238 N.C. App.—No. 3 Pages 365-609

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 15, 2016

MAILING ADDRESS: The Judicial Department
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THE COURT OF APPEALS

OF

NORTH CAROLINA

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COURT OF APPEALS

CASES REPORTED

FILED 31 DECEMBER 2014

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APPEAL AND ERROR

Appeal and Error—appealability—criminal judgment vacated—no explanation—not double jeopardy—not reviewed on merits—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a felonious breaking or entering charge arising from defendant's attempt to obtain vacant property by adverse possession. The trial court arrested judgment; given that the trial court did not explain its decision to arrest judgment and that judgment does not appear to have been arrested to avoid double jeopardy, the trial court's decision effectively vacated defendant's felonious breaking or entering conviction and deprived the Court of Appeals of the ability to review defendant's challenge to conviction on the merits. **State v. Pendergraft, 516.**

Appeal and Error—appealability—writ of certiorari—unclear order date—Respondent juvenile's writ of certiorari was granted and the Court of Appeals considered his challenges to the trial court's order on the merits as a result of the fact that the date was unclear for when the orders that the juvenile sought to challenge on appeal were entered. The juvenile may have lost his right to seek appellate review of these orders through no fault of his own. **In re Z.T.W., 365.**

Appeal and Error—appellate jurisdiction—notice of appeal—writ of certiorari—The trial court dismissed defendant's writ of certiorari requesting appellate review because her notice of appeal was deemed insufficient to confer jurisdiction. Defendant's notice of appeal listed the file numbers of the judgments she sought to appeal, the Court of Appeals was the only court with jurisdiction to hear defendant's appeal, and the State did not suggest that it was misled by either of the errors in the notice of appeal. **State v. Sitosky, 558.**

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Workers' Compensation—conclusions of law—failure to make reasonable efforts to return to work—supported by findings of fact—In a workers' compensation case, the Industrial Commission's findings of fact supported its conclusion that plaintiff failed to establish that he suffered from a continuing disability after 16 November 2011. The Commission found that plaintiff did not make reasonable efforts to return to work after 16 November 2011 and did not have a pre-existing condition that would make it futile for him to do so. **Seamon v. Ingersoll Rand, 452.**

Workers' Compensation—credit for payments made before award—from plan entirely funded by employer—not abuse of discretion—In a workers' compensation case, the Industrial Commission did not abuse its discretion by awarding defendant employer a credit for certain disability payments it made to plaintiff before workers' compensation benefits were awarded. Plaintiff's election to pay approximately $10.00 per month for an additional twenty percent of coverage in addition to the forty percent coverage provided by defendant did not render the insurance plan "no longer fully employer funded." In addition, the payment of the employer-funded coverage by insurance carrier Cigna was not a payment from an outside source. Because the plan was employer-funded, the Commission had the discretion to award a credit to defendant. **Seamon v. Ingersoll Rand, 452.**

Workers' Compensation—findings of fact challenged by plaintiff—manner of work—attempt to return to work—In a workers' compensation case, the Industrial Commission's findings of fact challenged by plaintiff were supported by competent evidence. Plaintiff misread or misinterpreted the findings regarding the manner in which he performed his job. In addition, there was no evidence in the record that plaintiff attempted to return to work, or that he had a pre-existing condition that would make it futile for him to do so. **Seamon v. Ingersoll Rand, 452.**

Workers' Compensation—findings of fact—nature of job and cause of injuries—supported by competent evidence—In a workers' compensation case, the Industrial Commission's findings of fact challenged by defendant were supported by plaintiff's testimony regarding the manner in which he performed his job and by his doctor's testimony regarding the nature and cause of the injuries. **Seamon v. Ingersoll Rand, 452.**

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Zoning—billboard sign—city ordinance—legal nonconforming signs could not be reestablished after discontinued use for more than a year—The trial court did not err by concluding that a billboard sign was not allowed based on a variance granted in 1992 for a sign located on the same property. The City's ordinance provided that legal nonconforming signs may not be reestablished after discontinued use for more than a year, and the pertinent structure was not in use for more than two years. The sign was installed without a permit and was larger than allowed by ordinance. **MYC Klepper/Brandon Knolls L.L.C. v. Bd. of Adjust. for City of Asheville, 432.**

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.

IN RE Z.T.W.

[238 N.C. App. 365 (2014)]

IN THE MATTER OF Z.T.W.

No. COA14-762

Filed 31 December 2014

1. Appeal and Error—appealability—writ of certiorari—unclear order date

Respondent juvenile's writ of certiorari was granted and the Court of Appeals considered his challenges to the trial court's order on the merits as a result of the fact that the date was unclear for when the orders that the juvenile sought to challenge on appeal were entered. The juvenile may have lost his right to seek appellate review of these orders through no fault of his own.

