards me, his lack of respect for me. So again, yes, I am fearful of him. I am fearful of being put in the same room with him without a DVPO in place. He's unpredictable. He's scary. He hates me. He is angry towards me. And all of this that they just tried to present is escalating the situation.

At the hearing, defendant also testified and claimed that the labs conducting the drug tests do not email the results; however, he stated that he has signed a release which would allow plaintiff to obtain the results from the lab directly. He did not deny sending the emails and calling plaintiff vulgar names, but he claimed that he did not express hatred or threaten her in any way. He also claimed that he is not a violent person and does not pose a danger to anybody.

The trial court, after noting that "[t]he burden is relatively low at a [DVPO] renewal hearing[,]" found that defendant continued to send vulgar and angry emails to plaintiff, plaintiff "continues to be in fear" of defendant, and "there has been a poor exchange of the drug tests." Furthermore, the trial court made "additional findings" based on defendant's past behavior. Specifically, the trial court found that defendant had: attempted to cause and intentionally caused bodily injury to

plaintiff, placed plaintiff in fear of serious bodily injury, threatened plaintiff during his hospitalization, made threats to seriously injure plaintiff, made threats to commit suicide, been hospitalized for several suicide attempts, and "has had issues with drug use." Based on these findings, the trial court renewed the DVPO until 1 June 2015. Defendant appeals.

Standard of Review

"When the trial court sits without a jury [regarding a DVPO], 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." *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009).

Arguments

[1] Initially, defendant argues that there was insufficient evidence to support the trial court's findings of fact that plaintiff continues to be in fear of defendant and that there had been a "poor exchange" of the monthly drug test results. We disagree.

"Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *City of Asheville v. Aly*, __ N.C. App. __, __, 757 S.E.2d 494, 499 (2014). Here, there was competent evidence to support the trial court's finding that plaintiff was in subjective fear of defendant. She specifically claimed that she was "fearful of being put in the same room with [defendant] without a DVPO in place." She also stated that:

> The restraining order has protected me in the way I need. . . . But if it were to be lifted–again, I am fearful of him, and I know that if it were to be lifted, he would be at my doorstep tonight. And I fear for the safe-my safety, my physical safety, as well as, you know, potential, you know, harm to the children, what might be done in their presence and that-that type of thing.

Although defendant disputed that he was a danger to plaintiff, plaintiff's testimony was adequate to support a finding that she was in subjective fear of defendant.

Furthermore, as to the finding that there was a "poor exchange" of the drug test results, there was also competent evidence to support this finding. Plaintiff claimed that she had not seen any of his drug test results except for one illegible result and the positive one from November 2013. Moreover, defendant did not deny that he had failed to

provide the results, claiming that "[t]here's nothing that [he] [could] give [plaintiff] that has the drug screen results on them." However, defendant failed to provide any proof of his negative tests even though he knew that the issue of his drug tests would be raised at the hearing and despite the fact that he claimed to have provided those results to his own attorney in their child custody proceedings. Consequently, the finding that there was a "poor exchange" of the drug test results is supported by competent evidence.

[2][3] Next, defendant argues that the trial court erred in concluding that "good cause" existed to renew the DVPO. We also disagree.

Section 50B-3(b) provides, in pertinent part, that:

> The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order[.] . . . The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed.

N.C. Gen. Stat. § 50B-3(b) (2013). As noted, the statute does not require a criminal act or even an act of domestic violence to renew a DVPO. *Id.*; N.C. Gen. Stat. § 50B-1(a) (2013). Instead, the trial court must find "good cause" to renew the DVPO. N.C. Gen. Stat. § 50B-3(b).

Here, the trial court found that "good cause" existed to renew the DVPO based on: (1) defendant's emails with "vulgar and angry language"; (2) the fact that "plaintiff continues to be in fear of the [defendant] due to his angry attitude—particularly surrounding custody issues"; (3) the "poor exchange" of the drug test results required in their Chapter 50 action which has "heighten[ed] plaintiff's anxiety and fear"; (4) defendant's past attempts to cause bodily injury to plaintiff in September 2012; (5) defendant's past conduct that placed plaintiff in fear of imminent serious bodily injury; (6) the threats defendant made while he was hospitalized at WakeMed hospital in September 2012; (7) defendant's past threats to commit suicide and commitments based on his attempts to commit suicide; and (8) defendant's past issues with drug use. Although the order renewing the DVPO rests, in large part, on defendant's acts from 2012 that served as the basis for the original 2013 DVPO, there is nothing in section 50B-3 nor in our caselaw prohibiting the trial court from basing its decision whether to renew a DVPO on acts that happened in the past which served as the basis for issuance of the original

DVPO. In fact, this Court, in an unpublished case, held that prior acts may provide support for and be "incorporated by reference" into orders renewing DVPOs. *Basden v. Basden*, COA01-1430, 2002 WL 31687267, at *4 (Dec. 3, 2002) (unpublished). Even though unpublished opinions from this Court do not constitute controlling legal authority, N.C.R. App. P. 30(e)(3) (2013), we find its reasoning persuasive and apply it to the facts of the present case. Thus, in totality, based on defendant's past conduct in addition to plaintiff's continued fear of defendant, defendant's use of angry language in emails, and the "poor exchange" of the drug tests results, we are unable to say that the trial court's conclusion that "good cause" existed to renew the DVPO constituted error.

Conclusion

The trial court's reliance on those past acts in addition to other findings were sufficient for plaintiff to meet her burden. Therefore, we affirm the order renewing the DVPO.

AFFIRMED.

Chief Judge McGEE and Judge BELL concur.

LARA GERHAUSER (FORMERLY VAN BOURGONDIEN), PLAINTIFF
v.
MARTIN R. VAN BOURGONDIEN, DEFENDANT

No. COA14-349

Filed 31 December 2014

Child Custody and Support—Uniform Child Custody Jurisdiction and Enforcement Act—significant connection jurisdiction—jurisdiction by necessity

The trial court did not have subject matter jurisdiction in a child custody modification case under the Uniform Child Custody Jurisdiction and Enforcement Act in N.C.G.S. § 50A-201(a). Neither the parties nor the children had resided in North Carolina for several years. Further, both Utah and Florida would have had "significant connection" jurisdiction under subdivision (2) on 27 March 2012, and thus, North Carolina could not exercise jurisdiction by necessity under subdivision (4). The orders entered on 13 June 2013, 28 June 2013, and 3 December 2013 were vacated.

Judge BRYANT dissenting.

Appeal by plaintiff from orders entered 13 June 2013, 28 June 2013, and 3 December 2013 by Judge James P. Hill in District Court, Moore County. Heard in the Court of Appeals 9 September 2014.

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

Doster, Post, Silverman, Foushee, Post & Patton, P.A. by Jonathan Silverman, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from three orders entered by the trial court, the first two modifying custody of the parties' two minor children, and the third addressing post-trial motions filed by plaintiff. For the reasons below, the trial court did not have modification jurisdiction under N.C. Gen. Stat. § 50A-201(a) (2013). Accordingly, we vacate the trial court's orders entered on 13 June 2013, 28 June 2013, and 3 December 2013.

I. Background

The parties were married in 1998 and later that year, Mary[1] was born. The next year they had a son, Daniel. During the marriage, the parties and children lived in Moore County, North Carolina. In 2002, the parties separated, and on 23 September 2002, plaintiff filed a complaint in Moore County seeking custody of the children as well as other claims that are not relevant to this appeal. Defendant counterclaimed for custody also. On or about 16 January 2003, the Moore County District Court entered a consent order that granted joint custody of the children to both parties, with primary physical custody to plaintiff; this order also resolved the other pending claims between the parties.

On 9 July 2003, plaintiff was remarried to Charles Gerhauser. On 27 September 2004, defendant filed a motion for temporary custody or, in the alternative, modification of the prior custody order. In this motion, defendant alleged that plaintiff had remarried to Mr. Gerhauser and that due to his military service, plaintiff was planning to move to either Hawaii or California. Defendant sought to prevent plaintiff from removing the children from North Carolina. Plaintiff, Mr. Gerhauser, and the

1. We have used pseudonyms for the minor children.

children moved to Hawaii on or about 30 October 2004. After a series of motions and temporary orders addressing plaintiff's move to Hawaii and other issues not relevant to this appeal, on 6 December 2004, the Moore County trial court entered a consent order addressing plaintiff's move to Hawaii with the minor children that modified the visitation schedule to provide for longer visits with defendant during holidays and spring and summer school breaks.

In 2005, defendant remarried, to Karen. On 10 August 2009, defendant and Karen moved to Palm Harbor, Florida. On 30 October 2009, plaintiff filed a motion to modify custody, alleging that she and the children had moved "back to the continental United States[,]"[2] that defendant had moved to Florida, and that defendant had failed to pay for or provide transportation for visitation when he was supposed to do so, resulting in missed visits, and requested that defendant be ordered to pay for all transportation and that his visits be "decreased to a number that he will actually use." On 18 December 2009, defendant also filed a motion to modify custody, alleging that he lived in Palm Harbor, Florida and that plaintiff lived in Lehi, Utah. He also alleged that plaintiff had interfered with his visitation and communication with the children and that the children wanted to reside with him.

On 18 August 2010, the Moore County District Court entered a consent Memorandum of Judgment that was incorporated into a formal consent order entered on 27 September 2010. This consent order modified the visitation schedule. The trial court found that "[d]efendant now resides in Florida" and that "[p]laintiff and the minor children now reside in Lehi, Utah and have for several years." The order granted the parties joint legal custody, with plaintiff having primary physical custody and defendant secondary physical custody. The order set out a schedule with long visitation periods during summer breaks and school holidays and included provisions regarding payment for the children's travel expenses for visitation.

In December 2011, Mr. Gerhauser moved to Germany pursuant to a military deployment due to his service in the Utah Army National Guard as a liaison officer to the Special Operations Command in Stuttgart, Germany. On or about 28 February 2012, plaintiff moved to Germany to join him, taking the minor children of the parties as well as the four

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2. Plaintiff did not allege where she lived at the time, nor does our record include an Affidavit of Status of Minor Children stating where the children were residing at the time or when they began to reside there. According to a 27 September 2010 order, they were living in Lehi, Utah and had been there "for several years."

children born to their marriage. Plaintiff did not tell defendant about the move to Germany until she was already there.

On 27 March 2012, defendant filed a motion for contempt, to modify visitation and custody, and for payment for travel expenses, alleging that he had received an email from plaintiff after her move to Germany and that she had not discussed the move with him nor did she provide an address to contact the children until 8 March 2012. Based on defendant's motion, the trial court entered an order to appear and show cause that required plaintiff to appear with the minor children on 21 May 2012 in Moore County District Court. In response, plaintiff filed a motion to dismiss, for judgment on the pleadings, for sanctions, and to modify child support. She alleged that her move to Germany did not cause any need for a change to visitation and that she could not take the children out of school to come to court on 21 May 2012. She also alleged that defendant's motion to modify was frivolous and requested that "[s]anctions be imposed against [d]efendant and his [a]ttorney."

On 25 June 2012, defendant filed an amended motion to modify custody and for contempt. He alleged that North Carolina continued to have "exclusive jurisdiction over the issue of child custody" pursuant to N.C. Gen. Stat. § 50A-202 (2011). He also made allegations regarding plaintiff's move to Germany without informing him in advance, her failure to inform him regarding the children's address, healthcare providers, or any details of Mr. Gerhauser's assignment in Germany with the United States Army and that she had alienated the children from defendant in various ways and interfered with his communication with them.

On 13 August 2012, the hearing upon plaintiff's and defendant's pending motions began; it resumed on 25 October 2012, and counsel made closing arguments on 1 November 2012. The trial court took the case under advisement and entered a "Memorandum of Decision" on 13 June 2013, which was incorporated into a formal order entered on 28 June 2013.[3] In the order, although neither party had raised any question regarding the trial court's jurisdiction over the custody matter, the trial court recognized the issue presented by the fact that neither the parties nor the children had resided in North Carolina for several years. The trial court therefore included various findings of fact and

3. There is no substantive difference between the "Memorandum of Decision" filed on 13 June 2013 and the formal order filed on 28 June 2013, so we will refer to the 28 June 2013 Order in this opinion and for purposes of our discussion treat it as the only order addressing the modification of custody.

conclusions of law regarding jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"). The trial court found that Utah had been the children's home state as of 28 February 2012, but as of the date of commencement, they had moved to Germany and their absence from Utah was not a temporary absence. The trial court ultimately determined that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2)." The trial court granted to defendant primary legal and physical custody of the children, subject to visitation with plaintiff.

On 24 June 2013, plaintiff filed a motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2013), alleging several grounds for new trial. She also filed two affidavits that included detailed allegations regarding various irregularities that she claimed impaired her ability to present her evidence at trial as well as factual allegations disputing various findings of fact. She also averred various changes in the circumstances of the children during the time between the trial and the trial court's entry of the order, alleging that many of the circumstances upon which the trial court had based the change of custody had changed because the family had moved to a new residence in Germany. On 11 July 2013, plaintiff filed an additional motion, for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (2013), for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1415 (2013), and a motion for stay. This motion included allegations regarding the nine-month delay between the trial and the entry of the judgment and changes in circumstances during that time and, for the first time, directly raised the issue of the trial court's jurisdiction to modify custody under the UCCJEA. Plaintiff alleged that

> North Carolina does not have jurisdiction of this matter under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as codified in North Carolina at N.C.G.S. § 50A-101 et seq. Specifically, the state of Utah has continuing exclusive jurisdiction over this matter in that Utah is the home state of the children on the date of the commencement of the proceeding and had been for the 6 months before the commencement of the proceeding and any absence from the State of Utah is and was temporary and did not deprive Utah of jurisdiction. This Court specifically found Utah was the residence of Plaintiff and where the children resided. This Court erroneously

> determined the children and Plaintiff were not "temporarily absent" due to Plaintiff's husband's military deployment to Germany, which is governed by a Status of Forces Agreement with Germany (which places significant restrictions on Plaintiff's presence and ability to remain, work and reside in Germany), on the basis there was no specific date certain for a return to the United States. However, this fact itself assumes the deployment is and was temporary—and certainly was so at the time of the commencement of this modification action which occurred weeks after Plaintiff's relocation to be with her deployed husband and that Plaintiff had no intent or expectation to remain permanently in Germany, even if there is no specifically set date for return. Therefore, Utah held exclusive, continuing jurisdiction over this matter. Consequently, the custody modification ordered by this Court is void for lack of subject matter jurisdiction.

On 9 September 2013, the trial court heard plaintiff's post-trial motions, and on 3 December 2013, the trial court entered a single-spaced, 23-page order denying plaintiff's motions. The trial court had the benefit of a trial transcript when considering plaintiff's motions and addressed each of plaintiff's claims of irregularity in detail, rejecting each one. The trial court also concluded that it had jurisdiction under the UCCJEA, although for a different reason than stated in the 28 June 2013 Order. But for purposes of this appeal, the relevant issue is the trial court's subject matter jurisdiction under the UCCJEA, and we will confine our analysis of the orders to that issue, as addressed in detail below. On 27 December 2013, plaintiff filed notice of appeal from the 13 June 2013 Memorandum of Decision, the 28 June 2013 Order, and the 3 December 2013 Order.

II. Appellate Jurisdiction

Plaintiff has filed notice of appeal from three orders: the 13 June 2013 Memorandum of Decision, the 28 June 2013 Order, and the 3 December 2013 Order. The 13 June 2013 Memorandum of Decision appears to be a transcription of the trial court's oral findings, conclusions of law, and decretal provisions, which were then repeated nearly verbatim in the formal order entered on 28 June 2013. As it was written, signed by the trial court, and filed with the Moore County Clerk of Court on 13 June 2013, it would appear that entry of the order actually occurred on 13 June 2013. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2013) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Plaintiff timely filed her Rule 59 motion for

new trial on Monday, 24 June 2013.[4] Plaintiff's time to appeal from the 13 June 2013 Order as well as the 28 June 2013 Order was tolled by the Rule 59 motion. *See Wolgin v. Wolgin*, 217 N.C. App. 278, 281, 719 S.E.2d 196, 198-99 (2011). Because plaintiff filed her motion for new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 on 24 June 2013, the time for appeal from both of the June 2013 orders was tolled pending disposition of the motion; we need not be concerned about which order—13 June or 28 June—is the modification order, for purposes of this appeal. The notice of appeal was timely filed after disposition of the Rule 59 motion and we have jurisdiction to address the appeal on the merits.

III. Trial Court Jurisdiction under the UCCJEA

Plaintiff argues first that the "Trial Court Erred in Determining North Carolina has Jurisdiction under the UCCJEA in its Initial Custody Order" and next that the "Trial Court Erred in its Order on Plaintiff's Post-Trial Motions by Making a 'Clerical' Correction which altered the entire basis of Jurisdiction under the UCCJEA." In our review of the trial court's denial of plaintiff's Rule 59 motions as to "lack of subject matter jurisdiction," the lower court's findings of fact are binding on this Court when supported by competent evidence; we review its conclusions of law *de novo*. *Hammond v. Hammond*, 209 N.C. App. 616, 631, 708 S.E.2d 74, 84 (2011); *Burton v. Phoenix Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583, *disc. rev. denied*, 363 N.C. 257, 676 S.E.2d 900 (2009).

> Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties. Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to

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4. A motion under Rule 59 must be served no later than 10 days after entry of the order. *Id.* § 1A-1, Rule 59(b). Under N.C. Gen. Stat. § 1A-1, Rule 6(a),

> [i]n computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

Id. § 1A-1, Rule 6(a) (2013). Our record does not reveal when the 13 June Memorandum of Decision was actually served upon the parties, but we need not be concerned about that date since the motion was timely based on the date of entry.

> object to the jurisdiction is immaterial. Because litigants cannot consent to jurisdiction not authorized by law, they may challenge jurisdiction over the subject matter at any stage of the proceedings, even after judgment. Arguments regarding subject matter jurisdiction may even be raised for the first time before this Court.

In re T.R.P., 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citations and quotation marks omitted).

Plaintiff's second argument is that the trial court referred to its change in the basis for jurisdiction under the UCCJEA in the 3 December 2013 Order as a correction of a "clerical error," but it is actually a substantive change and thus not a proper ground for modification of the 28 June 2013 Order. We need not address this second argument in detail. The trial court did not merely cite an incorrect subsection of N.C. Gen. Stat. § 50A-201 in the 28 June 2013 Order; the trial court quoted large portions of the statute in detail and made findings of fact and conclusions of law based upon the provisions of N.C. Gen. Stat. § 50A-201(a)(2), concluding that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2)."

In the 3 December Order, the trial court made additional findings of fact addressing the jurisdictional issue, again quoted relevant statutory provisions, and reached a different conclusion of law, after having the benefit of the parties' post-trial affidavits and arguments regarding jurisdiction. In that order, the trial court concluded that "[t]his Court therefore has jurisdiction to modify the 'Consent Order for Modification of Child Custody and Visitation' of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(4)." Considering each order as a whole, the change from the 28 June 2013 Order is clearly substantive and well beyond a "clerical" correction under N.C. Gen. Stat. § 1A-1, Rule 60. It is true that the effect of the order was unchanged, as the decretal provisions did not change. But the trial court did not merely make a typographical error when referring to 50A-201(a)(2) instead of 50A-201(a)(4).

> The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984);

> *Vandooren v. Vandooren*, 27 N.C. App. 279, 218 S.E.2d 715 (1975). We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.

Hinson v. Hinson, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 895 (1986).

But ultimately, whether the trial court should or should not have made any changes to the original order as to jurisdiction, our inquiry is still the same: we must review *de novo* whether there was any ground for the exercise of subject matter jurisdiction under the UCCJEA, whether under N.C. Gen. Stat. § 50A-201(a)(2) as stated by the 28 June 2013 Order, N.C. Gen. Stat. § 50A-201(a)(4) as stated by the 3 December Order, or some other basis. *See Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003) ("Because the trial court's sole basis for exercising subject matter jurisdiction is erroneous, we may review the record to determine if subject matter jurisdiction exists in this case."); *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 428 (2000) ("[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking.").

In her briefs before this Court, plaintiff argues that the trial court erred in concluding that it had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) because Utah was the children's "home state" on 27 March 2012, the date of commencement of this modification proceeding.[5] Defendant responds that the trial court properly concluded under N.C. Gen. Stat. § 50A-201(a)(4) that "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." *See* N.C. Gen. Stat. § 50A-201(a)(4). For the reasons discussed below, we believe there is a third way.

A. Initial Child Custody Jurisdiction

i. Statutory Framework

N.C. Gen. Stat. § 50A-202 sets out when North Carolina has "[e]xclusive, continuing jurisdiction" over a custody proceeding:

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5. We are addressing only the 2013 orders in this opinion because we are limited to reviewing the orders on appeal, but it would appear that the same analysis would apply to the trial court's 2010 order based on the facts of the case. Although we are vacating only the 2013 orders on appeal, it would appear that the last order that the trial court had jurisdiction to enter was the December 2004 consent order addressing plaintiff's move to Hawaii.

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State which has made a child-custody determination consistent with G.S. 50A-201 or G.S. 50A-203 has exclusive, continuing jurisdiction over the determination until:
>
> (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.
>
> (b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201.

Id. § 50A-202.

Here, it is undisputed that the children and their parents, the parties, did not reside in North Carolina as of the date of commencement. Thus, under N.C. Gen. Stat. § 50A-202(b), North Carolina may have jurisdiction to modify custody only if "it has jurisdiction to make an initial determination under G.S. 50A-201." *See id.* § 50A-202(b).

N.C. Gen. Stat. § 50A-201 sets forth four grounds for the court to exercise "[i]nitial child-custody jurisdiction":

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the

> child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;
>
> (3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or
>
> (4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).
>
> (b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

Id. § 50A-201(a), (b).

It is undisputed that North Carolina was not the "home state" of the children on the date of commencement and was not the "home state" within six months prior to the commencement, nor did any parent remain in North Carolina, so North Carolina cannot exercise jurisdiction under (a)(1). *See id.* § 50A-201(a)(1).

Additionally, no other state has been asked to exercise jurisdiction. Plaintiff asserts that Utah was the "home state" and argues in her reply brief that "there is no record Utah has declined to exercise jurisdiction under section 50A-201(a)(3)." We do not read this statement as a double-negative assertion that Utah *has* been requested to exercise or *has exercised* jurisdiction over this custody proceeding. Despite a full custody trial, post-trial motions and affidavits filed over several months, and hearings on post-trial motions addressing the issue of jurisdiction, the record does not reflect, and neither party has informed the court, that either party ever asked any other state's court to exercise jurisdiction over this custody proceeding, and a state could not decline to exercise

jurisdiction if no one filed a custody proceeding in that state. In addition, we note N.C. Gen. Stat. § 50A-209(a) requires that

> each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:
>
> (1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, the pleading or affidavit shall identify the court, the case number, and the date of the child-custody determination, if any;
>
> (2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, the pleading or affidavit shall identify the court, the case number, and the nature of the proceeding; and
>
> (3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

Id. § 50A-209(a) (2013). "The purpose of requiring that this information be filed under oath is to assist the court in deciding if it can assume jurisdiction." *Pheasant v. McKibben*, 100 N.C. App. 379, 382, 396 S.E.2d 333, 335 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417 (1991). In addition, after the initial pleading, the parties have an affirmative and continuing obligation "to inform the court of any proceeding in this or any other state that could affect the current proceeding." N.C. Gen. Stat. § 50A-209(d). Neither party informed the trial court of "any proceeding in this or any other state that could affect the current proceeding." *See id.*

ii. Home State Jurisdiction

Since subsection (a)(1) is not applicable, we must consider the grounds that the trial court considered in its orders. Under N.C. Gen. Stat. § 50A-201(a)(2), we must consider whether "[a] court of another state does not have jurisdiction under subdivision (1)." *Id.* § 50A-201(a)

(2). Subdivision (1), as noted above, is "home state" jurisdiction. *Id.* § 50A-201(a)(1). Plaintiff contends that on the date of commencement, Utah was the children's "home state."

For purposes of our review in this appeal, the relevant date is the date of commencement of this custody modification proceeding. *See id.* Under N.C. Gen. Stat. § 50A-102(5), "commencement" refers to "the filing of the first pleading in a proceeding." *Id.* § 50A-102(5) (2013). Under N.C. Gen. Stat. § 50A-102(4), a "child-custody proceeding" is "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue." *Id.* § 50A-102(4). Thus, the date of commencement of this proceeding was 27 March 2012, when defendant filed his first motion requesting modification of custody and visitation based upon plaintiff's relocation to Germany. On that date, the trial court found, and neither party challenges, that plaintiff and the children lived in Aichelbergneg, Germany. Defendant lived in Dunedin, Florida at the time. In the 28 June 2013 Order, the trial court made the following additional findings regarding whether Utah was the "home state" of the children:

> 30. At time of entry of "Consent Order for Modification of Child Custody, and Visitation," on September 27, 2010, [Mary] and [Daniel] resided in the primary physical custody of [plaintiff in Lehi], Utah. Said minor Children continued to reside . . . primarily at same location until on or about February 28, 2012, when they moved, with [plaintiff], to Aichelbergneg, Germany, where they remain living at close of this Hearing . . . with [Mr. Gerhauser at] Kelly Barracks Military Base in Germany, none of these individuals having subsequently returned to live in Utah.
>
> . . .
>
> 31. At time of entry of "Consent Order for Modification of Child Custody, and Visitation, on September 27, 2010, [defendant] resided in the State of Florida, where he has since continued to reside and where he resided on date of filing of "Motion to Show Cause for Contempt, to Modify Visitation, Custody, Payment of Travel," on March 27, 2012.
>
> . . .
>
> 39. [Mary] and [Daniel] did not live in Utah with [plaintiff] for six consecutive months immediately preceding commencement of the child custody proceeding now before the Court. Said minor Children left Utah and moved with

> [plaintiff] to live in Germany on or about 02/28/12, some 26 or more days[6] before commencement of the child custody proceeding now before the Court; therefore, Utah was not then the "home state" for the said minor Children. As of or on or about February 28, 2012, Utah was the "home state" for [Mary] and [Daniel], as they had been living there with [plaintiff] for six consecutive months immediately preceding that date, which was within the six months immediately preceding commencement of the child custody proceeding now before the Court; however, [Mary] and [Daniel] became absent from Utah as of on or about February 28, 2012, and [plaintiff] became absent from Utah with them at the same time, leaving no parent or person acting as a parent remaining living in Utah. [Mary], [Daniel] and [plaintiff] left Utah on or about February 28, 2012, knowing not when they would return, precluding characterization of their absence as "temporary." See: N.C.G.S. 50A-102(7). No other state would qualify as "home state" for [Mary] or [Daniel] and/or have jurisdiction, pursuant to N.C.G.S. 50A-201(a)(1), as of filing of the "Motion in the Cause for Contempt, to Modify Visitation, Custody, Payment of Travel," on 3/27/12. This Court therefore has jurisdiction to modify the "Consent Order for Modification of Child Custody and Visitation" of September 27, 2010, pursuant to N.C.G.S. 50A-202(b) and 50A-201(a)(2).

Plaintiff argues that the trial court erred in its conclusion that Utah had lost its home state status because plaintiff and the children had moved to Germany prior to the date of commencement of the proceeding. Plaintiff does not challenge the sufficiency of the evidence to support the trial court's findings of fact but contends that the trial court erred in concluding that her absence from Utah was not temporary.

The first inquiry as to jurisdiction under the UCCJEA is always the determination of the child's "home state," if any. *Id.* § 50A-201(a)(1). N.C. Gen. Stat. § 50A-102(7) defines "home state" as

> the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody

6. 27 March 2012 was actually 28 days after 28 February 2012.

> proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.

Id. § 50A-102(7). We must then consider whether the trial court properly determined that plaintiff's absence from Utah was not a "temporary absence."

Our courts have adopted a "totality of the circumstances approach" to the issue of temporary absence. *See Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004).

> Under the UCCJEA, the "home state" definition permits a court to include a temporary absence of a parent or child from the state within the six months before the filing of the custody action as time residing in North Carolina. N.C. Gen. Stat. § 50A–102(7). This Court has held that the proper method for determining whether an absence from the state is a temporary absence is by assessing the totality of the circumstances. *Chick v. Chick*, 164 N.C. App. 444, 449, 596 S.E.2d 303, 308 (2004). In *Chick*, we noted the totality of the circumstances test encompasses the length of the absence and the intent of the parties. *Id.* at 450, 596 S.E.2d at 308. The test also permits greater flexibility than other tests by allowing for the "consideration of additional circumstances that may be presented in the multiplicity of factual settings in which child custody jurisdictional issues may arise." *Id.*

Hammond, 209 N.C. App. at 633, 708 S.E.2d at 85.

Plaintiff's argument that the trial court erred in finding that her absence from Utah was not a temporary absence is much like the argument of the mother in *Chick*, who contended that "the parties' intent at the time of the move should determine whether the absence is a temporary absence for purposes of home state determinations." *See Chick*, 164 N.C. App. at 449, 596 S.E.2d at 308. Plaintiff argues that she believed that the move to Germany was temporary, and that her husband's orders for deployment at that time only ran to 30 September 2012. Although plaintiff's intent may be a relevant factor, it is by no means controlling. Here, the trial court made additional findings of fact in the 3 December 2013 Order addressing in greater detail the reasons for its conclusion that the absence was not temporary:

> 25. In the underlying case at bar, the Court determines it appropriate to make additional Findings of Fact, from

a review of the evidence previously received during the trial of this child custody case, along with one (1) additional finding from the Plaintiff's circumstances at [the] time [of] this Hearing, in re-examining this issue, pursuant to Plaintiff's Motions, and determining that Plaintiff and the Parties' minor Children's flight from the State of Utah, effective February 28, 2012, does not constitute a period of temporary absence, pursuant to N.C.G.S. 50A-102(7):

A. Plaintiff's Husband, Mr. Gerhauser[,] was not an active duty member of the United States Military. Mr. Gerhauser sought appointment by the United States Military to a full-time support position, which resulted in his receipt of original "unaccompanied" orders to station in Germany.

B. Plaintiff and her Husband, Mr. Gerhauser[,] expended substantial effort to have Mr. Gerhauser's "unaccompanied" order[s] changed to "accompanied" orders, authorizing Mr. Gerhauser to be accompanied by Plaintiff and these Parties' minor Children in Germany.

C. Defendant's Exhibit 1 in the underlying trial of this Matter, subject of these Motions, "Gerhauser Base Order, HEADQUARTERS UTAH NATIONAL GUARD, Office of the Adjutant General," stated, in pertinent parts, "(o) Dependent travel and shipment of household goods and personal baggage of authorized in IAW-JFTR" and further, that Mr. Gerhauser, Plaintiff's Husband was "ordered to Active Duty . . . for the period of time shown plus allowable travel time" to Kelly Barracks in Germany, with the period of time shown being from December 02, 2011 through September 30, 2012.

D. When Plaintiff and the Parties' minor Children departed from Utah, they had no idea when they would return.

E. Plaintiff and Mr. Gerhauser moved their entire Family, including the Parties' minor Children from Utah to Germany.

F. Plaintiff and Mr. Gerhauser went to the extent of having their vehicles shipped from Utah to Germany with them.

F. [(sic)] Plaintiff and Mr. Gerhauser went to the effort and extent of renting out their residence which they occupied and in which they and the Parties' minor Children lived in the State of Utah, evidencing that they had no intent of returning anytime in the near future or that they even knew when they might return.

G. At the time of the presentation of the Parties[']closing arguments in the underlying trial, November 01, 2012, Plaintiff and Mr. Gerhauser, along with the Parties' minor Children[,] had resided in Germany for eight (8) months.

H. At the time of the Hearing on these Motions, Plaintiff and Mr. Gerhauser had resided in Germany for a period of eighteen (18) months, Mr. Gerhauser having voluntarily extended his and his Family's stay in Germany, still with no return date in sight.

In addition to these findings, in the 28 June 2013 Order, the trial court considered the motives and circumstances of plaintiff's move to Germany and her failure to inform defendant in advance of the impending move:

92. [Plaintiff] failed to inform [defendant] that [plaintiff] was moving [Mary] and [Daniel] out of the United States to Germany before doing so because [plaintiff] did not want [defendant] to have [an] opportunity to file an action in court to allow the Court to determine whether such a move was in the said minor Children's best interests. [Plaintiff]'s actions were in disrespect of the Court's continuing responsibility to appropriately determine the best interests of [Mary] and [Daniel].

. . .

98. [Plaintiff] knew as early as during the Summer of 2011, and shared with [Mary] and [Daniel], that they would be moving overseas with [Mr. Gerhauser] and their half-siblings.

99. [Mr. Gerhauser] received military orders to move to Germany on or about November 29, 2011. [Mr. Gerhauser] immediately shared this information with [plaintiff]. [Plaintiff] knew that she intended to move

> [Mary] and [Daniel] to Germany some 88-days prior to their actual move to Germany.
>
> 100. [Plaintiff] told her Mother, Mary Scribner, [Mary] and [Daniel]'s maternal Grandmother[,] that [plaintiff] and [Mary] and [Daniel] were moving to Germany on or about January 12, 2012, some 46-days prior to [plaintiff] actually taking [Mary] and [Daniel] to Germany.
>
> 101. Though they were told by [plaintiff] that they were preparing to move to Germany, [plaintiff] instructed [Mary] and [Daniel] to not inform [defendant] of their impending move.

In considering the totality of the circumstances, the trial court properly considered Mr. Gerhauser's voluntarily seeking deployment to Germany, making extra efforts to get "accompanied" orders so the entire family could come, and plaintiff's concealment of the move until it was accomplished. Plaintiff stresses that when she first moved, the length of the deployment was only until 30 September 2012 and contends that the Court should not consider anything that happened after that date. It is true that the determination must be made as of the date of commencement, but the trial court should not ignore a party's actions taken after the relevant date in evaluating the party's credibility and intentions. The trial court properly concluded that plaintiff's actions after the move bolstered its determination that the move was not temporary. *See id.* at 449, 596 S.E.2d at 308 (adopting "totality of the circumstances" approach to issue of temporary absence).

Plaintiff argues that

> a rule in which when a military family is deployed overseas it [(sic)] automatically removes "home state" jurisdiction from the state in which they resided, simply because the family did not know when the deployment would end would be very unjust and subject military families to forum shopping from aggrieved former spouses in child custody matters. At a minimum, the fact [that] a military family is deployed overseas not knowing when they will return should not *preclude* a trial court from considering the absence temporary based on the totality of the circumstances—which, in this case, demonstrate the Gerhausers did intend to return to their home in Utah, where [plaintiff] remained a citizen and resident as found by the trial court.

We do not agree with plaintiff that the trial court considered the military deployment as "automatically" removing Utah's home state jurisdiction, nor do we endorse such a rule. The trial court considered many factors in making this determination. We also do not endorse a rule that a military deployment, even if the initial orders provide for a limited time period, is always a temporary absence.A military deployment is just one of the circumstances that a trial court may consider in determining whether an absence from a state is temporary.[7] And as noted above, although the determination is made based upon the circumstances on the date of commencement, the court need not ignore what happened afterwards, as this evidence may or may not tend to support the moving parent's claims. For example, in *Lemley v. Miller*, the court considered what happened after the initial military deployment to support its determination that the parent's relocation was a temporary absence:

> Important to our determination that the child's residency in Germany was a temporary absence is that, immediately before the family left for Germany, Lemley and the child resided in Harker Heights for one and one-half years. Additionally, when returning to the United States from Germany, Lemley and the child came back directly to Harker Heights where they continue to reside. Based upon the facts of this case, no other state but Texas had even the opportunity to become the child's home state.

932 S.W.2d at 287.

Here, Mr. Gerhauser actively sought "accompanied" status so that his family could come to Germany and then sought to stay in Germany after the initial assignment; his extended assignment was not forced upon him in disregard to his wishes or plans. In addition, even after defendant filed the motion to modify, plaintiff still did not inform defendant of her husband's new orders extending his assignment in Germany for a year, through September 2013, until she was "asked on the stand in open Court, under oath, in [the] hearing, on October 26, 2012." Mr.

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7. As few North Carolina cases have addressed this issue, we have also reviewed cases of other states applying this same provision of the UCCJEA or its predecessor, the Uniform Child Custody Jurisdiction Act ("UCCJA"). Some courts have considered a military deployment as not a "temporary absence." *See, e.g.*, *Carter v. Carter*, 758 N.W.2d 1, 9 (Neb. 2008); *Consford v. Consford*, 711 N.Y.S.2d 199, 205 (N.Y. App. Div. 2000); *L.H. v. Youth Welfare Office*, 568 N.Y.S.2d 852, 856 (N.Y. Fam. Ct. 1991). Others have considered military deployment as a "temporary absence." *See, e.g.*, *Lemley v. Miller*, 932 S.W.2d 284, 287 (Tex. App. 1996) (per curiam). But in all of these cases, the courts considered various other circumstances of the parties and children in addition to the deployment to make the determination.

Gerhauser and plaintiff had their vehicles shipped to Germany, and they relocated six children, at least three of whom were of school age, in the middle of a school year. These actions indicate that he and plaintiff intended to stay in Germany for an extended and indefinite period of time, with, as the trial court found, "no return date in sight" even as of the last hearing. Thus, on *de novo* review, we agree that plaintiff's absence from Utah on the date of commencement was not a "temporary absence" and Utah was no longer the "home state" of the minor children. Although Utah had been the "home state" within six months prior to the commencement of the proceeding, no parent continued to live in Utah, so Utah did not have "home state" jurisdiction. *See* N.C. Gen. Stat. § 50A-201(a)(1).

Although the parties have not made any argument regarding the possibility that another state may have jurisdiction under N.C. Gen. Stat. § 50A-201, we note that the findings of fact do raise questions of whether either Florida or Germany may have jurisdiction. Pursuant to N.C. Gen. Stat. § 50A-105(a), "[a] court of this State shall treat a foreign country as if it were a state of the United States for the purpose of applying Parts 1 and 2 [of the UCCJEA]." *Id.* § 50A-105(a) (2013). N.C. Gen. Stat. § 50A-201 and 202 are included in Part 2 of the UCCJEA, so we must treat Germany no differently than Utah, Florida, or North Carolina. *See id.*

The children lived in Germany on the date of commencement, but they had been there for only approximately 28 days and not "six consecutive months immediately before commencement," so Germany was not the "home state" of the children on the date of commencement. *See id.* § 50A-102(7). The children had visited defendant in Florida prior to the date of commencement, but they had not lived there for "six consecutive months immediately before the commencement." *See id.* The children had no "home state" on the date of commencement, so we must proceed to consider significant connection jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2).

iii. Significant Connection Jurisdiction

If there is no home state, N.C. Gen. Stat. § 50A-201(a)(2) then directs that "a court of this State has jurisdiction to make an initial child-custody determination" where

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; *and*

> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships.