2. Probation and Parole—juvenile delinquency—hearsay evidence

The trial court did not err in a juvenile delinquency case by finding that respondent juvenile had violated the terms and conditions of his probation allegedly based solely on hearsay evidence. Juvenile's argument applied to adjudication rather than dispositional hearings.

3. Probation and Parole—juvenile delinquency—federally recognized disability

The trial court did not err in a juvenile delinquency case by finding that respondent juvenile willfully violated the terms and conditions of his probation allegedly without accounting for the fact that he had a federally recognized disability. Even if this aspect of juvenile's challenge to the trial court's orders were properly preserved for purposes of appellate review, it had no merit.

4. Probation and Parole—juvenile delinquency—secure custody pending placement in out-of-home setting

The trial court did not err in a juvenile delinquency case by ordering that respondent juvenile be held in secure custody pending placement in an out-of-home setting. As a result of the fact that juvenile had been adjudicated delinquent by the trial court and had also been found to be in violation of the terms and conditions of his probation, the trial court had the authority under N.C.G.S. § 7B-1903(c).

Review stemming from the allowance of a petition for the issuance of a writ of *certiorari* filed by juvenile for the purpose of challenging orders entered 18 March 2014 and 21 April 2014 by Judge Vershenia B.

Moody in Northampton County District Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Richard Croutharmel for the juvenile.

ERVIN, Judge.

Juvenile Z.T.W. appeals from orders finding him to be in willful violation of his juvenile probation, ordering that he be placed in an out-of-home placement, and requiring that he be held in secure custody pending placement out of his home. On appeal, Juvenile contends that the trial court erred by finding that he had violated the terms and conditions of his probation based solely on hearsay evidence, finding that he had willfully violated the terms and conditions of his probation without adequately considering Juvenile's federally recognized disability, and ordering that Juvenile be held in secure custody pending placement outside his home despite the fact that the evidence did not support the trial court's decision to place Juvenile in secure custody and the fact that the trial court's dispositional order lacked adequate findings of fact. After careful consideration of Juvenile's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

On 1 November 2013, the Department of Juvenile Justice and Delinquency Prevention filed petitions alleging that Juvenile should be adjudicated a delinquent juvenile based upon the commission of two simple assaults. On 19 November 2013, Judge W. Rob Lewis entered orders adjudicating Juvenile to be a delinquent juvenile based upon a finding that he had committed two simple assaults and placing Juvenile on juvenile probation for 12 months subject to certain terms and conditions. On 16 December 2013, DJJDP filed two more juvenile petitions alleging that Juvenile should be adjudicated a delinquent juvenile for committing the offenses of injury to real property and assault with a deadly weapon. On 20 December 2013, DJJDP filed a juvenile petition alleging that Juvenile should be adjudicated a delinquent juvenile for committing the offense of communicating threats. On 21 January 2014, Juvenile admitted to having committed the offenses of injury to real property and communicating threats in return for the State's agreement

to dismiss the petition alleging that he had committed the offense of assault with a deadly weapon. After accepting Juvenile's admission, Judge Lewis entered orders adjudicating Juvenile to be a delinquent juvenile based upon the commission of the offenses of injury to real property and communicating threats and placing Juvenile on juvenile probation for an additional period of 12 twelve months.

On 10 March 2014, DJJDP filed a motion for review alleging that Juvenile had willfully violated the terms and conditions of his probation by failing to regularly attend school, being suspended from school, and threatening a teacher. On 18 March 2014, the trial court entered an order finding that Juvenile had willfully violated the terms and conditions of his juvenile probation. On 21 April 2014, the trial court entered a supplemental order providing that Juvenile should be placed out of his home and that, pending his transition to the out-of-home placement, Juvenile should be held in secure custody. Juvenile noted an appeal to this Court from the 18 March 2014 order on 16 April 2014.

II. Legal Analysis

A. Appealability

[1] N.C. Gen. Stat. § 7B-2602 provides that an appeal may be noted from an order entered in a juvenile delinquency proceeding in open court following the rendition of judgment or in writing within ten days after the entry of judgment. The extent to which Juvenile noted his appeal from the 18 March 2014 order in a timely manner is not entirely clear, given that the lack of a file stamp on the 18 March 2014 order precludes us from being certain as to the exact date upon which the order in question was entered. Similarly, the absence of a file stamp on the 21 April 2014 order deprives us of any knowledge concerning the date by which Juvenile was required to note an appeal from that order. In apparent recognition of the jurisdictional issues raised by the procedural posture in which this case has come to us, Juvenile filed a petition simultaneously with his brief seeking the issuance of a writ of *certiorari* in order to permit us to examine the merits of his challenges to the trial court's orders in the event that he had failed to appeal from these orders in a timely manner, and we therefore need not address or resolve any issues that might otherwise arise with respect to the extent to which he noted his appeal from the trial court's orders in a timely fashion.