Id. § 50A-201(a)(2) (emphasis added).

This jurisdiction is normally referred to as "significant connection" jurisdiction. We generally determine jurisdiction by examining the facts existing at the time of the commencement of the proceeding. *See Carolina Marina & Yacht Club, LLC v. New Hanover Cnty. Bd. Of Comm'rs*, 207 N.C. App. 250, 252, 699 S.E.2d 646, 648 (2010), *disc. rev. denied*, ___ N.C. ___, 706 S.E.2d 253 (2011). Neither plaintiff nor defendant argued that any state has "significant connection" jurisdiction in this case when the jurisdiction issue was addressed upon the post-trial motions.[8] In the 28 June 2013 Order, the trial court relied on (a)(2) in finding that North Carolina had significant connection jurisdiction. The trial court found that "[t]he [p]arties have voluntarily litigated all matters regarding custody and support of [Mary] and [Daniel] in this [c]ause, and neither [p]arty objects to this Court continuing to exercise jurisdiction to decide this [c]ause." This custody case did have a long history of litigation in Moore County and neither party had objected to jurisdiction, but since jurisdiction cannot be conferred by consent, this finding does not support a conclusion of jurisdiction under (a)(2). *See Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385 ("Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel."). In the 3 December 2013 Order, the trial court instead relied on (a)(4), sometimes called jurisdiction by necessity or default jurisdiction, after concluding that no state would have jurisdiction under (a)(1), (a)(2), or (a)(3). *See* N.C. Gen. Stat. § 50A-201(a)(4).

As mentioned above, the record raises other issues regarding significant connection jurisdiction that have not been argued by the parties. It is understandable that each party had his or her own reasons for not wanting to make an argument as to whether "any other state" might have

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8. Plaintiff's brief before this Court does at least acknowledge this alternative:

> Even assuming arguendo Utah did not have home state jurisdiction, there are at least two states on this record which would have "significant connection" jurisdiction under subsection (a)(2): Utah and, to a lesser degree, Florida. This is because each parent had substantial connections to Utah or Florida, respectively. Moreover, as the children had primarily been living, schooled, and engaged in social and other activities as well as personal relationships in Utah for the several years preceding this action, such evidence would clearly be located there.

significant connection jurisdiction, where there are four potential states to consider under the facts of this case. This custody case has been long, hard-fought, and expensive, both financially and emotionally, to all involved. Perhaps it was cheaper and easier for the parties to continue litigating their case in North Carolina, where it had been since 2002, than to start over with new litigation in another state. But the policy and intent behind the UCCJEA and the Parental Kidnapping Prevention Act ("PKPA") is to ensure that custody orders are enforceable in any state because the issuing court has exercised jurisdiction in accord with the UCCJEA and PKPA. This jurisdictional rule must be enforced in all cases. *See Williams v. Williams*, 110 N.C. App. 406, 409, 430 S.E.2d 277, 280 (1993) ("To determine jurisdiction of child custody issues, the trial court must follow the mandates of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (1989), and North Carolina's Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. §§ 50A-1–50A-25 (1989)."). Although differing in some respects, the provisions of the PKPA and UCCJEA are substantially similar. The PKPA provides in pertinent part:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A(g) (2012); *see also* N.C. Gen. Stat. § 50A-106 (2013).

On *de novo* review of jurisdiction under the UCCJEA, we must now consider what the parties did not: whether any other state, here Florida, Utah, or Germany, would have had significant connection jurisdiction on 27 March 2012, the date of commencement of this proceeding. Fortunately, the trial court made extensive and detailed findings of fact in both orders, none of which are challenged by the parties, so we have adequate factual findings upon which to make legal conclusions of significant connection jurisdiction in this case.

1. North Carolina

Defendant argues that if North Carolina did not have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(4) as found in the trial court's last order, it has jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2) as found in the first order. Defendant contends that

> [t]his matter has been litigated by the parties in Moore County, North Carolina since September[] 2002—twelve

> years. Because the matter of child custody has been litigated in this state for over a decade, the amount of historical evidence pertaining to the welfare of the children is substantial enough to make this State the proper jurisdiction under "significant connection" jurisdiction.

Defendant cites no authority to support the proposition that the history of the litigation itself can be the "significant connection" and "substantial evidence" that would confer jurisdiction. In fact, N.C. Gen. Stat. § 50A-207 supports our conclusion that these factors alone cannot confer jurisdiction. S*ee* N.C. Gen. Stat. § 50A-207 (2013). Under N.C. Gen. Stat. § 50A-207(b), when a court "*which has jurisdiction* under this Article" is considering declining jurisdiction because it is an inconvenient forum, the court may consider several factors, including "(5) [a]ny agreement of the parties as to which state should assume jurisdiction . . . and (8) [t]he familiarity of the court of each state with the facts and issues in the pending litigation." *Id.* § 50A-207(a), (b) (emphasis added). But the court must first have jurisdiction, as determined under N.C. Gen. Stat. § 50A-201(a)[9], before it may consider these factors, and it may consider them only as part of a determination of whether the court should decline to exercise its jurisdiction, where another state would also have jurisdiction.

As noted briefly above, we conclude that North Carolina did not have significant connection jurisdiction. Neither parent lived in North Carolina; plaintiff and the children moved away in 2004, more than seven years before the date of commencement of this proceeding. The only connection North Carolina had to the children on the date of commencement was the custody litigation in Moore County. The litigation itself is clearly not the sort of "significant connection" required by N.C. Gen. Stat. § 50A-201(a)(2). It is true that there was "substantial evidence" available in North Carolina regarding the children, since the parties had a full custody trial and they presented extensive evidence regarding the children's "care, protection, training, and personal relationships." *Id.* § 50A-201(a)(2). But N.C. Gen. Stat. § 50A-201(a)(2) requires both a "significant connection" and "substantial evidence," so North Carolina does not have "significant connection" jurisdiction. *See id.*

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9. N.C. Gen. Stat. § 50A-201(b) provides that "[s]ubsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State." *Id.* § 50A-201(b).

2. Utah

Plaintiff argues that Utah would have significant connection jurisdiction. Under the orders, Utah is the most obvious candidate state for significant connection jurisdiction. Even though no parent continued to live in Utah on the date of commencement, plaintiff and the children had only been away from Utah for approximately 28 days, after having lived there for about five and a half years. The trial court found that "[p]laintiff . . . remains a citizen of the United States and a resident of the State of Utah, but currently resides in or about Aichelbergneg, Germany." Plaintiff and her husband still own the home in which the children lived, which they rented out when they moved to Germany. As the children lived in Utah, attended school, received medical care, and generally carried on their lives in Utah for five and a half years, they still had "significant connections" to Utah only 28 days after leaving. There was also "substantial evidence" available in Utah regarding the children's "care, protection, training, and personal relationships" as they had been living there for five and a half years. *See id.* Thus, Utah would have had "significant connection" jurisdiction on 27 March 2012. *See id.*

3. Germany

The trial court also made extensive findings of fact about Germany. On the date of commencement, the children had lived there approximately 28 days. They had just begun the process of getting settled in Germany when defendant filed his motion. The trial court found that "[w]hen [plaintiff] arrived in Germany with all 6 minor [c]hildren, [plaintiff] did not know where they would be staying. They stayed in a hotel on base at Kelley Barracks Military Base for about a week after their arrival in Germany." At that time, the children had not developed a "significant connection" to Germany, nor would there have been time for "substantial evidence" regarding the children's "care, protection, training, and personal relationships" to develop. *See id.* Germany did not have "significant connection" jurisdiction on 27 March 2012. *See id.*

4. Florida

Plaintiff's brief also recognizes the possibility that Florida could have significant connection jurisdiction, and we agree that it does. Although the children had not lived in the primary physical custody of defendant as of the date of commencement, defendant shared joint legal custody of the children since the first custody order, and since defendant's move to Florida in 2009, the children had spent extended times in Florida during summers and holidays. In addition, they have a half-brother and stepsiblings in Florida. The trial court made extensive findings of fact about

defendant's home and family in Florida, including his wife Karen and the children's relationships with their step-family. The trial court made findings about the children's housing, activities, relationships, and household duties while in Florida. From these findings, it is clear that the children had developed relationships with their brother, step-siblings, and others in Florida long before 2012, based upon their time visiting there. There was also "substantial evidence" available in Florida, based on these relationships and activities. *See id.* Thus, Florida also had "significant connection" jurisdiction as of 27 March 2012. *See id.*

We have also considered whether N.C. Gen. Stat. § 50A-201(a)(2) requires us to decide which of the two states, Utah or Florida, had more significant contacts and substantial evidence, and we have found no authority directly on point, either in North Carolina or elsewhere. Reading the statute as a whole, N.C. Gen. Stat. § 50A-201(a)(4) requires us to determine only whether a "court of any other state" would have jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1), (2), or (3). *Id.* § 50A-201(a)(4). If so, "this state" does not have jurisdiction. *Id.* In this particular situation, we do not believe it is necessary or appropriate for us to consider which of the two states had the *most* "significant connections" and "substantial evidence" in March 2012. It is sufficient for us to determine that either of them could have exercised significant connection jurisdiction, consistent with the mandates of the UCCJEA and PKPA. Even if we were to address which state had the most "significant connections," our ruling would have no effect on how this case may proceed after this appeal, since that will depend upon the home state and other relevant circumstances of the children and parties on the "date of commencement[,]" when a new motion or proceeding regarding custody is filed. *See id.* § 50A-201(a)(1).

iv. More Appropriate Forum Jurisdiction

N.C. Gen. Stat. § 50A-201(a)(3) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208." *Id.* § 50A-201(a)(3). As noted above, Utah and Florida had significant connection jurisdiction as of the date of commencement, so they are courts having jurisdiction under (a)(2). As also discussed above, no party has informed the trial court of "any proceeding in this or any other state that could affect the current proceeding." *See id.* § 50A-209(d). Neither Utah nor Florida has declined to exercise

jurisdiction for any reason, including under N.C. Gen. Stat. § 50A-207 or N.C. Gen. Stat. § 50A-208. Thus, North Carolina could not exercise jurisdiction under section 50A-201(a)(3). See id. § 50A-201(a)(3).

v. Jurisdiction by Necessity

N.C. Gen. Stat. § 50A-201(a)(4) provides that a court of this State has jurisdiction to make an initial child-custody determination only if "[n]o court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3)." *Id.* § 50A-201(a)(4). We have determined that both Utah and Florida would have had "significant connection" jurisdiction under subdivision (2) on 27 March 2012. Since another state would have jurisdiction under the criteria of (a)(2), North Carolina cannot exercise jurisdiction by necessity under subdivision (4). *See id.* The trial court erred in concluding that no other state would have had jurisdiction under subdivisions (1), (2), or (3); thus, the trial court erred in exercising jurisdiction under (a)(4). *See id.*

IV. Conclusion

Because the trial court did not have subject matter jurisdiction under N.C. Gen. Stat. § 50A-201(a), we vacate the orders entered on 13 June 2013, 28 June 2013, and 3 December 2013. Because all three orders must be vacated, we need not consider plaintiff's arguments regarding the trial court's modification of primary custody or the delay in entry of the custody modification order.

VACATED.

Chief Judge McGEE concurs.

BRYANT, Judge, dissenting.

Because I do not believe the trial court's findings of fact lead unavoidably to the conclusion that jurisdiction in this forum is extinguished, I respectfully dissent.

Even if the parties lack a significant connection to North Carolina, a North Carolina court may exercise jurisdiction provided courts of the alternative forums decline to exercise such. *See* N.C.G.S. § 50A-201(a)(3) (A court of this State has jurisdiction to make a child-custody determination if "[a]ll courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the

child . . . .”). No court in an alternative forum has been presented with the question of assuming jurisdiction.

Moreover, I do not believe the jurisdictional framework of the UCCJEA, as codified in our General Statutes, compels that this forum relinquish jurisdiction over a current child custody matter when no other forum has assumed jurisdiction. As noted by the majority at the time the custody action was revived in 2012, the minor children had no home state, and the record reflects no acknowledgment by the parties or a court of an alternative forum as to an intent to exercise jurisdiction. Vacating the trial court’s order absent an acknowledgement that jurisdiction would be exercised by another forum is not a relinquishment of jurisdiction; it is an extinguishment. *See* N.C.G.S. § 50A-202 (Official Comment) (“[T]he original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction. . . . [T]he State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 207.”); *see also In re Baby Boy Scearce*, 81 N.C. App. 531, 538-39, 345 S.E.2d 404, 409 (1986) (“Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined.” (citations omitted)).

For this reason, I would reverse the trial court’s order and remand it for a determination of what forum will exercise jurisdiction. *See* N.C.G.S. § 50A-110(a) (“Communication between courts”) (“A court of this State may communicate with a court in another state concerning a proceeding arising under [the UCCJEA as codified in General Statutes, Chapter 50A, Article 2].”).

Also, I write separately to note the majority’s analysis concluding that North Carolina, as a forum, lacks jurisdiction over this child custody matter is precariously perched on the following observation and extrapolation: “The only connection North Carolina had to the children on the date of commencement was the custody litigation in Moore County. The litigation itself is clearly not the sort of ‘significant connection’ required by N.C. Gen. Stat. § 50A-201(a)(2).”[1]

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1. The majority acknowledges that “there was substantial evidence available in North Carolina regarding the children, since the parties had a full custody trial and they presented extensive evidence regarding the children’s care, protection, training, and personal relationships.” (citation and quotations omitted).

This conclusion is influenced by an analysis of factors listed in section 50A-207.1 authorizing a court to decline the exercise of jurisdiction where this forum is determined to be inconvenient. While I acknowledge there is little guidance directly addressing the question of when a history of litigation, standing alone, can connote a significant connection to a forum, I am not persuaded that the history of litigation as evidenced here is irrelevant to that consideration.

The custody litigation commenced in Moore County in 2002 and was revived in 2004, 2009, and 2010, prior to the current action filed in 2012. While plaintiff and the minor children moved from North Carolina in 2004 and defendant moved from North Carolina in 2009, both parties participated in current proceedings before the Moore County District Court and failed to raise the issue of jurisdiction or the possibility of alternative forums prior to the trial court's 28 June 2013 order declaring the exercise of jurisdiction proper in North Carolina. It would appear that while jurisdiction cannot be conferred by the consent of the parties, the impropriety of North Carolina's exercise of jurisdiction was not immediately obvious. Whether it is of legal significance may be debatable but, it is apparent the parties felt a connection to this State that was not insignificant.

IN THE MATTER OF A.R. AND C.R.

No. COA14-732

Filed 31 December 2014

1. Appeal and Error—order ceasing reunification efforts—appeal untimely

In an appeal of the trial court's order ceasing reunification efforts between respondent mother and her children, respondent's appeal was untimely and therefore dismissed. Although the 180-day period in N.C.G.S. 7B-1001(a)(5)(b) delayed the date from which notice of appeal could be taken, respondent waited more than ten months from the entry of the order to file her notice of appeal, exceeding the 210-day time limit.

2. Child Abuse, Dependency, and Neglect—guardian ad litem—appointed in assistance-only capacity—no abuse of discretion

In an appeal of the trial court's order awarding guardianship of respondent mother's children to paternal relatives, the trial court

did not abuse its discretion by appointing her a guardian ad litem (GAL) in an assistance-only capacity. The fact that respondent suffered epileptic seizures and that the father exercised strong influence over her did not render her incompetent. The GAL testified that respondent was smart, reasonable, and understood the proceedings, and respondent testified that she had graduated from high school, paid her bills, managed her daily affairs, and was capable of making her own decisions.

Appeal by respondent-mother from orders entered 14 June 2013 and 2 June 2014 by Judge Ali B. Paksoy in Cleveland County District Court. Heard in the Court of Appeals 2 December 2014.

Charles E. Wilson, Jr., for petitioner-appellee Cleveland County Department of Social Services.

Administrative Office of the Courts, by Appellate Counsel Tawanda N. Foster, for guardian ad litem.

Richard Croutharmel, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother ("respondent") appeals from the trial court's orders which ceased reunification efforts with respondent and her minor children "Ariel" and "Cristina[1]" (collectively "the children") and awarded guardianship of the children to paternal relatives in Arizona. We dismiss in part and affirm in part.

I. Background

On 21 May 2012, the Cleveland County Department of Social Services ("DSS") filed petitions alleging that the children were neglected, based upon respondent and her husband's (collectively "the parents") failure to properly treat Ariel's seizure disorder and Cristina's asthma. After a hearing, the trial court entered an order which adjudicated the children as neglected on 5 December 2012. The trial court placed the children in the physical and legal custody of DSS and ordered the parents to obtain psychological evaluations and follow any treatment recommendations which resulted. The parents were granted visitation, with respondent

1. Pseudonyms are used to protect the identity of the minor children.

receiving an extra hour of visitation per week outside the presence of the children's father.

At a subsequent hearing, the trial court appointed a guardian *ad litem* ("GAL") to assist respondent. On 19 February 2013, the trial court entered an order appointing respondent-mother a GAL in an assistance-only capacity.

Respondents failed to obtain their required psychological evaluations. As a result, on 14 June 2013, the trial court entered an order which ceased reunification efforts, suspended the parents' visitation, changed the children's permanent plan to guardianship, and placed the children with paternal relatives in Arizona. Both parents filed a notice of their intent to appeal the trial court's order. DSS did not initiate any proceedings to terminate respondent's parental rights in the 180 days after the entry of the order ceasing reunification efforts. Respondent entered formal notice of appeal of that order on 21 April 2014.

On 2 June 2014, the trial court entered an order awarding permanent guardianship to the paternal relatives in Arizona. Respondent appeals. The father did not appeal this order.

II. Appellate Jurisdiction

[1] As an initial matter, we note that respondent did not file a notice of appeal from the trial court's 14 June 2013 order ceasing reunification efforts until 21 April 2014, more than ten months after the order was entered. Pursuant to N.C. Gen. Stat. § 7B-1001(b), "[n]otice of appeal and notice to preserve the right to appeal shall be given in writing by a proper party as defined in G.S. 7B-1002 and shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58." N.C. Gen. Stat. § 7B-1001(b) (2013). However, under N.C. Gen. Stat. § 7B-1001(a)(5), a parent who has properly preserved the right to appeal an order which ceases reunification "shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order." N.C. Gen. Stat. § 7B-1001(a)(5)(b) (2013). Thus, for a respondent-parent who has preserved their right to appeal the order ceasing reunification efforts, the statute renders the order unappealable for a period of 180 days, if no termination of parental rights ("TPR") petition or motion is filed. *See In re D.K.H.*, 184 N.C. App. 289, 645 S.E.2d 888 (2007) (dismissing an appeal of an order ceasing reunification efforts filed less than 180 days after the entry of the order when no TPR petition had been filed). After 180 days have passed without the filing of a TPR petition or motion, the respondent-parent may proceed with their appeal.

Respondent contends that once 180 days have passed, a parent has the right to appeal the order at essentially any time, so long as the trial court "continues to review the matter." In support of her contention, respondent notes that N.C. Gen. Stat. § 7B-1001(a)(5) "contains no affirmative language covering a deadline date in which to appeal such orders when there is no subsequent [TPR] action." However, respondent's interpretation of N.C. Gen. Stat. § 7B-1001(a)(5) is illogical when that subsection is considered *in pari materia* with the remainder of the statute.

N.C. Gen. Stat. § 7B-1001(a) (1) – (6) lists the six types of juvenile orders which are appealable. N.C. Gen. Stat. § 7B-1001(b) then establishes that notice of appeal "shall be made within 30 days after entry and service of" these orders included in subsection (a). In light of the 30-day time limitation to appeal that unquestionably applies to the other orders listed in N.C. Gen. Stat. § 7B-1001(a), we conclude that the 180-day period in N.C. Gen. Stat. § 7B-1001(a)(5)(b) operates solely to delay the date from which notice of appeal may be taken. Once the 180 days after the entry of the order ceasing reunification efforts has elapsed, the respondent-parent that has properly preserved their right to appeal the order becomes subject to the 30-day limitation in N.C. Gen. Stat. § 7B-1001(b).

In the instant case, the trial court's order ceasing reunification efforts with respondent was entered on 14 June 2013. Respondent timely filed her notice of intent to appeal that order. However, respondent did not file her notice of appeal until 21 April 2014. This date was unquestionably more than the 210 days after the entry of the order ceasing reunification efforts, and as a result, respondent's appeal of that order was untimely and must be dismissed.

However, respondent has also filed a petition for writ of *certiorari* seeking our review of the trial court's 14 June 2013 order which ceased reunification efforts. In our discretion, we deny respondent's petition because the only argument respondent makes on appeal does not relate directly to this order. Thus, our appellate review in the instant case is limited to respondent's appeal from the trial court's 2 June 2014 order which awarded permanent guardianship to paternal relatives in Arizona, from which respondent timely appealed.

III. Guardian *ad Litem*

[2] Respondent argues that the trial court erred by appointing her a GAL in an assistance-only capacity, rather than a substitution capacity. We disagree.

At the time the trial court appointed a GAL for respondent, the appointment was governed by N.C. Gen. Stat. § 7B-1101.1(c) (2011), which stated:

> On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17 if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

This statute permitted the trial court to "appoint a GAL upon finding a 'reasonable basis' for believing that the parent *either* (1) is incompetent, or (2) has diminished capacity and cannot adequately act in his or her own interest. Any appointment of a GAL is required to be in accordance with Rule 17 of the Rules of Civil Procedure." *In re P.D.R.*, ___ N.C. App. ___, ___, 737 S.E.2d 152, 157 (2012) (internal quotations and citation omitted). In *P.D.R.*, this Court established that a GAL appointed under this statute would serve different roles, depending upon the reason for the appointment:

> [T]he role of the GAL should be determined based on whether the trial court determines that the parent is incompetent or whether the trial court determines that the parent has diminished capacity and cannot adequately act in his or her own interest. Rule 17(e), which addresses the duties of a GAL for an incompetent person, should apply if the parent is incompetent — the role of the GAL should be one of substitution. On the other hand, if the parent has diminished capacity, N.C. Gen. Stat. § 7B-1101.1(e) should apply and the role of the GAL should be one of assistance.

Id. at ___, 737 S.E.2d at 158. "If the court chooses to exercise its discretion to appoint a GAL under N.C. Gen. Stat. § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the GAL should play, whether one of substitution or assistance." *Id.* at ___, 737 S.E.2d at 159.

In the instant case, the court appointed respondent a GAL that would serve in an assistance-only capacity. Respondent contends that the trial court's conclusion was erroneous because the evidence before the court demonstrated that respondent was incompetent. Respondent is mistaken.

An incompetent adult is defined as one who "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2013). Respondent contends that there was evidence before the trial court that she suffered from epileptic seizures and that the children's father exercised such a strong influence over her that she was rendered incompetent.

However, at the hearing in which the trial court considered the propriety of appointing a GAL, the proposed GAL specifically testified that respondent was reasonable, smart, and understood the proceedings. She further testified that she could possibly assist respondent if respondent was making poor decisions that were influenced by the children's father. Also at the hearing, respondent told the trial court that she graduated from high school, paid her bills, managed her daily affairs, and was capable of making her own decisions. Based upon this evidence, we conclude that the trial court did not abuse its discretion by appointing a GAL for respondent in an assistance-only capacity. This argument is overruled.

IV. Conclusion

After 180 days had elapsed from the entry of the trial court's order ceasing reunification efforts with respondent, respondent had 30 days to enter her notice of appeal from that order and failed to do so. As a result, we dismiss respondent's appeal from the trial court's 14 June 2013 order. The trial court did not abuse its discretion by appointing a GAL for respondent to serve in an assistance-only capacity. Consequently, we affirm the trial court's 2 June 2014 order which awarded permanent guardianship to paternal relatives in Arizona.

Dismissed in part and affirmed in part.

Judges STROUD and McCULLOUGH concur.

IN RE ADOPTION OF ROBINSON

[238 N.C. App. 308 (2014)]

GARRY MARTINOUS ROBINSON AND ANITA JO ROBINSON, PETITIONERS, FOR THE ADOPTION OF B.J.R., A MINOR CHILD

WILLIAM PHELAN PATE, PLAINTIFF
v.
SHAUNASIE UNIQUE PERKINS, GARRY MARTINOUS ROBINSON, AND ANITA JO ROBINSON, DEFENDANTS

No. COA14-327

Filed 31 December 2014

1. Adoption—child born out of wedlock—failure of father to meet statutory support requirements—father's consent not required

The trial court did not err by concluding that the consent of plaintiff father was not required under N.C.G.S. § 48-3-601 for the adoption of his daughter, who was born out of wedlock. Plaintiff failed to meet the support requirements of N.C.G.S. § 48-3-601 because his parents provided for his needs and he had at least $1,000 in his bank account that he was free to spend, yet he did not provide any monetary or tangible support to the mother or child before the filing of the adoption petition.

2. Adoption—child born out of wedlock—father's consent not required—as-applied constitutional challenge—insufficient actions after birth to develop relationship with child

The trial court did not violate plaintiff father's substantive due process rights under the state and federal constitutions by determining that his consent was not required for the adoption of his daughter, who was born out of wedlock. Although many of plaintiff's actions before the birth of his daughter were consistent with the desire to develop a relationship with her, his actions after the birth of the child were insufficient. Because plaintiff failed to take the opportunity to develop a relationship with his child, his parental rights under the Constitution were not "full blown," and Chapter 48 of the General Statutes was not unconstitutional as applied to him.

Appeal by Plaintiff from an order entered 26 August 2013 by Judge Anna F. Foster in Lincoln County District Court. Heard in the Court of Appeals 10 September 2014.

Crowe & Davis, P.A., by H. Kent Crowe, for the Plaintiff-Appellant, William Phelan Pate.

Thomas B. Kakassy, for the Third-Party Defendant-Appellees, Garry Martinous Robinson and Anita Jo Robinson.

DILLON, Judge.

William Phelan Pate ("Plaintiff") appeals from an order adjudicating that his consent to his daughter's adoption was not required. For the reasons stated below, we affirm.

I. Background

Plaintiff and Shaunasie Unique Perkins ("Ms. Perkins") dated for about seven months from late 2011 to mid-2012, while both were attending high school and into the summer. The two engaged in sexual intercourse on a number of occasions. At some point during their relationship, Ms. Perkins became pregnant. She informed Plaintiff of her pregnancy.

In August of 2012, their relationship began to deteriorate when Ms. Perkins moved away to attend college and Plaintiff remained in high school.

On 7 January 2013, Ms. Perkins gave birth to a baby girl without informing Plaintiff. She authorized a direct discharge of the child to Garry and Anita Robinson, the prospective adoptive parents, and signed a consent form. The Robinsons took the child home with them the following day.

On 13 January 2013, after discovering that Ms. Perkins had given birth, Plaintiff filed an action for child custody, child support and genetic testing.

On 13 February 2013, the Robinsons filed a petition for adoption. On 21 February 2013, Plaintiff filed an objection to the adoption, contending that as the biological father his consent was required.

On 7 June 2013, the trial court entered an order for genetic testing. In early July of 2013, Plaintiff learned that the results from the testing proved him to be the father of the child.

On 26 August 2013, the trial court entered an order denying Plaintiff's motion to dismiss the adoption proceeding, concluding that Plaintiff's consent was not required. Plaintiff timely appealed from this order.

II. Jurisdiction

An order determining that a putative father's consent to an adoption is unnecessary is immediately appealable because a father's right to make decisions concerning the care, custody, and control of his children is fundamental, and the denial of his right to consent to an adoption deprives him of this fundamental right. *In re Schuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 459-60 (2004). Accordingly, we proceed to address the merits of Plaintiff's arguments.

III. Analysis

Plaintiff makes two arguments on appeal: He contends that his consent is required to allow the adoption of his child by the Robinsons to proceed pursuant to the General Statutes and, alternatively, pursuant to the State and federal Constitutions. We address each argument in turn.

A. Statutory Requirements

[1] "The adoption of children is purely a statutory procedure and the only procedure for the adoption of minors is that prescribed by G.S. Chapter 48." *In re Daughtridge*, 25 N.C. App. 141, 145, 212 S.E.2d 519, 521 (1975) (internal marks omitted). Our Supreme Court has explained that by enacting Chapter 48,

> the General Assembly recognized the public interest in establish[ing] a clear judicial process for adoptions, . . . promot[ing] the integrity and finality of adoptions, [and] structur[ing] services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

In re Anderson, 360 N.C. 271, 275-76, 624 S.E.2d 626, 628-29 (2006) (internal marks and citations omitted).

Chapter 48 designates the class of unwed putative fathers whose consent to an adoption is required under the statutory scheme. In relevant part, Chapter 48 provides that an adoption petition may not be granted without the consent of any man who – prior to the earlier of the filing of the adoption petition or the date of hearing under N.C. Gen. Stat. § 48-3-601 – has done three things: (1) acknowledge paternity; (2) communicate or attempt to communicate with the mother regularly; ***and*** (3) make reasonable and consistent support payments within his financial means for the mother or child or both. N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2013); *In re Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001).

In the present case, the trial court, relying on our Supreme Court's opinion in *Byrd*, ruled that Plaintiff failed to meet the third prong under this portion of the statute, concluding that Plaintiff "failed to satisfy the support requirement found in N.C. [Gen. Stat.] § 48-3-601(2)(b)(4)(II)" prior to the filing of the adoption petition, which occurred on 13 February 2013. Specifically, the district court found as follows: Plaintiff lived with his parents and worked part-time between February and August of 2012. He had a joint checking account with his father where he deposited the money he earned, and this account always had at least $1,000.00 on deposit. His basic needs were provided for by his parents, so the money in the bank account was his to spend. Though he spent money on dates with Ms. Perkins and did *offer* on occasion to provide financial resources to her, he never *actually* provided money or any other tangible support. Likewise, he never offered any support to the Robinsons for the child prior to the filing of the adoption petition. Finally, though the trial court found that Plaintiff purchased two packages of infant diapers after the child's birth, the court also found that these packages were never delivered to the Robinsons. Plaintiff fails to challenge any of these findings. Thus, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991).

We conclude that the trial court's findings support its conclusion that Plaintiff did not provide "reasonable and consistent" payments of support commensurate with his ability to provide such payments. As our Supreme Court has held, the statute requires "actual, real and tangible support, and that attempts or offers of support do not suffice." *Byrd*, 354 N.C. at 196, 552 S.E.2d at 148. Accordingly, this portion of Respondent's argument is overruled.

B. Constitutional Protections

[2] Plaintiff next contends that his substantive due process rights supplied by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution were violated by the district court's determination that his consent to adoption was not required and that Chapter 48 is therefore unconstitutional as applied to him. Again, we disagree.

At the outset, we note that whether Plaintiff's child might be better off with the Robinsons than with Plaintiff is irrelevant to the core constitutional question in this case. *Cf. Adoptive Couple v. Baby Girl*, ___ U.S. ___, ___, 133 S. Ct. 2552, 2572, 186 L. Ed.2d 729, 752 (2013) (Scalia, J., dissenting) ("We do not inquire whether leaving a child with his parents

is 'in the best interest of the child.' . . . [P]arents have their rights, no less than children do."). As our Supreme Court has explained,

> [a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). The issue presented by this case is whether Plaintiff, as an unwed biological father, enjoys that constitutionally paramount status.

At common law, a child born out of wedlock "was said to be a *filius nullius*, the child of nobody." *State v. Robinson*, 245 N.C. 10, 13, 95 S.E.2d 126, 128 (1956). An unwed father had no legal *obligation* to support the child or its mother, *see State v. Tickle*, 238 N.C. 206, 209, 77 S.E.2d 632, 634 (1953); however, his *right* to the care, custody, and control of that illegitimate child was generally subjugated to the mother's paramount right. *Jolly v. Queen*, 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965).

Today, the state of the law is considerably different. *See*, *e.g.*, *Rosero v. Blake*, 357 N.C. 193, 199, 581 S.E.2d 41, 45 (2003). Unwed fathers and mothers are no longer on unequal footing with respect to their parental rights and obligations. *See id.* at 199-204, 581 S.E.2d 45-48. Both parents owe their children a duty of support, and the law protects their rights because it presumes that they will fulfill their obligations. *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961).

The United States Supreme Court, however, has held that not all biological fathers are entitled to the same substantive due process protections. *Lehr v. Robertson*, 463 U.S. 248, 263-64, 103 S. Ct. 2985, 2994-95, 77 L. Ed.2d 614, 627-28 (1983). "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260, 103 S. Ct. at 2992, 77 L. Ed.2d at 626. The *Lehr* Court was careful to distinguish the interest of fathers in *developed* parent-child relationships from the merely "inchoate" interest of fathers in *potential* parent-child relationships. The *Lehr* Court described the inchoate interest of a biological father who did not have a developed relationship with his child as follows:

> The significance of the biological connection is that it *offers the natural father an opportunity* that no other

> male possesses to develop a relationship with his offspring. *If he grasps that opportunity* and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 262, 103 S. Ct. at 2993-94, 77 L. Ed.2d at 627 (emphasis added). The *Lehr* Court recognized that the inchoate interest of an unwed father to have an opportunity to develop a relationship with his child is entitled to some level of protection under the federal Constitution. *See id.* at 249-50, 103 S. Ct. at 2987, 77 L. Ed.2d at 619 (phrasing the question as "whether New York has sufficiently protected an unmarried father's inchoate relationship with a child").

The *Lehr* case involved a putative father who did not have actual notice of the birth of the child or of the child's adoption. The *Lehr* Court concluded that "statutes that establish classes of biological fathers entitled to notice nevertheless may fail constitutional scrutiny (1) if they omit too many responsible fathers, or (2) if the qualifications for notice are beyond the control of an interested putative father." *In re S.D.W.*, ___ N.C. ___, ___, 758 S.E.2d 374, 380 (2014) (citing *Lehr*, 463 U.S. at 263-64, 103 S. Ct. at 2994, 77 L. Ed.2d at 628) (emphasis added).

Our Supreme Court dealt with the notice requirements under Chapter 48 this past summer in a case involving a biological father who only became aware of the existence of his child after the mother had given birth and had placed the child with adoptive parents. *See In re S.D.W.*, ___ N.C. ___, 758 S.E.2d 374 (2014). The Court ultimately held that Chapter 48 was not unconstitutional as applied to him. *Id.* at ___, 758 S.E.2d at 381. The Court reasoned that the biological father's passivity in the face of a possibility of pregnancy constituted a failure to grasp the opportunity to develop a parent-child relationship, and concluded that proceeding with the adoption without his consent did not violate his due process rights. *Id.* Specifically, the Court noted that the biological father was well aware that a pregnancy might result from his intimate relationship with the mother and that the child had been in the care of adoptive parents for over five months when the father finally began taking steps to assert his parental rights to the child. *Id.* at ___, 758 S.E.2d at 375-76. Further, the Court observed that the biological father exhibited "only incuriosity and disinterest" rather than taking the affirmative steps

necessary to establish himself as a responsible father. *Id.* at ___, 758 S.E.2d at 380-81.

In the present case, Plaintiff does not argue that he did not have notice. However, like the biological fathers in *Lehr* and *S.D.W.*, Plaintiff had not developed an enduring relationship with his child such that his rights under the federal Constitution had sprung "full blown," in the words of the *Lehr* Court. Nevertheless, as the biological father of Ms. Perkins' child, he still had a constitutionally protected, inchoate interest in having an "opportunity [to develop a relationship with his child] *and* accept[] some measure of responsibility for the child's future[.]" *Lehr*, 463 U.S. at 262, 103 S. Ct. 2993, 77 L. Ed.2d at 627. Our Supreme Court in *S.D.W.*, in quoting this portion of *Lehr*, described this inchoate interest of an uninvolved biological father as a "liberty interest in developing a relationship with [his] child[.]" ___ N.C. at ___, 758 S.E.2d at 381.

Plaintiff argues that Chapter 48 is unconstitutional as applied to him because the statutory scheme did not afford him an opportunity to develop a relationship with his child. Specifically, he argues that the requirement under N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) that a putative father provide *actual* support excludes those fathers, such as him, who *attempt* to provide support but are prevented from doing so under circumstances that are beyond their control. We agree that a conclusion by a court that the consent of a biological father to the adoption of his child is not required under Chapter 48 due solely to circumstances beyond his control *where he has otherwise grasped the opportunity and accepted some measure of responsibility for his child* would result in the statute being unconstitutional as applied to him.

Here, though, we conclude that Chapter 48, as applied in this case to Plaintiff, is not unconstitutional. We recognize the efforts of Plaintiff and note that many of his actions – especially those taken prior to the child's birth - were consistent with his desire to "develop a relationship with [his] child." *S.D.W.*, *supra*. Specifically, the trial court found that Plaintiff, a seventeen-year-old high school student, offered to marry Ms. Perkins while they were dating; that he and his mother offered money to Ms. Perkins during the pregnancy; that he hired an attorney shortly before the child's birth when it was obvious that Ms. Perkins was going to put the child up for adoption; that he contacted Ms. Perkins on a number of occasions during the pregnancy; that he openly acknowledged that the child was his; that at around the time of Ms. Perkins' due date, he and his mother called a number of hospitals to ascertain where

the child was being birthed when Ms. Perkins had not notified him that she was in labor or where she anticipated delivering the child; and that within a week of the child's birth, he filed an action for genetic testing and child custody.