According to well-established North Carolina law, "[t]he writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action," N.C. R. App. P.

21(a)(1), with a showing that "the right of appeal has been lost through no fault of the petitioner" being generally sufficient to support the issuance of a writ of *certiorari*. *Johnson v. Taylor*, 257 N.C. 740, 743, 127 S.E.2d 533, 535 (1962). As a result of the fact that the date upon which the orders that Juvenile seeks to challenge on appeal were entered is unclear, Juvenile may have lost his right to seek appellate review of the orders in question through no fault of his own. As a result, in the exercise of our discretion, we hereby grant Juvenile's *certiorari* petition and will consider his challenges to the trial court's orders on the merits.

B. Validity of the Trial Court's Orders

1. Revocation of Probation Based on Hearsay Evidence

[2] In his first challenge to the trial court's orders, Juvenile contends that the trial court erred by finding that he had violated the terms and conditions of his probation based solely on hearsay evidence. As Juvenile has candidly acknowledged in his reply brief, however, the Supreme Court has rejected the validity of the position upon which his argument rests in its recent decision in *State v. Murchison*, __ N.C. __, __, 758 S.E.2d 356, 359 (2014) (holding that, since the formal rules of evidence do not apply in probation revocation hearings, the trial court did not err by relying solely on hearsay evidence in determining that the defendant had violated the terms and conditions of his probation).[1] In view of the fact that the Supreme Court has clearly held that an adult offender's probation may be revoked solely on the basis of hearsay, we are not inclined to take Juvenile up on the unsupported suggestion advanced in his reply brief to the effect that we should make a generalized analysis of the extent to which the manner in which Juvenile's revocation hearing adequately protected his procedural rights and are not persuaded that the trial court's failure to advise Juvenile of the risks that he incurred by testifying at the revocation hearing necessitates an award of appellate relief given that the decision upon which Juvenile's argument applies to adjudication, rather than dispositional, hearings. *In re J.R.V.*, 212 N.C. App. 205, 209, 710 S.E.2d 411, 413 (2011) (stating that N.C. Gen. Stat.

1. In view of the fact that the Supreme Court rejected the underpinnings of Juvenile's challenge to the trial court's determination that Juvenile had violated the terms and conditions of his probation, we need not address the validity of the State's contention that the conduct of a juvenile probation revocation hearing is governed by N.C. Gen. Stat. § 7B-2501(a) rather than by the statutory provisions governing adult probation revocation proceedings and that the evidence upon which the trial court based its revocation decision was, in fact, admissible under the exceptions to the prohibition against the admission of hearsay evidence applicable to public records and records of regularly conducted activities.

§ 7B-2405(4), under which the trial court has a duty to protect a juvenile's due process right "against self-incrimination" at an adjudication hearing, "requires, at the very least, *some* colloquy between the trial court and the juvenile to ensure that the juvenile understands his right against self-incrimination before choosing to testify at his adjudication hearing") (emphasis in original), *disc. review improvidently granted*, 365 N.C. 416, 720 S.E.2d 387 (2012). As a result, Juvenile is not entitled to relief from the trial court's orders on the basis of this contention.[2]

2. Willfulness of Violation

[3] Secondly, Juvenile contends that the trial court erred by finding that he willfully violated the terms and conditions of his probation without accounting for the fact that Juvenile has a federally recognized disability. More specifically, Juvenile contends that he had a federally recognized disability that determined his behavior and that the existence of this disability should have precluded the revocation of his probation. In addition, Juvenile contends that the trial court erred by revoking his probation given that the record contained evidence tending to show that any violation of the terms and conditions of his probation that he might have committed was not a willful one. Juvenile is not entitled to relief from the trial court's orders based on this set of contentions.

a. Standard of Review

"[A]ll that is required [in order for the trial court to revoke a juvenile's probation] is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the [juvenile] had, without lawful excuse, willfully violated a valid condition of probation." *In re O'Neal*, 160 N.C. App. 409, 412, 585 S.E.2d 478, 481, *disc. review denied*, 357 N.C. 657, 590 S.E.2d 270 (2003) (quotation marks and citation omitted). As a result, the revocation of a juvenile's probation simply requires proof "by a preponderance of the evidence that a juvenile has violated the conditions of his probation under N.C.