However, the trial court found that Plaintiff made very few efforts *after* the birth of his child to develop a parent-child relationship. For instance, the trial court found that the Robinsons gave Plaintiff *the opportunity* to visit the baby, which he took advantage of on only one occasion - in late January, a few weeks after the birth. The trial court found that he made no further attempt to meet with his child or provide support for her during February, March, April, May, or June. Thus, during the child's first six months of life, besides filing papers with the court, Plaintiff largely remained "passive" in developing a relationship with his child, where his efforts consisted of a single visit in January and a single purchase of diapers, which he never delivered. *See generally S.D.W.*, ___ N.C. at ___, 758 S.E.2d at 381 (emphasizing the unwed father's passivity towards his child during the relevant times). While filing court papers may be part of that which is involved in grasping the opportunity to develop a parent-child relationship in certain situations, we conclude that in this case Plaintiff failed to take many of the essential steps within his control to develop this relationship with his child. *See id.* (noting that the unwed father in that case failed to "grasp [the] opportunity" to take "the steps that would establish him as a responsible father"). Accordingly, we hold that Plaintiff "does not fall within the class of protected fathers who may claim a liberty interest in developing a relationship with a child, and thus he was not deprived of due process."[1] *Id.*

Plaintiff points to the trial court's finding that he did provide $100.00 to the Robinsons; however, the trial court found that this support was provided six months after the child was born, upon learning conclusively from the results of the court-ordered genetic test that he was the child's biological father. Furthermore, awaiting the test results did not excuse Plaintiff from failing to take certain steps – such as visiting the child and offering support for her care – that were available to him to develop a relationship during this time. Specifically, as was held in *Lehr* and *S.D.W.*, due process rights under the federal Constitution only

1. Plaintiff has not put forth any argument that the Law of the Land Clause under the North Carolina Constitution and the Due Process Clause under the federal Constitution are to be construed differently; and, therefore, we do not distinguish between them here. *See S.D.W.*, ___ N.C. at ___, 758 S.E.2d at 378.

spring when one has grasped his opportunity to develop a relationship with his child.[2]

IV. Conclusion

We do not believe that Plaintiff sufficiently grasped the opportunity that was available to him to develop a relationship with his child such that the constitutionally protected paramount rights of parentage sprung fully from his inchoate interest in an opportunity to develop those rights. Accordingly, we believe that the district court did not err in adjudicating that Plaintiff's consent to the adoption of his biological daughter was not required.

AFFIRMED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

IN THE MATTER OF BABY BOY

No. COA14-647

Filed 31 December 2014

1. Appeal and Error—mootness—termination of parental rights—prior adoption determination

Respondent's appeal from an order terminating her parental rights was not moot where an appellate ruling finalized a prior adoption proceeding of the child, so that the termination of parental rights had no practical effect on the outcome. However, the termination order may have an effect in the future as to any other children plaintiff had or may have.

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2. By our opinion, we do not intend to create a bright-line test as to what one must do to "grasp the opportunity" sufficient to cause full-blown constitutional rights to spring from a putative father's inchoate interest. This determination must be made on a case-by-case basis as each case is fact-specific. Different putative fathers have different opportunities. However, we also do not intend our opinion to be construed to require a putative father who is awaiting the results of genetic testing to sign an affidavit of parentage or take other actions which would impose upon him an affirmative duty to care for the child even if the genetic testing results subsequently show that he is, in fact, not the biological father.

2. Jurisdiction—termination of parental rights—adoption appeal pending

The trial court was not deprived of jurisdiction to terminate parental rights during the pendency of an adoption appeal by N.C.G.S. § 7B-1003. The plain language of the statute limits the trial court's jurisdiction while an appeal of an order entered under the juvenile code is pending, but the statute does not refer to appeals of orders outside the juvenile code.

3. Jurisdiction—standing—termination of parental rights—petition to adopt

Petitioners' standing to file a petition for termination of parental rights was established by their petition to adopt the child in question.

Appeal by respondent from order entered 14 April 2014 by Judge Margaret Eagles in Wake County District Court. Heard in the Court of Appeals 25 November 2014.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Cheri C. Patrick, for petitioners-appellees adoptive parents.

Cranfill Sumner & Hartzog LLP, by Michelle D. Connell, for respondent-appellant biological mother.

DILLON, Judge.

Respondent appeals from an order terminating her parental rights to Baby Boy Clark[1]. For the following reasons, we affirm.

I. Background

Respondent gave birth to Baby Boy Clark in April 2012. Respondent and the father signed relinquishment forms and surrendered legal custody of Baby Boy Clark to an adoption agency. On 23 April 2012, the adoption agency transferred physical custody of Baby Boy Clark to appellee parents ("petitioners") who filed a petition to adopt him that same day with the Wake County Clerk of Superior Court (12 SP 1911). *See In re Adoption of "Baby Boy"*, ___ N.C. App. ___, 757 S.E.2d 343, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2014).

1. A pseudonym.

In June 2012, respondent filed a motion to dismiss the adoption petition and to declare her relinquishment void, alleging that her relinquishment did not comply with statutory requirements. *Id.* at ___, 757 S.E.2d at 345-46. By order filed 15 February 2013, the district court declared respondent's signed relinquishment was not valid because it did "not conform to the mandatory statutory requirements of a relinquishment set out in N.C.G.S. 48-3-702 and [was] void to operate as a relinquishment." *Id.* at ___, 757 S.E.2d at 346. Petitioners and the adoption agency appealed to this Court. *Id.*

While the appeal from the trial court's 15 February 2013 order regarding respondent's relinquishment was pending in this Court, petitioners, on 27 February 2013, filed a petition to terminate the parental rights of respondent and the father in Wake County District Court (13 JT 69). Respondent's motions to stay the termination proceedings were denied and a hearing was held in February 2014.

By order entered 14 April 2014, the trial court concluded grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) (2013) (failure to pay child support towards the care of the children) and determined that termination of her parental rights was in the best interests of Baby Boy Clark.[2]

The next day, on 15 April 2014, this Court filed its opinion in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343, reversing the district court's order. This Court held that respondent's "relinquishment is valid and conforms to the mandatory statutory requirements as set out in N.C. Gen. Stat. § 48-3-702." *Id.* at ___, 757 S.E.2d at 351. Our Supreme Court denied respondent's petition for discretionary review (157P-14-1). From the order terminating her parental rights, respondent appeals. Given the prior rulings and procedure of this case, we first address the issue of whether respondent's appeal is moot.

II. Mootness

[1] This Court has held in other types of cases, in which an order has expired by the time of consideration on appeal, that if the order may cause a party to "suffer collateral legal consequences" in the future, the appeal still has "legal significance and is not moot." *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 436-37, 549 S.E.2d 912, 914 (2001). Thus, even though our ruling in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343 finalized the adoption of Baby Boy Clark, so that this

2. The trial court also terminated the father's parental rights.

termination of rights proceeding could have no practical effect upon the outcome as to his parentage, this appeal is not moot. Specifically, the termination order may have an effect on respondent's parental rights in the future as to any other children she has or may have. N.C. Gen. Stat. § 7B-1111(a)(9) states that one ground for termination of parental rights is whether "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." Respondent's appeal is not moot, and we will therefore consider her arguments.

III. Analysis

Respondent does not challenge any of the findings of fact and conclusions of law with regard to grounds for termination, nor does she challenge the best interest determination. Rather, respondent challenges the trial court's subject matter jurisdiction to terminate her parental rights where: (1) the appeal in the adoption case was pending, and (2) the petitioners did not have standing to file the termination petition.

A. Subject matter jurisdiction

[2] "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). "In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). According to the Juvenile Code, our district courts have "exclusive original jurisdiction" to hear and determine proceedings to terminate parental rights. *See* N.C. Gen. Stat. § 7B-200(a)(4) and § 7B-1101 (2013). Whether a court possesses jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

Citing N.C. Gen. Stat. § 7B-1003, respondent argues the trial court was precluded from hearing the termination proceeding because the adoption case was pending appeal in this Court. We disagree.

Generally, N.C. Gen. Stat. § 1-294 operates to stay further proceedings in the trial court upon perfection of an appeal. N.C. Gen. Stat. § 1-294 (2013). "When a specific statute addresses jurisdiction during an appeal, however, that statute controls over the general rule." *In M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012). Pursuant to the Juvenile Code, jurisdiction by the trial court while an appeal is pending is governed by N.C. Gen. Stat. § 7B-1003, which provides:

> (a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.
>
> (b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.
>
> (c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered. . . .

N.C. Gen. Stat. § 7B-1003 (emphasis added). Article 11 of Chapter 7B of the General Statutes governs termination of parental rights. *See*, *e.g.*, N.C. Gen. Stat. Ch. 7B, Art. 11 (2013).

This statute does not deprive the trial court of jurisdiction to terminate parental rights during the pendency of the adoption appeal. Rather, the plain language of the statute limits the trial court's jurisdiction while an appeal of an order entered under the Juvenile Code is pending in

the appellate court. Nowhere in the statute does it reference appeals of orders outside of the Juvenile Code, Chapter 7B of the North Carolina General Statutes. Section 7B-1003 does not apply to petitioners' appeal of the adoption order, which originated as an adoption petition filed under Chapter 48. The order appealed from in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343, was entered under Chapter 48 which governs adoption, not under Chapter 7B. The district court's ruling regarding respondent's relinquishment restored parental rights to respondent pursuant to Chapter 48, pending appeal, and petitioners sought to terminate those rights pursuant to Chapter 7B based on respondent's actions in not providing support for Baby Boy Clark, while appeal was pending. The appeal of an order entered under Chapter 48, which is outside of the Chapter 7B Juvenile Code, did not preclude the district court's jurisdiction to terminate respondent's parental rights.

Further, respondent's reliance on *In re M.I.W.*, in which our Supreme Court interprets Section 7B-1003, is misplaced. In *M.I.W.*, our Supreme Court applied section 7B-1003 to determine whether the district court had jurisdiction to conduct a termination proceeding while an appeal was pending of a permanency planning disposition order entered in the same case. *M.I.W.*, 365 N.C. at 375-76, 722 S.E. at 470. In holding that the trial court had jurisdiction because section 7B-1003 only barred the trial court from exercising jurisdiction or holding hearings before the appellate court's mandate issued, the *M.I.W.* Court recognized that its "holding is limited to matters arising under the Juvenile Code." *Id.* at 378, 722 S.E.2d at 472.

Contrary to respondent's assertion, the present case is distinguishable from *M.I.W.* Here, the district court's order appealed from in *In re Adoption of: "Baby Boy"* ___ N.C. App. ___, 757 S.E.2d 343 originated in district court as an adoption petition filed under Chapter 48, as stated above. In contrast, the order appealed from in *M.I.W.*, involved a disposition order entered under Chapter 7B. Accordingly, the trial court properly entered its termination order while the adoption appeal was pending in the appellate court.

B. Standing

[3] As part of her argument that the trial court did not have authority to preside over the termination hearing, respondent contends petitioners did not have standing to file the juvenile petition.

"Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the

merits of the case are judicially resolved." *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (citation, brackets, and quotation marks omitted). Standing to file a petition to terminate parental rights is conferred by statute:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> . . .
>
> (7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

N.C. Gen. Stat. § 7B-1103(a) (2013). Here, there is no question that petitioners filed a petition to adopt Baby Boy Clark. This establishes petitioners' standing to file a petition for termination of respondent's and the father's parental rights.

In sum, because petitioners had standing to file their petition to terminate parental rights and the trial court had jurisdiction over the termination of parental rights matter, the trial court's order terminating respondent's parental rights to Baby Boy Clark is affirmed.

AFFIRMED.

Judge STROUD and Judge DIETZ concur.

IN THE MATTER OF DAVID PAUL HALL

No. COA14-435

Filed 31 December 2014

1. Sexual Offenders—sex offender registration—denial of request to terminate

The trial court did not err by relying on the federal sex offender registration statute to deny petitioner's request to terminate his sex offender registration. Since petitioner could not become eligible to petition for termination of his sex offender registration until 2013 at the earliest, N.C.G.S. § 14-208.12A was retroactively applicable to petitioner.

2. Constitutional Law—ex post facto laws—sex offender registration statutes does not violate

The trial court's application of the sex offender registration statute to support its denial of petitioner's petition did not constitute an ex post facto violation. The imposition of lifetime sex offender registration programs does not constitute an ex post facto violation.

3. Appeal and Error—preservation of issues—constitutional issue—failure to argue at trial

Although petitioner contended that the denial of his petition did not violate his substantive due process rights, this argument was waived because petitioner failed to raise it at trial. Even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14-208.5 et seq. do not amount to a violation of due process.

Appeal by petitioner from order entered 30 September 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Glenn Gerding and Anne M. Hayes for petitioner.

BRYANT, Judge.

Where the language of N.C. Gen. Stat. § 14-208.12A shows a clear intent by our legislature to incorporate the requirements of the federal sex offender registration statutes, SORNA, into our State's statutory provisions governing the sex offender registration process, and to retroactively apply those provisions to sex offenders currently on the registry, we affirm the trial court's order doing so. It is well-established by our Courts that the application of N.C. Gen. Stat. § 14-208.5 *et seq.* which governs the sex offender registration process does not violate our prohibition against *ex post facto* laws. Where petitioner fails to raise a constitutional argument before the trial court, that argument is deemed waived on appeal.

On 18 January 1982, petitioner David Paul Hall pled guilty to first-degree rape and second-degree kidnapping and was sentenced to life in prison. After serving over twenty years, petitioner was released on

parole in April 2003 and properly registered himself as a sex offender in Mecklenburg County.

On 3 May 2013, petitioner filed a petition in Mecklenburg County Superior Court seeking termination of his sex offender registration. After a hearing on 23 September 2013, the trial court entered an order on 30 September denying the petition. Petitioner appeals.

Petitioner raises three issues on appeal: (I) whether the trial court erred in relying on the federal SORNA statute to deny his petition to terminate his sex offender registration; (II) whether the trial court's application of SORNA to support denying the petition constituted an *ex post facto* violation; and (III) whether the denial of the petition violated petitioner's substantive due process rights.

I.

[1] Petitioner contends the trial court erred in relying on the federal SORNA statute to justify the denial of his petition for termination of his sex offender registration. Specifically, petitioner contends such reliance on SORNA was erroneous because N.C. Gen. Stat. § 14-208.12A was not meant to be applied retroactively. We disagree.

> Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*. . . .
>
> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.
>
> The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari*

> *materia* should be construed together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.

In re Borden, 216 N.C. App. 579, 581, 718 S.E.2d 683, 685 (2011) (citations and quotations omitted).

North Carolina General Statutes, section 14-208.12A, provides that

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article. . . .
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) *The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State*, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A(a), (a1) (2013) (emphasis added).

SORNA,[1] 42 U.S.C.S. § 16911 *et seq.*, the Sex Offender Registration and Notification Act, establishes federal standards for sex offender registration and sets up guidelines for state sex offender registration programs. The federal standards are implemented and applied pursuant

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1. SORNA was initially known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Jacob Wetterling Act"). 42 U.S.C. § 14071 (1997). Upon its repeal in 2006, the Jacob Wetterling Act was replaced by the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"). 42 U.S.C. § 16901 (2006). The Adam Walsh Act covers substantially the same material as previously covered by the Jacob Wetterling Act; it further details and updates the registration requirements for sex offenders. *See id.; see also In re McClain*, ___ N.C. App. ___, ___, 741 S.E.2d 893, 895, *discretionary review denied*, 366 N.C. 600, 743 S.E.2d 188 (2013) (discussing the evolution of the federal SORNA statute).

to the provisions of N.C. Gen. Stat. § 14-208.5 *et seq.*, which set forth North Carolina's sex offender registration program. *See* N.C. Gen. Stat. § 14-208.7(a) (2013) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.").

SORNA utilizes three tiers. Under SORNA, a tier I sex offender must register for fifteen years, a tier II sex offender must register for twenty-five years, and a tier III sex offender must register for life. However, a tier I sex offender may reduce his or her registration period to ten years by keeping a clean record; likewise, a tier II sex offender may reduce his or her registration period to twenty years. Only a tier III sex offender who is "adjudicated delinquent [as a juvenile] for the offense" may reduce his or her registration period to twenty-five years; otherwise, a tier III sex offender is subject to lifetime registration. *See* 42 U.S.C.S. § 16915(a), (b) (2013).

Here, petitioner pled guilty to first-degree rape in which a knife was used to threaten the victim; petitioner was not adjudicated delinquent for this offense. Therefore, based on the application of SORNA standards, petitioner is a tier III sex offender subject to lifetime registration. *Compare id.* § 16911(4) ("The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and [] is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code [18 USCS §§ 2241 and 2242])[.]"), and 18 U.S.C.S. § 2241(a) (2013) (defining "aggravated sexual abuse" as "[w]hoever . . . knowingly causes another person to engage in a sexual act -- (1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."), *with* first-degree rape as defined by N.C. Gen. Stat. § 14-27.2(a)(2) (2013) ("A person is guilty of rape in the first degree if the person engages in vaginal intercourse [] [w]ith another person by force and against the will of the other person, and [] [e]mploys or displays a dangerous or deadly weapon[.]").

Petitioner argues that because N.C.G.S. § 14-208.12A, as amended in 2001, did not apply retroactively to petitioner's sex offender registration requirements, the 2006 amendment of this statute cannot be applied retroactively either. N.C.G.S. § 14-208.12A(a) (2001) stated that: "The requirement that a person register under this Part automatically terminates 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article." In 2006, N.C.G.S. § 14-208.12A(a) was amended, and subsection (a1) added, to provide that:

> *(a) A person required to register under this Part may petition the superior court in the district where the person resides to terminate the registration requirement 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article.*
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(emphasis added).

Petitioner's argument that the 2006 amendment is not applicable to his petition to terminate his sex offender registration lacks merit, since N.C.G.S. § 14-208.12A (2006) is clearly retroactively applicable to petitioner. Petitioner was released from prison in April 2003, at which time petitioner registered with the Mecklenburg County Sheriff's Office as a sex offender. As such, petitioner was not eligible to petition the Mecklenburg County Superior Court for termination of his sex offender registration until ten years later, in April 2013.

This Court has addressed a similar retroactivity argument in *In re Hamilton*. In *In re Hamilton*, the petitioner argued that the requirements governing the termination of sex offender registration pursuant to N.C.G.S. § 14-208.12A were not intended to be retroactively applied. We disagreed, finding that:

> The implementing language of [N.C.G.S. § 14-208.12A] states that it became effective 1 December 2006, and further specifies that it "is applicable to persons for whom the period of registration would terminate on or after [the effective] date." Petitioner's period of registration was not scheduled to terminate until 2011, and thus, section 14-208.12A plainly and explicitly applies to Petitioner. Further, while Petitioner contends the 2006 amendment to section 14-208.7, deleting the automatic termination language and adding language that the registration requirement last for "at least ten years" is ambiguous, we are not persuaded. The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14-208.7 *in pari materia* with section 14-208.12A, *we must construe the abolition of the automatic termination provision as applying to persons for whom the period of registration would terminate on or after 1 December 2006*. To do otherwise would render the implementing language of section 14-208.12A superfluous and frustrate the General Assembly's intent in enacting and amending the registration scheme.

In re Hamilton, 220 N.C. App. 350, 355-56, 725 S.E.2d 393, 397 (2012) (emphasis added). Therefore, since petitioner could not become eligible to petition for termination of his sex offender registration until 2013 at the earliest, N.C.G.S. § 14-208.12A is retroactively applicable to petitioner. *See id.; see also In re McClain*, ___ N.C. App. at ___, 741 S.E.2d at 896 (affirming the trial court's incorporation of SORNA in N.C.G.S. § 14-208.12A), *discretionary review denied*, 366 N.C. 600, 743 S.E.2d 188 (2013); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). Accordingly, petitioner's argument is overruled.

II.

[2] Petitioner next contends the retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation. We disagree.

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citations omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation. The State, in contrast, contends petitioner has not properly preserved this argument for appellate review. Specifically, the State argues that petitioner's *ex post facto* argument was not properly preserved for review because this argument was not ruled upon by the trial court.

Constitutional issues which are not raised and passed upon at trial cannot be reviewed for the first time on appeal. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citations omitted). Here, the record indicates that petitioner raised an argument during the petition hearing concerning whether the trial court's retroactive application of SORNA constituted an *ex post facto* violation. In addition, petitioner sent a memorandum addressing his *ex post facto* argument to the trial court after the hearing but before the trial court entered its order denying the petition. Although the trial court did not make any findings of fact or conclusions of law regarding petitioner's *ex post facto* argument in its order denying the petition, we disagree with the State's contention that this issue has not been properly preserved for review. Rather, based on the record, which clearly indicates that petitioner presented his *ex post facto* argument to the trial court and the trial court's own statement that it would "take the time to read through the materials" provided to it by both petitioner and the State, it would appear that by entering an order denying the petition, the trial court implicitly rejected petitioner's *ex post facto* argument.[2] As such, we address petitioner's *ex post facto* argument.

The enactment of *ex post facto* laws is prohibited by both the United States and the North Carolina Constitutions. *See* U.S. CONST. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law

2. We note that the better practice would have been for the trial court to have ruled explicitly upon petitioner's *ex post facto* argument, either in a separate order or by including additional findings of fact and conclusions of law in the order. However, since the record supports a determination that the trial court reviewed and denied petitioner's *ex post facto* argument, we will review petitioner's contentions on appeal.

impairing the obligation of contracts . . . ."); N.C. CONST. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). This prohibition against *ex post facto* laws applies to:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citations and quotation omitted). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* (citation omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14-208.12A constitutes an *ex post facto* violation because this application has a "clearly punitive effect".

> An ex post facto analysis begins with determining whether the express or implicit intention of the legislature was to impose punishment, and if so, that ends the inquiry. If the intention was to enact a civil, regulatory scheme, then by referring to the factors enunciated in *Kennedy v. Mendoza-Martinez* for guidance, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's civil intent.

Bowditch, 364 N.C. at 341-42, 700 S.E.2d at 6 (citations and quotations omitted).

In examining the legislative intent behind our sex offender registry statutes, it is well established that N.C.G.S. § 14-208.12A creates a "non-punitive civil regulatory scheme." *See State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011) (noting that "the sex offender registration requirement provided in Article 27A was a non-punitive civil regulatory scheme." (citing *State v. White*, 162 N.C. App. 183, 193, 590 S.E.2d 448,

455 (2004)). Nevertheless, as we are urged to do so by defendant's vigorous argument, we will "further examine whether the statutory scheme is so punitive . . . as to negate the legislature's civil intent." *Bowditch*, 364 N.C. at 342, 700 S.E.2d at 6 (citations and quotations omitted).

In determining whether the effects of a civil statute are truly punitive, this Court applies the factors as set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *White*, 162 N.C. App. at 194, 590 S.E.2d at 455 (citation omitted).

> [T]he most relevant factors for registration laws [have been found] to be whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non[-]punitive purpose; or is excessive with respect to this purpose.

Id. (citation and quotation omitted).

In reviewing whether the requirements of sex offender registration are so punitive as to negate the civil intent behind such registration, our Courts have consistently held that the sex offender registration provisions as set forth in N.C. Gen. Stat. § 14-208.5 *et seq.* (Article 27A) do not amount to *ex post facto* violations. *See* N.C.G.S. § 14-208.5 (2013) (setting forth the purposes behind the sex offender registration requirements); *see also State v. Sakobie*, 165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004) ("[T]he legislature did not intend that the provisions of Article 27A be punitive [and] . . . the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws." (citing *White*, 162 N.C. App. at 194-98, 590 S.E.2d at 455-58)).

Petitioner argues that despite our Court's well-established line of decisions holding that sex offender registration does not constitute an *ex post facto* violation, such a view is inapplicable to the instant case since it involves lifetime registration. Petitioner contends lifetime registration, such as that based on SORNA, is so overly punitive as to constitute an *ex post facto* violation. We reject petitioner's contention, since the reasoning in *Bowditch*, upholding lifetime satellite-based monitoring of sex offenders, informs us that the imposition of lifetime sex offender registration programs does not constitute an *ex post facto* violation. *See Bowditch*, 364 N.C. at 342-43, 700 S.E.2d at 6-7 (holding

that satellite-based monitoring ("SBM") of sex offenders does not create an *ex post facto* violation, for "the placement of the SBM program within Article 27A of Chapter 14 of our General Statutes is significant. The SBM program follows immediately after the Article 27A sections comp[ri]sing the Sex Offender Registration Programs [pursuant to] N.C.G.S. §§ 14–208.5 to –208.32 (2009). *Before enactment of the SBM program, the Supreme Court of the United States had determined sex offender registration statutes to be civil regulations, Smith [v. Doe], 538 U.S. [84,] 105–06, 123 S.Ct. 1140 [2003], and North Carolina appellate courts had reached the same conclusion, see State v. Sakobie, 165 N.C. App. 447, 451–52, 598 S.E.2d 615, 617–18 (2004).* Moreover, the legislature's statement of purpose for Article 27A, found at section 14–208.5, explains that 'the purpose of this Article [is] to assist law enforcement agencies' efforts to protect communities.' Understandably, section 14–208.5 explicitly refers to registration, but the SBM program [set forth in §§ 14-208.40–208.45, Part 5 of Article 27A] is consistent with that section's express goals of compiling and fostering the 'exchange of relevant information' concerning sex offenders. The decision to codify the SBM statutory scheme in the same Article and immediately following the registration programs implies a legislative objective to make the SBM program one part of a broader regulatory means of confronting the unique 'threat to public safety posed by the recidivist tendencies of convicted sex offenders.' [*State v.*] *Abshire*, 363 N.C. [322,] 323, 677 S.E.2d [444,] 446." (emphasis added)).

This broader, regulatory means of addressing the need for law enforcement officers and the public to have information regarding certain convicted sex offenders may seem burdensome, but it is not penal or punitive. We note that defendant has argued vigorously for a different result regarding the burden imposed on him by the registration requirements as they currently exist. Without addressing each individual point raised by defendant, we acknowledge these arguments and note that they have been previously addressed and rejected by our Courts. *See State v. Williams*, 207 N.C. App. 499, 505, 700 S.E.2d 774, 777-78 (2010). Moreover, this Court has held that Article 27A of Chapter 14 of our North Carolina General Statutes sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of *ex post facto* laws. *See id.* Therefore, in light of this Court's prior decisions rejecting the argument that our sex offender registration statutes constitute an *ex post facto* law, we are bound to say that petitioner's argument lacks merit. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different

case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). Accordingly, petitioner's argument is overruled.

III.

[3] Finally, petitioner argues that the trial court's denial of the petition violated petitioner's substantive due process rights. However, since petitioner did not raise this argument before the trial court, this argument has not been properly preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (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."); *see also Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. Moreover, we note that even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14-208.5 *et seq.* do not amount to a violation of due process. *See State v. Williams*, ___ N.C. App. ___, ___, 761 S.E.2d 662, 665-68 (2014) (holding that the imposition of lifetime SBM did not violate the defendant's due process); *White*, 162 N.C. App. at 189-90, 590 S.E.2d at 453 ("[T]he notice provisions of the registration act (N.C. Gen. Stat. §§ 14-208.8 [*et seq.*]) remove the statute from due process attacks[.]" (citation omitted)). Accordingly, petitioner's argument is deemed waived. The order of the trial court is, therefore, affirmed.

Affirmed.

Judges ELMORE and ERVIN concur.

IN RE J.K.P.

[238 N.C. App. 334 (2014)]

IN THE MATTER OF J.K.P.

No. COA14-756

Filed 31 December 2014

1. Constitutional Law—right to counsel—waiver

The trial court did not err in a termination of parental rights case by allowing respondent to waive her right to counsel and proceed pro se. The transcript showed that respondent asked to represent herself and read and signed the waiver of counsel form.

2. Constitutional Law—right to counsel—notice of right

The argument of respondent in a termination of parental rights case that she was never told she had a right to be represented by counsel was rejected. The trial court explained that respondent was represented by court-appointed counsel because she filed an affidavit of indigency and requested a lawyer and that if she chose to represent herself she would waive her right to a lawyer. Respondent repeatedly invoked her right to have court-appointed representation during the juvenile proceedings and was represented by counsel at various points throughout the proceedings, and respondent read and signed the waiver form.

3. Jurisdiction—clerical error—correction after notice of appeal

The trial court had jurisdiction to amend a waiver of counsel form after appeal where the court first checked the not knowing and voluntary box on the waiver form, then amended the form several days later to show that respondent's waiver was knowing and voluntary. The trial court's findings on the form, and its additional contemporaneous statements at that hearing, show that the trial court made an inadvertent clerical mistake by checking the wrong box. Under N.C.G.S. § 1A-1, Rule 60(a), the trial court had jurisdiction to correct that mistake at any time before the record on appeal was docketed in the Court of Appeals.

Appeal by respondent mother from order entered 4 April 2014 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 9 December 2014.

Roger A. Askew for petitioner-appellee Wake County Human Services.

Administrative Office of the Courts Appellate Counsel, Tawanda N. Foster, for guardian ad litem.

Edward Eldred for respondent-appellant mother.

DIETZ, Judge.

Respondent, the mother of J.K.P., appeals from an order terminating her parental rights. She argues that the trial court erred in allowing her to waive her right to counsel and represent herself at the termination hearing. She also contends that the trial court improperly corrected a clerical mistake on the waiver-of-counsel form after entering judgment. We reject Respondent's arguments and affirm.

Facts and Procedural Background

The Wake County Department of Human Services (WCHS) filed a petition on 29 May 2012 alleging that J.K.P. was a neglected juvenile. By order filed 17 August 2012, the trial court adjudicated J.K.P. neglected. Respondent appealed and this Court affirmed the adjudication on 7 May 2013. *In re J.P.*, ___ N.C. App. ___, 741 S.E.2d 928 (2013) (unpublished). WCHS filed a motion to terminate Respondent's parental rights on 18 September 2013.

The trial court held a review and permanency planning hearing on 2 October 2013, at which Respondent indicated she did not wish to have her court-appointed attorney, Mr. Milholland, represent her. The trial court allowed both Respondent's court-appointed attorney and her guardian ad litem to withdraw. Respondent later filed an affidavit of indigency requesting court-appointed counsel, and the trial court appointed Ms. Ferrell to represent Respondent in the termination hearing.

Then, at a January 2014 pre-trial hearing, Respondent informed the trial court that she changed her mind, did not want Ms. Ferrell to represent her, and intended to retain an attorney.

The trial court held the termination hearing on 28 February 2014. Ms. Ferrell advised the court that "[Respondent] has informed me that she wishes to represent herself in this matter." The trial court engaged in a lengthy colloquy with Respondent about her desire to proceed pro se and her understanding of the consequences, and then asked Respondent to read and sign a waiver-of-counsel form. Respondent checked the box indicating that she intended to represent herself and signed her name. On the signed form, the court made written findings of fact to show

that Respondent's waiver was "knowing and voluntary"; however, the court checked the box corresponding with the conclusion of law that "[p]arent's waiver is *not* knowing and voluntary." Respondent proceeded *pro se* at the termination hearing.

By order filed 4 April 2014, the trial court terminated Respondent's parental rights. Respondent timely filed her notice of appeal on 6 May 2014. Three days later, before the record on appeal was docketed with this Court, the trial court signed appellate entries and amended Respondent's waiver form to correct the court's mistaken check mark in the wrong box on the waiver-of-counsel form.

Analysis

I. Request to Relieve Counsel and Proceed *Pro Se*

[1] On appeal, Respondent contends the trial court erred in allowing her to waive her right to counsel and proceed *pro se* at the termination hearing. A parent's right to counsel in a termination of parental rights proceeding is governed by N.C. Gen. Stat. § 7B-1101.1, which provides:

> (a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right.
>
> . . . .
>
> (a1) A parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary.

N.C. Gen. Stat. § 7B-1101.1 (2013).

Here, after the trial court explained the nature of the proceeding and the consequences of waiving the right to counsel, Respondent read and signed a waiver form containing the following language:

> I am the parent of the juvenile named above. I have been told that I have the right to have a lawyer represent me. I have been told of my right to have a lawyer appointed by the Court if I cannot afford to hire one. With full knowledge of these rights, I knowingly, willingly, and understandingly choose as follows:
>
> . . . .

> I do not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do.

Below Respondent's signature on the form, the trial court made specific factual findings supporting its conclusion that Respondent's waiver of counsel was knowing and voluntary. The court found that Respondent understood she was represented by a court-appointed attorney and agreed that her court-appointed attorney "has not been ineffective." The court also found that Respondent knew she "was expected to know the law of [termination of parental rights], rules of evidence, [and] rules of court."

Respondent does not challenge these findings by the trial court, nor does she argue that these findings are insufficient to support the trial court's conclusion that her waiver was knowing and voluntary. Instead, Respondent argues that she never requested to represent herself and that the court never told her she had a right to counsel. We disagree.

First, the transcript unquestionably shows that Respondent asked to represent herself. Before the proceedings began, the trial court engaged in the following lengthy colloquy about Respondent's right to counsel:

> MS. FERRELL: Okay. But I would make my motion to withdraw at this time based on my client's wishes for me to do so, Your Honor.
>
> THE COURT: *And, [Respondent], why is it that you wish to represent yourself?*
>
> [RESPONDENT]: *Because every attorney that you put on my case has given me ineffective assistance of counsel and y'all violating my constitutional rights.*
>
> . . . .
>
> THE COURT: All right. On October the 2nd you said in the underlying case that you did not want a court-appointed attorney. When we -- in the underlying case. On the TPR I asked you what you wanted to do about a lawyer and on November the 25th you filed an affidavit of indigency and I appointed Ms. Ferrell to represent you. Is that correct?
>
> [RESPONDENT]: Yes, you did.
>
> THE COURT: Okay. And what is your basis for saying that you have been given ineffective assistance of counsel by Ms. Ferrell?

[RESPONDENT]: I was never given ineffective assistance of counsel by Ms. Ferrell.

THE COURT: You were not.

[RESPONDENT]: I was given --

THE COURT: You were not --

[RESPONDENT]: Right.

THE COURT: -- is that correct?

[RESPONDENT]: I was given ineffective assistance of counsel by Mr. Locke Milholland from the beginning.

THE COURT: And since you have not been given ineffective assistance of counsel by Ms. Ferrell why is it that you wish to waive your right to a lawyer instead of allowing Ms. Ferrell to represent you?

[RESPONDENT]: Because I'm going to wait until I find me the appropriate attorney even if I have to find a way to get me an attorney to come and regard [sic] and research this case and do this case over from the beginning because this whole case like I said in the beginning was fallacious. That whole petition was fallacious.

THE COURT: Well, ma'am, we've moved on from there. We're at the termination of parental rights case today.

[RESPONDENT]: You can do whatever you want. But I'm going to let you know that I'm going to get an attorney to show that you violated my constitutional rights.

THE COURT: And you're more than welcome to do that, [Respondent]. I'm asking you why for purpose of the termination of parental rights case that was filed in September why you are asking that Ms. Ferrell not represent you in this hearing today.

[RESPONDENT]: Because y'all work together.

THE COURT: Because we work together?

[RESPONDENT]: Yes.

THE COURT: Ms. Ferrell is in private practice, she has no association with me, ma'am.

[RESPONDENT]: That's hard to believe.

. . . .

THE COURT: Well, ma'am, let me just tell you what the law says. The law says that these cases are to be heard within 90 days of the filing. We're two months past that. You have a very effective lawyer that's been appointed to represent you. I'm asking why you want to waive your right to counsel.

[RESPONDENT]: Because like I said, I've been violated by this courtroom since the beginning.

THE COURT: Okay.

. . . .

THE COURT: *And why is it that you believe that you should not -- you should represent yourself?*

[RESPONDENT]: *Because I'll make sure what I say is everything is on record so that when I do have an attorney, he can go back to the record and see everything that I was said [sic] in that courtroom and what was mentioned in that courtroom.*

THE COURT: Okay. And you know that the Court of Appeals had a complete record of everything that was said during your adjudication hearing.

[RESPONDENT]: Uh-huh.

THE COURT: You know that?

[RESPONDENT]: And neither did I get a chance to speak on record because you had Mr. Locke Milholland speaking for me.

THE COURT: Well, I had Mr. Milholland at your request because –

[RESPONDENT]: That was not my request.

THE COURT: Because you filed an affidavit of indigency, ma'am, Mr. Milholland was appointed to represent you. I don't choose the attorney that represents people.

[RESPONDENT]: But you could have chose to get him off my case if I requested for him to be off my case as an attorney.

THE COURT: When you made that motion, ma'am, I did relieve him of that obligation.

[RESPONDENT]: You relieved him at the last moment.

THE COURT: I relieved him at the hearing in which you requested that he not represent you, ma'am, because you signed a waiver of your right to counsel in the underlying case.

[RESPONDENT]: Right.

THE COURT: Do you understand that if you represent yourself at this hearing today that you will be expected to know the law pertaining to termination of parental rights? Do you understand that?

[RESPONDENT]: Uh-huh.

THE COURT: Do you understand that law?

[RESPONDENT]: No.

THE COURT: Do you understand that you would be expected to know the Rules of Evidence?

[RESPONDENT]: Yes.

THE COURT: Do you know the Rules of Evidence?

[RESPONDENT]: Yes.

THE COURT: Do you understand that you would be expected to understand --

[RESPONDENT]: Matter of fact, let me correct that. I understand the law of termination of parental rights.

THE COURT: Okay. And --

[RESPONDENT]: Let me correct that to you.

THE COURT: And do you understand that you would have to know the Rules of Court?

[RESPONDENT]: Yes.

THE COURT: And do you believe you understand those?

[RESPONDENT]: Some of it.

THE COURT: Okay. Do you believe that you are qualified to represent yourself?

[RESPONDENT]: As an attorney, no.

THE COURT: Okay. Do you think you can do a better job than an attorney can?

[RESPONDENT]: No.

THE COURT: *Then why are you choosing to represent yourself?*

[RESPONDENT]: *Because I don't want an attorney on my case that's not going to properly represent me.*

. . . .

THE COURT: *I'm asking you, ma'am, do you understand what you're doing if you waive your right to a lawyer?*

[RESPONDENT]: *Yes.*

THE COURT: And are you sure that you want to represent yourself or do you want Ms. Ferrell to represent you today?

[RESPONDENT]: How can she represent me if she don't [sic] even know what's going on? She understand [sic] some of it, not everything.

. . . .

THE COURT: Ma'am, what are you going to do about a lawyer in this case? Are you going to allow Ms. Ferrell to continue to represent you or are you going to represent yourself?

[RESPONDENT]: I'm fine where I'm at, Your Honor, thank you.

THE COURT: I don't know what that means, ma'am.

[RESPONDENT]: I'm good, I don't need Ms. Ferrell. Thank you.

THE COURT: You do not want Ms. Ferrell to represent you?

> [RESPONDENT]: I'm good. Thank you.
>
> THE COURT: Then I need you to step over and see the Clerk, sign a waiver of your right to counsel by marking box number two.