2. In addition to the argument discussed in the text, Juvenile contends that the trial court erred by allowing Juvenile's court counselor, Chris Langston, to read from a school report that had not been provided to Juvenile prior to the hearing. Juvenile has not, however, cited any authority requiring that evidence of this nature be provided to Juvenile before a probation revocation hearing. Although Juvenile does cite N.C. Gen. Stat. § 15A-1345(e), which provides that, "[a]t the hearing, evidence against the probationer must be disclosed to him," this statutory provision does not support the position that Juvenile has asserted before this Court given that the contents of the school report were disclosed to Juvenile at the hearing. Thus, Juvenile is not entitled to relief from the trial court's orders on the basis of this contention.

Gen. Stat. § 7B-2510(e)." *Id.* at 412-13, 585 S.E.2d at 481. In the event that the State establishes that a juvenile violated the terms and conditions of his probation, the juvenile bears the burden of demonstrating the existence of an inability to comply with the condition that he or she violated or some other lawful excuse for the juvenile's failure to comply with his or her obligations under the existing probationary judgment. *See State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (stating that "the burden is on the [juvenile] to present competent evidence of his inability to comply" and, in the event that the juvenile fails to adduce sufficient evidence of an inability to comply, "evidence of [juvenile's] failure to comply may justify a finding that [juvenile's] failure to comply was willful or without lawful excuse"). In the event that "a [juvenile] has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can properly order revocation." *Id.* at 567, 328 S.E.2d at 834.

Assuming that the trial court finds that a juvenile has willfully violated the terms and conditions of his or her probation, N.C. Gen. Stat. § 7B-2510(e) provides that "the court may continue the original conditions of probation, modify the conditions of probation, or . . . order a new disposition at the next higher level on the disposition chart." In instances involving permissive statutory language, such as the language contained in N.C. Gen. Stat. § 7B-2510(e), the validity of the trial court's actual dispositional decision is reviewed on appeal using an abuse of discretion standard of review. *In re A.F.*, __ N.C. App. __, __, 752 S.E.2d 245, 248 (2013). "[A]n abuse of discretion is established only upon a showing that a court's actions are manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *In re E.S.*, 191 N.C. App. 568, 573, 663 S.E.2d 475, 478 (internal quotation marks and citation omitted), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 231 (2008). As a result, a trial court's dispositional decision should be upheld on appeal unless the decision in question could not have been a reasoned one.

b. Validity of Dispositional Decision

The conditions of probation to which Juvenile was subject provided, in pertinent part, that he had to attend school regularly and obey all school-related rules and regulations. At Juvenile's probation violation hearing, the State presented evidence that, since he had been placed on probation, Juvenile had had numerous unexcused absences and had violated school rules by communicating threats to a teacher, an action that resulted in his suspension from school. As a result, the State clearly

met its burden of establishing that Juvenile violated the terms and conditions of the probationary judgment to which he was subject.

In his brief, Juvenile argues that the fact that he had an Individualized Education Plan that was based on his inability to control his behavior provided competent evidence from which the trial court could have determined that Juvenile did not willfully violate the terms and conditions of his probation when he threatened his teacher. However, instead of presenting evidence that he lacked the ability to comply with the conditions of probation to which he was subject at the hearing held before the trial court, Juvenile simply disputed the accuracy of the State's evidence concerning the events that transpired at the time that he allegedly threatened one of his teachers. For that reason, Juvenile does not appear to have properly preserved this contention for appellate review. N.C. R. App. P. 10(a)(1) (providing that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"). Moreover, even if we were to accept Juvenile's contention that the trial court's recognition in its initial disposition order that Juvenile had "an IEP from the school system" constituted evidence that Juvenile lacked the ability to control his behavior and comply with the applicable school rules, we note that the trial court, after hearing testimony from Juvenile and his mother, explicitly found that Juvenile was able to control his behavior and comply with the applicable school rules.[3] Juvenile has cited no authority requiring the trial court to make additional written findings relating to the effect of any disability from which Juvenile suffered on the willfulness determination in its order, and we have found none in the course of our own research.[4]

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3. The fact that the trial court appears to have based this determination, at least in part, on Juvenile's behavior in court does not, contrary to the argument advanced in Juvenile's brief, invalidate the trial court's decision since the differences in the environment that Juvenile faced in the courtroom and the academic environment goes to the weight to be given to the information available to the trial court rather than to its sufficiency to support a determination that Juvenile acted willfully when he threatened the teacher.