At the beginning of this lengthy colloquy, Respondent's counsel informed the court that Respondent did not want to be represented by counsel. The trial court then asked Respondent repeatedly "why is it that you wish to represent yourself?" Each time, Respondent provided a cogent answer confirming that she wanted to represent herself. As Respondent explained, she intended to hire a lawyer in the future to collaterally attack the constitutionality of the proceedings. Respondent believed that, unlike her appointed counsel, "I'll make sure . . . everything is on record so that when I do have an attorney, he can go back to the record and see everything that I was said [sic] in that courtroom."

[2] Moreover, Respondent read and signed the waiver of counsel form which expressly states that "I do not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do." Accordingly, we reject Respondent's argument that she never asked to represent herself.

Respondent next argues that the trial court never told her she had a right to counsel. But during the lengthy colloquy quoted above, the trial court explained that Respondent was represented by court-appointed counsel because she "filed an affidavit of indigency" and requested a lawyer. Indeed, Respondent repeatedly invoked her right to have court-appointed representation during the juvenile proceedings in the trial court and was represented by counsel at various points throughout the proceedings. Moreover, the court told Respondent that if she chose to represent herself "you waive your right to a lawyer." Finally, Respondent read and signed the waiver form which stated that "I have been told that I have the right to have a lawyer represent me. I have been told of my right to have a lawyer appointed by the Court if I cannot afford to hire one." Thus, we reject Respondent's argument that she was never told she had a right to be represented by counsel.

In sum, the trial court properly concluded that Respondent knowingly and voluntarily chose to represent herself at trial. However unwise that decision may have been, it "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta v. California*, 422 U.S. 806, 834 (1975) (internal quotation marks omitted) (discussing the right to self-representation in criminal proceedings).

II. Clerical Error on the Waiver of Counsel Form

[3] Respondent next argues the trial court expressly found that her waiver of counsel was *not* knowing and voluntary because the court checked the "not knowing and voluntary" box on the waiver form. Respondent acknowledges that the trial court amended the form several days after entering judgment to show that Respondent's waiver *was* knowing and voluntary, making the following handwritten change on the form:

> The court ex mero moto amends the clerical error made by the court on 2/28/14[.] The parent's waiver was knowing and voluntary[.] The court marked the incorrect box.

But Respondent argues that the trial court lacked jurisdiction to make this amendment because Respondent already had filed her notice of appeal. We disagree.

Generally, "a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *In re C.N.C.B.*, 197 N.C. App. 553, 555, 678 S.E.2d 240, 241 (2009) (citation and internal quotation marks omitted). But Rule 60(a) of the North Carolina Rules of Civil Procedure permits the trial court to correct "clerical mistakes" in orders and judgments on its own initiative, even after notice of appeal has been filed, so long as the case has not yet been docketed with this Court. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013).

"Clerical mistakes" are typographical errors, mistakes in writing or copying something into the record, or other, similar mistakes that are not changes in the court's reasoning or determination. *See In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006). Importantly, this Court has held that the term "clerical mistakes" includes the "inadvertent checking of boxes on forms." *Id.*

The AOC form used here, entitled "Waiver of Parent's Right to Counsel," contains a "Findings of Fact" section that requires the trial court to make findings of fact demonstrating that the waiver is knowing and voluntary. The section contains six blank lines for the court to make such findings of fact. The form also includes a "Conclusions of Law" section which requires the trial judge to check one of two boxes concluding either: (1) "The parent's waiver is knowing and voluntary," or (2) "The parent's waiver is not knowing and voluntary."

Here, the trial court hand-wrote five sentences in the "Findings of Fact" section of the form and checked the box associated with the conclusion of law that Respondent's waiver "is not knowing and voluntary."

But, as explained above, the handwritten findings of fact support the conclusion that Respondent's waiver of counsel *was* knowing and voluntary. Moreover, the trial court made additional remarks at the conclusion of the hearing that confirm the court intended at the time to check the "is knowing and voluntary" box. The trial court stated:

> I am just going to very briefly state for the record once again that [Respondent] has chosen to represent herself today, that she had an attorney throughout the underlying proceeding. I believe that the first time she may have mentioned she wanted another attorney may have been at a September hearing which we in fact did not have.
>
> She waived her right to an attorney in an underlying proceeding in October. I believe the record would show at the October hearing she represented herself during that hearing. But by that time the Court had already ordered that [sic] the permanent plan for the child to be adoption and we were moving on with that. There have not been any additional review hearings since that time.
>
> At her request in November I did appoint an attorney to represent her for these proceedings and today she has determined that she did not want that person. She didn't want any attorney to represent her.

We hold that the trial court's findings on the form, and its additional, contemporaneous statements at that hearing, show that the trial court made an inadvertent "clerical mistake" by checking the wrong box. Under Rule 60(a), the trial court had jurisdiction to correct that mistake at any time before the record on appeal was docketed in this Court. N.C. Gen. Stat. § 1A-1, Rule 60(a). Because the court corrected this clerical mistake before the appeal was docketed, we reject Respondent's jurisdictional argument.

Conclusion

The trial court's findings support its conclusion that Respondent knowingly and voluntarily waived her right to counsel at the termination proceeding below. Accordingly, we reject Respondent's arguments and affirm the trial court's judgment.

AFFIRMED.

Judges STROUD and DILLON concur.

IN RE L.M.

[238 N.C. App. 345 (2014)]

IN THE MATTER OF L.M.

No. COA14-868

Filed 31 December 2014

1. **Child Abuse, Dependency, and Neglect—permanency planning hearing—guardianship—verification of guardian**

   The trial court did not err by awarding guardianship of a minor to his foster father because there was evidence that the foster father understood the legal significance of guardianship. The foster father testified regarding the care he had provided to the minor and signed a form acknowledging that he would assume responsibility for him without the assistance of the Department of Social Services.

2. **Child Abuse, Dependency, and Neglect—permanency planning hearing—guardianship—verification of guardian**

   The trial court erred by awarding guardianship of a minor to his foster mother because there was no evidence that the foster mother understood the legal significance of guardianship. The foster mother did not testify or sign a guardianship form. The order was remanded.

3. **Child Abuse, Dependency, and Neglect—permanency planning hearing—guardianship—best interest of the child**

   The trial court did not abuse its discretion in determining that guardianship with the foster parents was in the minor's best interest. Even though there was evidence that the mother had made improvements and the minor wanted to return to her, there was evidence supporting the conclusion that the foster parents would provide the best home for him.

Appeal by respondent mother from order filed 20 May 2014 by Judge John B. Carter, Jr., in Robeson County District Court. Heard in the Court of Appeals 2 December 2014.

J. Hal Kinlaw, Jr., for petitioner-appellee Robeson County Department of Social Services.

Ryan McKaig for respondent-appellant mother.

Kilpatrick Townsend & Stockton LLP, by Susan H. Boyles and Elizabeth L. Winters, for guardian ad litem.

McCULLOUGH, Judge.

Respondent mother appeals from an order awarding legal guardianship of her son L.M. ("Lance")[1] to foster parents. We affirm in part and vacate and remand in part.

I. Background

Although the record indicates that Robeson County Department of Social Services ("DSS") has been involved with respondent's family off and on since 1992, Lance's case began on 10 January 2002 when DSS filed a juvenile petition alleging Lance was a neglected juvenile in that he lived in an environment injurious to his welfare. Pending a hearing on the petition, Lance was removed from respondent's home and placed in the nonsecure custody of DSS. Lance was four years old at the time.

Following a 20 February 2002 adjudication and disposition hearing, on 22 March 2002, the trial court filed an order adjudicating Lance a neglected juvenile and awarding custody to DSS, who was to arrange foster care or other placement. The permanent plan for Lance was set for reunification.

At the recommendation of DSS, on 27 May 2004, Lance began a trial placement with respondent. However, on 12 July 2004, DSS filed a juvenile petition alleging Lance was a neglected juvenile based on the suspected abuse of another child in respondent's home. Lance was removed from respondent's home at that time, but was later allowed to return when the trial court dismissed the petition on 28 July 2004.

On 5 September 2008, DSS filed another juvenile petition alleging Lance was a neglected juvenile on the basis that he was living in an unsuitable environment. Lance was again removed from the home and placed with foster parents. Following an adjudication and disposition hearing on 17 December 2008, on 16 January 2009, the trial court filed an order adjudicating Lance neglected and awarding custody of Lance to DSS for foster placement.

On 19 January 2011, the trial court issued a permanency planning review order returning Lance to respondent's home for another trial placement. However, the trial placement was terminated shortly thereafter and Lance was removed from respondent's home and returned to foster placement. Following further proceedings on 18 May 2011, the trial court adjudicated Lance a neglected juvenile and changed

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

the permanent plan from reunification to guardianship. The trial court filed adjudication and disposition orders on 20 July 2011.

On 19 March 2014, the case came on for a permanency planning hearing in Robeson County District Court. Following the hearing, the trial court, the Honorable John B. Carter, Jr., entered an order awarding guardianship of Lance to his foster parents. Respondent appeals from the order awarding guardianship of Lance to his foster parents.

II. Discussion

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 192 (2002)). "If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *Id.* (citing *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003)).

[1] In her first argument on appeal, respondent contends the trial court erred in creating a guardianship without a proper verification of the appointed guardians, the foster parents. Specifically, respondent contends the foster parents should have been questioned about their understanding of a guardian's responsibilities and their willingness and ability to fulfill those responsibilities.

The Juvenile Code, Chapter 7B of the North Carolina General Statutes, authorizes the appointment of a guardian for a juvenile "[i]n any case . . . when the court finds it would be in the best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-600(a) (2013). Yet, "[i]f the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c); *see also* N.C. Gen. Stat. § 7B-906.1(j) (2013). As respondent acknowledges in her brief, this Court has previously recognized that the Juvenile Code does not "require that the court make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007). It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship. *Id.*

In the present case, testimony at the permanency planning hearing showed that except for a brief trial placement with respondent, Lance,

who was sixteen years old at the time of the hearing, had resided with the foster parents since the age of nine. All accounts seemed to indicate that Lance was doing well in the foster home. The foster father testified he had been working to get Lance off of medication and he had taken Lance on several trips, including an extended trip to Canada. The foster father indicated that those efforts had been successful, as Lance was no longer taking medication, was performing well in school, and was active in church. The foster father further testified that he had encouraged Lance to go into the military and law enforcement; and was actively working with Lance and supporting him financially to reach those goals. The DSS caseworker indicated that the foster father was willing to accept guardianship and when the foster father was directly questioned whether he was willing to continue to provide care to Lance, the foster father replied "I want to take guardianship of him."

Moreover, Lance's foster father, along with the judge presiding over the permanency planning hearing, executed a form on 19 March 2014 which indicates the foster father appeared before the court and "acknowledged to assume the responsibility of [Lance] . . . without the assistance of [DSS.]" In doing so, the foster father acknowledged that DSS was released of all responsibility related to Lance and that he willingly accepted all responsibility of Lance.

We hold that, based upon the consideration of the above evidence, the trial court performed the required verification of the foster father. Thus, respondent's argument as it relates to the foster father is overruled.

[2] Although there was sufficient evidence to verify Lance's foster father as a suitable guardian, we hold there was insufficient evidence that Lance's foster mother understood and accepted the responsibilities of guardianship.

As DSS concedes, the foster mother did not testify and did not sign a guardianship form. Nevertheless, DSS asserts the court's award of guardianship to both foster parents should stand under this Court's decision in *In re J.E.* We disagree. In *In re J.E.*, this Court held the trial court adequately complied with the verification requirement when it received into evidence and considered home studies showing the juveniles' maternal grandparents were aware of and committed to the responsibilities of raising the juveniles. 182 N.C. App. at 617, 643 S.E.2d at 73. Upon review of *In re J.E.*, we find it significant that the home studies before the trial court in *In re J.E.* referred to the "grandparents." *Id.* In the present case, the evidence before the trial court tended to relate to the foster father's role in raising Lance and his desire to continue doing so; there was no

evidence that the foster mother accepted responsibility for Lance. Thus, we hold the trial court did not properly verify the foster mother.

[3] In the second issue on appeal, respondent contends the trial court erred in determining that guardianship with the foster parents was in Lance's best interests.

In response, the guardian ad litem first asserts that respondent cannot challenge the determination that guardianship was in Lance's best interest because she did not challenge trial court's 20 July 2011 disposition order changing the permanent plan for Lance from reunification to guardianship following the termination of Lance's trial placement with respondent. While we acknowledge there may be merit to the guardian ad litem's assertion, for arguments sake, we address respondent's argument and hold the trial court did not err in the best interests determination.

"Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court . . . ." *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984). The decision of the trial court regarding best interests of a juvenile is within the trial court's discretion and will not be overturned absent an abuse of discretion. *See In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

In this case, respondent points to evidence that she obtained employment, found stable housing, developed a positive relationship with Lance, and that Lance desired to return to her custody; respondent then argues "[i]n light of [her] efforts and improvements and [Lance's] wishes, and in light of the Juvenile Code's preference for reunification with biological relatives, it was error for the trial court to determine that guardianship with foster parents was in the best interest of [Lance]."

While we agree with respondent that the evidence shows she has made progress, the evidence is not conclusive in the trial court's best interests analysis. There is also evidence to support the trial court's findings that Lance has been in the home of the foster parents for an extended period of time, that "[the foster father] has been actively involved in [Lance's] life[,]" "[t]hat the current plan for [Lance] is guardianship with a court approved caretaker[,]" and "[t]hat the return of [Lance] to the home of [respondent] would be contrary to the welfare of [Lance]."

Moreover, it is clear from the transcript of the 19 March 2014 permanency planning hearing that the trial court weighed respondent's

progress in the best interests determination. In announcing its decision in open court, the trial court explained,

> [t]he Court does find that [respondent] has made improvement in her life. [Respondent] does have adequate housing and employment and has personally done well at her individual life, but the Court does find that [respondent] does not adequately appreciate the needs of both children and would not be able to adequately care for them as they attend – as they progress toward adulthood. The Court, therefore, finds that it would be in [Lance's] best interest that guardianship be granted to [the foster father] . . . . The Court will continue supervised visits.

The court then reiterated to Lance,

> I understand that [Lance] would like to return home, but it's clear to the Court that there are certain needs that will not be met in your mother's home and the - not that she doesn't desire to try to meet those needs, but the Court is of the opinion that she's not able to adequately address them, and that failure or inability will prevent . . . you from reaching all the goals that you want to reach in life.

Based on the trial court's findings and the evidence presented, we hold the trial court did not abuse its discretion in determining that guardianship with the foster parents was in Lance's best interest.

III. Conclusion

For the reasons discussed above, we affirm the order of guardianship for the foster father and vacate and remand the order of guardianship for the foster mother.

Affirmed in part, vacated and remanded in part.

Judges CALABRIA and STROUD concur.

JACKSON v. CHARLOTTE MECKLENBURG HOSP. AUTH.

[238 N.C. App. 351 (2014)]

GARY W. JACKSON, PLAINTIFF
v.
CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM; AND KEITH A. SMITH, AS SENIOR VICE PRESIDENT AND GENERAL COUNSEL OF CHARLOTTE MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM, DEFENDANTS

No. COA13-1338

Filed 31 December 2014

Public Records—settlement documents—action initiated by public agency

The trial court erred by dismissing a public records action under N.C.G.S. § 1A-1, Rule 12(b)(6) where the action was brought against Carolinas Health System (CHS), a local unit of government, seeking documents from the settlement of an action involving investments initiated by CHS. Based on the language of N.C.G.S. § 132-1.3, the well-recognized structure of the Public Records Act, controlling Supreme Court precedent, the requirement that N.C.G.S. § 132-1.3 be construed consistently with other provisions of the Public Records Act and the Open Meetings Law, and subsequent legislation reflecting the General Assembly's views, that statute does not except from the Public Records Act settlement documents in actions instituted by public agencies falling within the Public Records Act.

Appeal by plaintiff from order entered 22 July 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 April 2014.

The Jackson Law Group, PLLC, by Gary W. Jackson, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Adam K. Doerr, for defendant-appellee.

GEER, Judge.

Plaintiff Gary W. Jackson appeals from an order granting defendants' motion to dismiss for failure to state a claim for relief under the North Carolina Public Records Act. Plaintiff argues that the trial court erred in interpreting N.C. Gen. Stat. § 132-1.3 (2013) to exempt from disclosure settlement documents pertaining to litigation

instituted by defendant Carolinas Healthcare System ("CHS") against a financial institution.

It is well established that the purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of "public records" under N.C. Gen. Stat. § 132-1 (2013). Our Supreme Court has held that only specific statutory exceptions exempt documents meeting that definition from disclosure. Because the Public Records Act does not contain a specific statutory exception for settlement documents arising out of litigation instituted by a State agency, we hold that the trial court erred, and we reverse.

Facts

The parties do not dispute that CHS is a local unit of government subject to the Public Records Act. In 2008, CHS filed a lawsuit against Wachovia Bank, allegedly in connection with financial losses suffered through its investment accounts maintained with Wachovia. On or about 5 June 2012, CHS entered into a confidential settlement agreement with Wachovia Bank ("the Wachovia settlement"), and CHS dismissed its suit against Wachovia with prejudice.

On 24 September 2012, plaintiff sent a written request to defendant Keith A. Smith in his capacity as Senior Vice President and General Counsel of CHS seeking production of a copy of the Wachovia settlement. On behalf of CHS, Mr. Smith refused to provide a copy of the document. On 21 November 2012, plaintiff filed a complaint against CHS and Mr. Smith in Mecklenburg County Superior Court requesting relief under N.C. Gen. Stat. § 132-9(a) and seeking to obtain a copy of the Wachovia settlement. CHS and Mr. Smith moved to dismiss plaintiff's action under Rule 12(b)(6) of the Rules of Civil Procedure.

The trial court granted the motion to dismiss as to all parties in an order entered 22 July 2013, construing N.C. Gen. Stat. § 132-1.3 as exempting the Wachovia Settlement from disclosure. Plaintiff timely appealed to this Court.[1]

Discussion

"Our standard of review on a motion to dismiss for failure to state a claim is *de novo* review." *S.N.R. Mgmt. Corp. v. Danube Partners* 141, LLC, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). "Pursuant to the

1. Plaintiff only appeals with respect to CHS and does not challenge the trial court's dismissal of the action with respect to Mr. Smith.

de novo standard of review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Blow v. DSM Pharmaceuticals, Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009) (internal quotation marks omitted).

The sole question presented by this appeal is whether settlement documents in actions brought by an entity covered by the Public Records Act constitute "public records" within the meaning of N.C. Gen. Stat. § 132-1(a), which provides that "public record"

> shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

As our Supreme Court has held, "[t]he term 'public records,' as used in N.C.G.S. § 132–1, includes all documents and papers made or received by any agency of North Carolina government in the course of conducting its public proceedings." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999).

It is well established that the purpose of the Public Records Act is to "provide[] for liberal access to public records." *Id.* Consistent with that purpose, "in the absence of *clear statutory exemption or exception*, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992) (emphasis added). In other words, "North Carolina's public records act grants public access to documents it defines as 'public records,' absent *a specific statutory exemption*." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686 (emphasis added).

Since the Wachovia settlement agreement falls within the definition of "public record" set out in N.C. Gen. Stat. § 132-1, s*ee News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981) (holding that "the public has the right to know the terms of settlements made by the [Wake County Hospital] System in actions for wrongful terminations of its agreements"), the public is entitled to access to that agreement unless there is a "specific statutory exemption" for settlement agreements in actions instituted by the public agency, *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686.

In claiming that the Wachovia settlement agreement is exempt from the Public Records Act, CHS and the trial court relied solely upon N.C. Gen. Stat. § 132-1.3, which provides:

> (a) Public records, as defined in G.S. 132-1, *shall include* all settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, *except in an action for medical malpractice against a hospital facility*. No agency of North Carolina government or its subdivisions, nor any counsel, insurance company or other representative acting on behalf of such agency, shall approve, accept or enter into any settlement of any such suit, arbitration or proceeding if the settlement provides that its terms and conditions shall be confidential, except in an action for medical malpractice against a hospital facility. No settlement document sealed under subsection (b) of this section shall be open for public inspection.
>
> (b) No judge, administrative judge or administrative hearing officer of this State, nor any board or commission, nor any arbitrator appointed pursuant to the laws of North Carolina, shall order or permit the sealing of any settlement document in any proceeding described herein except on the basis of a written order concluding that (1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement. Such order shall articulate the overriding interest and shall include findings of fact that are sufficiently specific to permit a reviewing court to determine whether the order was proper.
>
> (c) Except for confidential communications as provided in G.S. 132-1.1, the term "settlement documents," as used herein, shall include all documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence,

> settlement agreements, consent orders, checks, and bank drafts.

(Emphasis added.)

The plain language of N.C. Gen. Stat. § 132-1.3 contains only two "specific statutory exemption[s]," *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686, to the Public Records Act: (1) settlement documents "in an action for medical malpractice against a hospital facility," and (2) settlement documents in certain actions against state agencies when sealed by a written court order containing specified findings of fact. N.C. Gen. Stat. § 132-1.3. N.C. Gen. Stat. § 132-1.3 contains no specific exception or exemption to the Public Records Act for settlement agreements arising out of litigation commenced by an entity that is subject to the Public Records Act.

Nonetheless, CHS and the trial court concluded that N.C. Gen. Stat. § 132-1.3(a)'s specification that settlement agreements in cases "instituted against" any State agency are public records necessarily means that the General Assembly intended to exclude settlements in cases instituted by a State agency. In other words, according to CHS and the trial court, we should imply an exception to the Public Records Act for settlement agreements in cases brought by a State agency because of the General Assembly's failure to specifically include such settlements in N.C. Gen. Stat. § 132-1.3. This contention -- implying an exemption -- cannot be reconciled with the Supreme Court's mandate that a document is a public record in the absence of a "specific statutory exemption." *Virmani*, 350 N.C. at 465, 515 S.E.2d at 686. *See also Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of the Courts*, ___ N.C. App. ___, ___, 754 S.E.2d 223, 229 (holding that ACIS database is a "public record" because "there is no clear statutory exemption or exception applicable to the ACIS database"), *disc. review granted*, ___ N.C. ___, 758 S.E.2d 862 (2014); *McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 471, 596 S.E.2d 431, 438 (2004) (holding that "[a]s there is [n]o statute specifically exempt[ing] from public access [under the Public Records Act] materials held by a local government attorney that qualify as work product which would apply to the City Attorney, the City Attorney's documents are not protected from disclosure as work product" (internal quotation marks omitted)).

Indeed, CHS' argument is analogous to the one made in *Poole*: the State defendants contended that the exception in N.C. Gen. Stat. § 132-1.1 for communications from an attorney to a State agency should be expanded to encompass records from a public agency to its attorney.

330 N.C. at 482, 412 S.E.2d at 17. In rejecting this argument, our Supreme Court held: "The Public Records Law provides only one exception to its mandate of public access to public records: written statements to a public agency, by any attorney serving the government agency, made within the scope of the attorney-client relationship. . . . In the context of what such agencies must disclose pursuant to the Public Records Law, the statute itself defines the scope of the privilege. . . . Under this definition only those portions of the Poole Commission meeting minutes revealing written communications from counsel to the Commission are excepted from disclosure under the Public Records Law." *Id.* at 481-83, 412 S.E.2d at 17. Thus, under *Poole*, we are limited to the letter of the statutory exemption, and, in N.C. Gen. Stat. § 132-1.3, the only exceptions are for settlements in medical malpractice cases and for properly sealed settlements.

Even if we were to disregard the unique structure of the Public Records Act and our Supreme Court's holdings interpreting it,[2] CHS' argument is inconsistent with our Supreme Court's construction of comparable language in other statutes. CHS' argument amounts to a contention that *expressio unius est exclusio alterius*: because the legislature expressly included settlement documents from litigation instituted against a State agency as public records, it necessarily excluded from the Public Records Act settlement documents in proceedings instituted by a State agency.

In *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 111, 143 S.E.2d 319, 321 (1965) (quoting N.C. Gen. Stat. § 136-89.59), the Supreme Court addressed whether N.C. Gen. Stat. § 136-89.59 (1963), by providing for the construction of highways " 'embodying safety devices, including' " a list of safety devices, precluded the construction of highways with safety devices not specified in the statute. Our Supreme Court explained that " '[t]his is not a situation which calls for the application of the maxim, *expressio unius est exclusio alterius*.' " 265 N.C. at 120, 143 S.E.2d at 327 (quoting *Guar. Trust Co. of N.Y. v. W.V. Tpk. Comm'n*, 109 F.2d 286, 296 (1952)).

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2. That structure and the well-established law relating to the Public Records Act render immaterial CHS' argument that other statutes unrelated to the Public Records Act reference both proceedings instituted by and pending against a public agency. *See, e.g.*, N.C. Gen. Stat. §§ 162A-77.1(4) (2013) (addressing "actions, suits, and proceedings pending against, or having been instituted by," a sewage district); 160A-505(b)(5) (2013) (discussing suits "pending against, or having been instituted by," redevelopment commissions).

Instead, " '[t]he term "includes" is ordinarily a word of enlargement and not of limitation[,]' " and " '[t]he statutory definition of a thing as "including" certain things does not necessarily place thereon a meaning limited to the inclusions.' " *Id.* (quoting *People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 639, 268 P.2d 723, 733 (1954)). Applying these principles, the Supreme Court held that " '[c]learly, by use of the word "including" the lawmakers intended merely to list examples of known safety devices, but not to exclude others equally well known.' " *Id.* (quoting *Guar. Trust Co. of N.Y.*, 109 F.2d at 296). *See also Polaroid Corp. v. Offerman*, 349 N.C. 290, 301, 507 S.E.2d 284, 292 (1998) (acknowledging that "the phrase 'shall include' indicates an intent to enlarge the statutory definition, not limit it"), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2014).

Here, under *Pine Island* and *Polaroid Corporation*, the General Assembly, by using the phrase "shall include" in N.C. Gen. Stat. § 132-1.3, used a term of enlargement and not a term of limitation. Consequently, N.C. Gen. Stat. § 132-1.3 acknowledges that settlement documents in actions instituted against a State agency are public records under N.C. Gen. Stat. § 132-1 subject to two specified exceptions. In doing so, the phrase does not indicate that only such settlement documents are public records. To hold otherwise would be contrary to the statutory construction principles set out in *Pine Island* and *Polaroid Corporation*. *See also Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100, 86 L. Ed. 65, 70, 62 S. Ct. 1, 4, (1941) (noting that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle").

Nonetheless, in support of its position, CHS points to the legislative history of N.C. Gen. Stat. § 132-1.3, noting that the language exempting settlement documents in medical malpractice actions was not added until the second version of the bill enacting N.C. Gen. Stat. § 132-1.3. *See* S.B. 456, s.1 (1st ed. 1989). CHS contends that the original absence of medical malpractice language indicates that the legislature intended, from the bill's inception, to exempt from public records all settlement documents apart from those in litigation instituted against an agency. Nothing in the original bill is inconsistent with our analysis. Under *Pine Island* and *Polaroid Corporation*, the language of the initial bill simply confirmed that settlements in actions against State agencies are public records with one specific statutory exception: settlement agreements sealed by proper court order. It did not exempt other settlement agreements, and, therefore, the initial bill does not support CHS' position under the principles set out in controlling Supreme Court authority.

Further, N.C. Gen. Stat. § 132-1.3 must be construed consistently with other provisions of the Public Records Act. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004) (holding that "this Court does not read segments of a statute in isolation"; "[r]ather, we construe statutes *in pari materia*, giving effect, if possible, to every provision"). N.C. Gen. Stat. § 132-1.1(a) (emphasis added) provides an exception to the Public Records Act for communications by an attorney with a public agency "concerning any claim *against or on behalf of* the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, *settlement* or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected." However, "such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body." *Id.*

If we upheld CHS' and the trial court's construction of N.C. Gen. Stat. § 132-1.3, then settlement documents in actions instituted by a public agency would not be public records, but all "communications and copies thereof" from the agency's attorney relating to that settlement would become public record in three years. We do not believe that the General Assembly intended to allow the public to have access to attorney communications regarding settlements -- which would include, for example, letters attaching settlement agreement drafts -- but to deny access to the actual finalized settlement documents.

It is also a well-established principle of statutory construction that "'statutes *in pari materia* must be read in context with each other.'" *Wake Cnty. Hosp. System, Inc.*, 55 N.C. App. at 7, 284 S.E.2d at 546 (quoting *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976)). "'*In pari materia*' is defined as '[u]pon the same matter or subject.'" *Id.* at 7-8, 284 S.E.2d at 546 (quoting *Black's Law Dictionary* 898 (4th ed. 1968)). Here, N.C. Gen. Stat. § 143-318.11 (2013) -- part of the Open Meetings Law -- addresses the same matter or subject as N.C. Gen. Stat. § 132-1.3: the public's access to the terms of any settlement.

N.C. Gen. Stat. § 143-318.11(a)(3) allows a public body subject to the Open Meetings Law to meet in closed session with an attorney and "preserve the attorney-client privilege between the attorney and the public body," including meetings to discuss the settlement of "a claim" or "judicial action" without limitation as to whether the claim or action was instituted by or pending against the public body. However,

> [i]f the public body has approved or considered a settlement, *other than a malpractice settlement by or on behalf of a hospital*, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

Id. (emphasis added). N.C. Gen. Stat. § 143-318.10(e) (2013) in turn provides that the minutes "shall be public records within the meaning of the Public Records Law," although "minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection *so long as public inspection would frustrate the purpose of a closed session*." (Emphasis added.)

Thus, the Open Meetings Law provides that "the terms of that settlement," N.C. Gen. Stat. § 143-318.11(3), shall become a public record at some point -- unless the settlement involves a malpractice settlement by or on behalf of a hospital. CHS' construction would lead to the anomalous result that settlement terms would be public under N.C. Gen. Stat. § 143-318.11, but not public under N.C. Gen. Stat. § 132-1.3. However, our construction of N.C. Gen. Stat. § 132-1.3 -- excepting from the Public Records Act only settlement documents in an action for medical malpractice against a hospital facility and in certain actions against state agencies when sealed by a proper court order -- is consistent with the plain language of N.C. Gen. Stat. § 143-318.11.

Finally, the General Assembly's recent enactment of N.C. Gen. Stat. § 114-2.4A, enacted on 2 August 2014, provides further evidence of the legislature's intent that settlement documents in actions instituted by a State agency are public records under the Public Records Act. "Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990).

N.C. Gen. Stat. § 114-2.4A provides the following in pertinent part:

> (a) Definition. -- For purposes of this section, the term "settlement" means an agreement entered into by the State or a State agency, with or without a court's participation, that ends (i) a dispute, lawsuit, or part of the dispute or lawsuit or (ii) the involvement of the State or State agency in the dispute, lawsuit, or part of the dispute or lawsuit. This term includes settlement agreements,

> stipulation agreements, consent judgments, and consent decrees.
>
> . . . .
>
> (g) Required Submission. – In addition to any other report or filing that may be required by law, and unless the settlement is sealed pursuant to a written order of the court in accordance with G.S. 132-1.3 or federal law, *the Attorney General's Office shall submit a copy to the Legislative Library of any settlement or other final order or judgment of the court in which the State or a State agency receives funds in excess of seventy-five thousand dollars ($75,000)*. The submission required by this subsection shall be made within 60 days of the date (i) the settlement is entered into or (ii) the final order or judgment of the court is entered. *Any information deemed confidential by State or federal law shall be redacted from the copy of the settlement or other final order or judgment of the court prior to submitting it to the Legislative Library.*

(Emphasis added.) In short, N.C. Gen. Stat. § 114-2.4A requires that settlement agreements in which a State agency receives in excess of $75,000.00 will be available to the public at the Legislative Library with the sole exceptions being settlement agreements sealed under N.C. Gen. Stat. § 132-1.3 and "confidential" material redacted from the agreement.[3]

Obviously, the vast majority of settlement agreements involving payments to the State agency will be in actions instituted by the State agency. The fact that N.C. Gen. Stat. § 114-2.4A requires that a copy of such settlement agreements be available at the Legislative Library is inconsistent with any reading of N.C. Gen. Stat. § 132-1.3 that settlement documents in actions instituted by a State agency are not public records.

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3. The General Assembly frequently requires the filing of documents in the Legislative Library in addition to other offices, ensuring public access. *See, e.g.*, N.C. Gen. Stat. § 120C-220 (2013) (requiring Secretary of State to furnish State Legislative Library with list of all persons who have registered as lobbyists and whom they represent); N.C. Gen. Stat. § 143-47.7 (2013) (requiring appointing authority to file written notice of appointment with Governor, Secretary of State, Legislative Library, State Library, State Ethics Commission, and State Controller); N.C. Gen. Stat. § 160A-111 (2013) ("The city clerk shall file a certified true copy of any charter amendment adopted under this Part with the Secretary of State, and the Legislative Library.").

CHS makes various policy arguments supporting its position that settlement agreements in actions initiated by public agencies should not be public. In *Poole*, our Supreme Court was clear: it is not our role to expand upon the General Assembly's specific statements in the Public Records Act. *See Poole*, 330 N.C. at 481, 412 S.E.2d at 16 ("While we recognize this policy argument, we must yield to the decision of the General Assembly, which enacted several specific exceptions to the Public Records Law, none of which permanently protects a deliberative process like that of the Commission after the process has ceased.").

Based on the language of N.C. Gen. Stat. § 132-1.3, the well-recognized structure of the Public Records Act, controlling Supreme Court precedent, the requirement that we construe § 132-1.3 consistently with other provisions of the Public Records Act and the Open Meetings Law, and subsequent legislation reflecting the General Assembly's views, we hold that N.C. Gen. Stat. § 132-1.3 does not except from the Public Records Act settlement documents in actions instituted by public agencies falling within the Public Records Act. We, therefore, reverse the trial court's order granting defendants' motion to dismiss.

Reversed.

Judges STEPHENS and ERVIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 16 December 2014)

ANDERSON v. ANDERSON No. 14-748	Surry (12CVD460)	Remanded
ARNOLD v. INS. CO. OF STATE OF PA. No. 14-715	Edgecombe (12CVS996)	Vacated
BECKER v. N.C. CRIM. JUSTICE EDUC. & TRAINING STANDARDS COMM'N No. 14-568	Edgecombe (13CVS106)	Affirmed
BOBBITT v. EIZENGA No. 14-586	Davie (10CVD13)	Vacated and Remanded
BRANCH BANKING & TR. CO. v. HARRELSON BLDG., LLC No. 14-512	Forsyth (13CVS6326)	Affirmed
BRYANT v. HOLZINGER No. 14-711	Randolph (11CVS2727)	Affirmed
CURRITUCK CLUB PROP. OWNERS ASS'N, INC. v. MANCUSO DEV., INC. No. 14-476	Currituck (11CVS118) (11CVS118)	Affirmed
DAWKINS v. CRUZ No. 14-834	Wake (13CVS7633)	Dismissed
GORDON v. GORDON No. 14-484	Wake (11CVD17745)	Affirmed
IN RE C.M.W. No. 14-768	Gaston (10JT200)	Affirmed
IN RE H.H. No. 14-902	Polk (13JA31-32)	Affirmed in Part; Remanded in Part
IN RE J.C.S. No. 14-685	Nash (12JT102)	Affirmed
IN RE L.B-M. No. 14-747	Orange (12JT98)	Affirmed
IN RE M.M.M. No. 14-298	Onslow (11JT166)	Affirmed
IN RE N.D.S. No. 14-826	Wake (12JT219)	Affirmed

IN RE O.K.D No. 14-755	Wilkes (13JA62) (13JA63) (13JA64)	Affirmed
IN RE R.D.L. No. 14-781	Robeson (10JT206)	Affirmed
IN RE S.T. No. 14-825	Guilford (13JA434) (13JA435)	Affirmed
IN RE T.D.J. No. 14-853	Gaston (12JT72-74)	Affirmed
IN RE Z.M. No. 14-866	Orange (11JT2)	Affirmed
JOHNSON v. CITY OF RALEIGH No. 14-730	N.C. Industrial Commission (992368)	Affirmed
LEDBETTER v. CITY OF DURHAM No. 14-656	Durham (12CVS5955)	Affirmed
LOGAN v. MORGAN No. 14-487	Guilford (11CVS8678)	Affirmed
NIXON ASSOCS., LLC v. BROWN No. 14-783	New Hanover (12CVS3806)	Affirmed
PREMIER RES. OF N.C., INC v. KELLY No. 14-602	Mecklenburg (13CVS21279)	Affirmed
RIGSBEE v. WALSH No. 14-628	Onslow (13CVS3660)	Affirmed
STATE v. AMYX No. 14-383	Pasquotank (10CRS51675)	Affirmed
STATE v. AVERY No. 14-601	Mecklenburg (09CRS240639)	No Prejudicial Error
STATE v. BENITEZ No. 14-542	Lee (09CRS1227)	Reversed and remanded; judgment vacated
STATE v. DEESE No. 14-508	Mecklenburg (11CRS202838-40)	Vacated in part; no error in part

STATE v. HIGHSMITH No. 14-608	Pitt (11CRS51062-63)	No Error
STATE v. HOXIT No. 14-439	Transylvania (12CRS50388-97)	New Trial
STATE v. JOHNSON No. 14-543	Mecklenburg (10CRS257480) (11CRS23263)	No Error
STATE v. LENNON No. 14-806	Guilford (12CRS24794) (12CRS70321)	No Prejudicial Error
STATE v. MOORE No. 14-636	Cabarrus (06CRS54375) (10CRS903)	No Error
STATE v. QUICK No. 14-758	Montgomery (11CRS50655)	No Plain Error
STATE v. TSILIMOS No. 13-1369	Mecklenburg (10CRS242533)	Affirmed
STATE v. WILLIAMS No. 14-754	Wake (09CRS25171)	No prejudicial error
STATE v. WYNN No. 14-280	Beaufort (08CRS50412)	New Trial
TONEY v. EDGERTON No. 14-453	Rutherford (12CVD864)	Affirmed
VALLEY PROTEINS, INC. v. ECO-COLLECTION SYS., LLC No. 14-717	Cumberland (12CVS2387)	Reversed, vacated, and remanded.
WALLY v. CITY OF KANNAPOLIS No. 13-1425	Cabarrus (13CVS1562)	Affirmed
WELLS v. CHARLOTTE MECKLENBURG HOSP. AUTH. No. 14-700	N.C. Industrial Commission (X88380) (Y05621)	Affirmed
WILLIAMS v. LYNCH No. 14-769	Mecklenburg (10CVS9849)	No Error
WITCHER v. PARSONS No. 14-684	Guilford (13CVS1470)	Vacated and Remanded

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