4. Admittedly, Juvenile does cite two cases in which this Court reversed trial court orders that failed to account for any age-related disability under which a young parent labored in determining whether grounds to terminate that parent's parental rights existed. *See In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002); *In re J.G.B.*, 177 N.C. App. 375, 384, 628 S.E.2d 450, 456-57 (2006). However, these decisions, while relevant in termination of parental rights proceedings, have no application in the juvenile probation revocation context.

As a result, even if this aspect of Juvenile's challenge to the trial court's orders were properly preserved for purposes of appellate review, we would find that it had no merit.

In addition, even if the trial court erred in finding that Juvenile had the ability to control his behavior and did not willfully violate the applicable school rules at the time that he communicated threats to a teacher, that fact would have no bearing on the extent to which he was willfully absent from school without a valid excuse on numerous occasions. The only justification that Juvenile has offered for his unexcused absences from school was that he left school when he was having a bad day, an explanation that the trial court could have readily found to be inadequate. Thus, in view of the fact that the trial court had the authority to enter a new dispositional order based solely on the fact that Juvenile's unexcused absences from school constituted a violation of the terms and conditions of his probation and the fact that the trial court had ample justification for determining that the only explanation that Juvenile offered for these unexcused absences was completely inadequate, the trial court did not err by entering a new dispositional order providing for Juvenile's placement in an out-of-home setting even if the fact that Juvenile had an IEP somehow operated to render his conduct in communicating threats toward one of his teachers something other than willful. As a result, Juvenile is not entitled to relief from the trial court's orders on the basis of this set of contentions.

3. Placement in Secured Custody

[4] In his final challenge to the trial court's orders, Juvenile contends that the trial court erred by ordering that Juvenile be held in secure custody pending placement in an out-of-home setting. More specifically, Juvenile contends that the facts did not warrant placing him in secure custody and that the trial court's order placing him in secure custody failed to include findings delineating the evidence upon which it relied in reaching its decision to place him in secure custody and the purposes sought to be achieved by placing him in secure custody in violation of N.C. Gen. Stat. § 7B-1906(g). Juvenile's contention lacks merit.

a. Mootness

As an initial matter, the State contends that Juvenile's challenge to the trial court's decision to place him in secure custody pending his transfer to an out-of-home placement is not properly before us on mootness grounds given that the passage of time makes it likely that Juvenile is no longer in secure custody. Aside from the fact that the record

contains no definitive information concerning Juvenile's current placement, we conclude that Juvenile's challenge to the trial court's temporary secure custody order is properly before us on the grounds that the issue that Juvenile seeks to raise "is capable of repetition, yet evading review." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989). An order is reviewable pursuant to this exception to the general rule prohibiting the judicial system from addressing and resolving moot issues in the event that "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* (alteration in original). In *In re D.L.H.*, 198 N.C. App. 286, 289, 679 S.E.2d 449, 452 (2009), *rev'd on other grounds*, 364 N.C. 214, 694 S.E.2d 753 (2010), this Court heard the juvenile's challenge to the trial court's decision that she be held in the Guilford County Juvenile Detention Center following her release from detention. In ruling that this Court could consider the juvenile's challenge to the trial court's detention order in spite of the fact that the underlying order had become moot, we stated that, "since the issues in this case concern the scope of statutory authority of the trial court, we address the merits of juvenile's appeal as the matters in controversy are likely to recur." *Id.* Similarly, Juvenile's challenge to the trial court's decision to have him held in secure custody pending his transfer to an out-of-court placement requests that we review an order implementing an inherently temporary measure that is likely to recur in other instances in the future. As a result, for both of these reasons, we will address the merits of the trial court's decision to have Juvenile held in secure custody pending his placement outside the home.

b. Applicable Legal Principles

N.C. Gen. Stat. § 7B-1906(g) provides that:

> If the court determines that the juvenile meets the criteria in [N.C. Gen. Stat. § 7B-1903] and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

A careful review of the relevant statutory language establishes, contrary to Juvenile's contention, that N.C. Gen. Stat. § 7B-1906(g) has no

application to the situation that is before us in this case.[5] Instead, N.C. Gen. Stat. § 7B-1906(g) applies when the trial court holds a hearing to determine whether to continue a juvenile's secure custody following an initial accusation of delinquency rather than when the trial court orders that a juvenile be held in secure custody pending the effectuation of a legally authorized out-of-home placement. The latter situation is addressed in N.C. Gen. Stat. § 7B-1903(c), which provides that, "[w]hen a juvenile has been adjudicated delinquent, the court may order secure custody pending the dispositional hearing or pending placement of the juvenile pursuant to [N.C. Gen. Stat. § 7B-2506]." As a result, our review of Juvenile's challenge to the trial court's decision that he be held in secure custody pending his transfer to an out-of-home placement is limited to determining whether the applicable provisions of the trial court's order violated N.C. Gen. Stat. § 7B-1903(c). Appellate review of a trial court order entered in reliance upon a statutory provision employing permissive language is reviewed to determine whether the trial court abused its discretion, *In re A.F.*, __ N.C. App. at __, 752 S.E.2d at 248, with such an abuse of discretion having occurred in the event "that a court's actions are manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *In re E.S.*, 191 N.C. App. at 573, 663 S.E.2d at 478 (internal quotation marks and citation omitted).

C. Validity of Secure Custody Decision

Although Juvenile asserts that the record did not support the trial court's decision that he should be held in secure custody pending his transfer to an out-of-home placement, we do not find this contention persuasive. As we understand its provisions, N.C. Gen. Stat. § 7B-1903(c) allows a juvenile to be held in secure custody pending disposition or placement in the event that the "juvenile has been adjudicated delinquent." As a result of the fact that Juvenile had been adjudicated delinquent by the trial court and had also been found to be in violation of the terms and conditions of his probation, the

5. Juvenile's reliance on our holding in *In re V.M.*, 211 N.C. App. 389, 712 S.E.2d 213 (2011), is similarly misplaced. In that case, we reversed a dispositional order based upon the trial court's failure to make written findings as required by N.C. Gen. Stat. § 7B-2501(c) in support of an order placing the juvenile in secure custody until his 18th birthday. *Id.* at 391-92, 712 S.E.2d at 215-16. As a result of the fact that the order at issue in *In re V.M.* involved a challenge to the trial court's primary dispositional decision rather than to an interim measure that was taken in order to effectuate a longer-term dispositional decision and the fact that Juvenile has not challenged the trial court's dispositional decision in reliance on N.C. Gen. Stat. § 7B-2501(c), *In re V.M.* has no bearing on the validity of Juvenile's attack upon the trial court's order at issue here.

trial court clearly had the authority to hold Juvenile in secure custody pursuant to the authority granted by N.C. Gen. Stat. § 7B-1903(c).

In addition, we have no difficulty determining that the trial court had ample justification for its decision to hold Juvenile in secure custody pending his transfer to an out-of-home placement. In its order, the trial court incorporated the report of Juvenile's court counselor, Mr. Langston, which spoke to Juvenile's suspension from school, his anger-related difficulties, and his disobedience while living at home, by reference. In light of these determinations, Mr. Langston recommended that Juvenile be placed in secure custody pending his placement out of the home. Based on Mr. Langston's recommendations and the testimony provided by Juvenile, Juvenile's mother, and Deputy Ray Lynch, who served as the resource officer at Juvenile's school, the trial court concluded that a decision to order that Juvenile be kept in secure custody pending placement in a group home was proper, noting that, "if [Juvenile is kept] in secure custody he goes to school, he gets his education . . . any medication he needs, any treatment he needs."[6] Thus, the trial court had ample support for a decision that Juvenile should be held in secure custody pending his transfer to an out-of-home placement.[7] As a result, Juvenile is not entitled to relief from the trial court's secure custody order on the basis of the arguments advanced in his briefs.

III. Conclusion

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

AFFIRMED.

Judges ELMORE and DAVIS concur.

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6. In his reply brief, Juvenile argues that the trial court failed to make adequate findings of fact concerning the reason for requiring that Juvenile be held in secure custody pending his transfer to an out-of-home placement in violation of N.C. Gen. Stat. § 7B-2512 (providing that "[t]he dispositional order shall . . . contain appropriate findings of fact and conclusions of law"). However, Juvenile has not cited any authority in support of his contention that a trial court electing to place a juvenile in secure custody pending transfer to an out-of-home placement is required to make detailed findings in support of this decision, and we know of none.

7. Although N.C. Gen. Stat. § 7B-1903(c) does not, as we have already held, require the trial court to make findings of fact in support of a decision to hold a juvenile in custody pending transfer to a longer-term placement, we believe that the trial court's decision to incorporate Mr. Langston's report into its order by reference would satisfy the finding requirement set out in N.C. Gen. Stat. § 7B-1906(g) in the event that that statutory provision had any application to the situation that is before us in this case, not to mention the findings requirement set out in N.C. Gen. Stat. § 7B-2512.

LACEY v. KIRK

[238 N.C. App. 376 (2014)]

MARY LACEY AND JONATHAN LUCAS, PLAINTIFFS
v.
BONNIE KIRK, INDIVIDUALLY AND AS ATTORNEY-IN-FACT, BONNIE KIRK AS TRUSTEE OF THE MARY FRANCES COCHRAN LONGEST TESTAMENTARY TRUST, AND BONNIE KIRK AS EXECUTRIX OF ESTATE OF MARY FRANCES COCHRAN LONGEST, DEFENDANT

NO. COA14-688

Filed 31 December 2014

1. Appeal and Error—preservation of issues—brief—arguments not pursued—abandoned

Although defendant noted an appeal from the denial of several post-trial motions, the arguments in her brief were directed solely at the denial of her motion for a new trial pursuant to N.C.G.S. § 1A-1, Rule 59. As a result, defendant's appeal from the denial of her other post-trial motions was deemed abandoned.

2. Trials—judge's direction to defendant—not a comment on credibility

In context, the trial court's decision to urge defendant to "tell the truth" was nothing more than an effort to persuade defendant to refrain from giving confusing answers and did not constitute a comment concerning defendant's credibility.

3. Trials—comment by court—not an assertion about defendant's position—not a statement that defendant was being deceptive

In context, a comment by the trial court was nothing more than a reiteration of the trial court's prior statement that defendant should not testify about statements made by other people and was not an assertion that defendant's position had no merit or that defendant was being deceptive.

4. Trials—judge's instruction to answer the questions—restatement of defendant's answers—no error

The trial court did not err when attempting to address defendant's failure to answer directly the questions posed to her. The trial court's comments were made for a legitimate purpose and were consistent with the comments that the trial court made to other witnesses.

5. Trial—comments to defendant—outside the presence of jury—not prejudicial

Defendant in an action for a breach of fiduciary duty and defamation was not entitled to relief from the trial court's judgment on

the basis of comments made to defendant outside the presence of the jury. Defendant did not establish that these comments prejudiced her chances for a more favorable outcome at trial.

6. Trials—comments by trial judge—impatience—both sides treated equally

The defendant in a breach of fiduciary duty and defamation case did not receive a new trial where she contended that the trial court made inappropriate comments to or about her trial counsel. Although the record clearly indicated that the trial court exhibited a certain degree of impatience during the trial, it meted out equal treatment to counsel for both parties and did not make inappropriate jokes.

7. Damages and Remedies—compensatory—supported by evidence—stipulation

The record provided ample support for the compensatory damages awarded to plaintiffs in an action for breach of fiduciary duty and defamation arising from an estate. Although defendant argued that the jury's award of compensatory damages to each plaintiff was contrary to stipulations involving interest, interest began at the date of reasonable distribution and the stipulations allowed the jury to determine when a distribution from the estate could reasonably have been made. Moreover, although defendant argued that the jury's decision to award equal damages to each plaintiff also violated a stipulation concerning shares in the estate, the evidentiary record supported the jury's overall damage award and it is not for appellate court to second-guess the means by which the jury calculated the award of damages.

8. Damages and Remedies—punitive damages—not excessive

A jury award of punitive damages in a breach of fiduciary duty claim arising from an estate was not grossly excessive. Although defendant argued that her actions were not particularly egregious given that she did not do anything more than merely delaying distribution, her conduct considered in its entirety was exceedingly reprehensible.

9. Damages and Remedies—punitive damages—ratio to compensatory—not excessive

A 38 to 1 ratio of punitive to compensatory damages in a breach of fiduciary duty case was not excessive given the ratios held not to be excessive in other cases.

10. Damages and Remedies—punitive damages—no criminal liability—award not excessive

Although defendant argued that a punitive damage award was excessive because she was not subjected to criminal liability for her conduct, nothing in our case law requires the availability of a criminal sanction to uphold a punitive damages award and the fact that defendant was merely subject to a civil rather than a criminal sanction does not in any way serve to mitigate the reprehensibility of her conduct.

11. Defamation—damages—accusation of murder—emotional trauma

The trial court did not err by denying defendant's motion for a new trial concerning the amount of compensatory damages the jury awarded for defamation. Defendant made oral communications to several people in which she accused plaintiff Lacy of having committed murder; any failure on plaintiff Lacey's part to establish pecuniary loss as a result of defendant's statements was simply irrelevant. Moreover, the testimony that plaintiff Lacey provided at trial was more than sufficient to establish that she experienced significant emotional trauma stemming from defendant's false accusations.

12. Attorney Fees—award reduced due to large punitive damages—improper

The trial court abused its discretion by reducing the amount of attorney fees it awarded to plaintiffs based on the fact that plaintiffs received a large punitive damages award. Plaintiffs did not challenge any of the trial court's findings of fact as lacking in sufficient evidentiary support. The use of a substantial punitive damages award as the sole reason for reducing an otherwise reasonable attorney fee award involved reliance upon a factor that has no reasonable bearing on a proper attorney fee award.

Appeal by defendant from judgment entered 24 February 2014 and orders entered 10 March 2014 by Judge G. Wayne Abernathy in Alamance County Superior Court and cross-appeal by plaintiffs from order entered 10 March 2014 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 5 November 2014.

Wishart Norris Henninger & Pittman, PA, by Molly A. Whitlatch and Pamela S. Duffy, for Plaintiffs.

Robert A. Hassell Attorney At Law, P.A., by Robert A. Hassell, for Defendant.

ERVIN, Judge.

Defendant Bonnie Kirk appeals from a judgment awarding compensatory and punitive damages to Plaintiffs based on Plaintiffs' claim for breach of fiduciary duty and awarding Plaintiff Lacey compensatory and punitive damages for defamation, from an order denying Defendant's post-trial motions, and from an order awarding attorneys' fees and costs to Plaintiffs. On appeal, Defendant argues that this Court should order a new trial on the grounds that the trial court made inappropriate remarks to Defendant and Defendant's counsel that violated her right to a fair trial and that the trial court's decision to award compensatory and punitive damages for breach of fiduciary duty and compensatory damages for defamation lacked adequate record support and was contrary to law. Plaintiffs Mary Lacey and Jonathan Lucas cross-appeal from an order awarding attorneys' fees and costs to Plaintiffs. On appeal, Plaintiffs argue that the trial court erred by reducing the amount of the attorneys' fee award based on the jury's decision to award punitive damages in Plaintiffs' favor. After careful consideration of the parties' challenges to the trial court's judgment and orders in light of the record and the applicable law, we conclude that the trial court's judgment awarding damages based on Plaintiffs' claims for breach of fiduciary duty and defamation should be affirmed, that the trial court's order denying Defendant's post-trial motions should be affirmed, and that the trial court's order awarding attorneys' fees should be vacated and that this case should be remanded to the Alamance County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

On 24 June 2011, Mary Frances C. Longest died in Alamance County. Ms. Longest's last will and testament was admitted to probate in common form on or about 6 July 2011. Ms. Longest's will devised fifty percent of her estate to her daughter, Defendant Bonnie Kirk, and fifty percent of her estate to Plaintiffs, who were her grandchildren, with one-third of the fifty percent share allotted to the grandchildren having been devised to Plaintiff Lacey and the remaining two-thirds of the fifty percent share allotted to the grandchildren having been devised to Plaintiff Lucas. Defendant was named executrix in Ms. Longest's will.

On 18 September 2012, Plaintiffs filed a complaint, petition for partition, petition for declaratory judgment, and motion for preliminary injunction against Defendant, individually and as attorney-in-fact for Ms. Longest, as trustee of the Mary Frances Cochran Longest Testamentary Trust, and as executrix of the estate of Mary Frances Cochran Longest.

In their complaint, Plaintiffs asserted a number of claims for relief, including claims for breach of the fiduciary duty that Defendant owed to Plaintiffs as executrix of Ms. Longest's estate and for defamation of Plaintiff Lacey based on Defendant's assertion that Plaintiff Lacey had murdered Ms. Longest.[1] On 19 November 2012, Defendant filed an answer in which she denied that she was liable to Plaintiffs for breach of fiduciary duty and defamation and asserted that Plaintiffs had stolen from Ms. Longest and that Plaintiff Lacey had murdered Ms. Longest.

On 5 June 2013, following a mediated settlement conference, the parties entered into and signed a memorandum of settlement. On 25 July 2013, Plaintiffs filed a motion to enforce the settlement agreement. At a hearing held on 6 August 2013, Defendant stated that she would not comply with the terms of the settlement agreement. As a result, Plaintiffs withdrew their motion to enforce the settlement agreement, indicated that they would seek a trial on the merits in this case, and announced their intention to prosecute a petition before the Clerk of Superior Court seeking to have the letters testamentary that had been issued to Defendant revoked. On 29 August 2013, the Clerk of Superior Court entered an order revoking the letters testamentary that had been issued to Defendant.

On 7 January 2014, the trial court granted summary judgment in favor of Plaintiff Lacey with respect to the defamation claim.[2] The issue of liability for breach of fiduciary duty and the issue of the amount of compensatory and punitive damages that should be awarded to Plaintiffs for breach of fiduciary duty and defamation came on for trial before the trial court and a jury at the 7 January 2014 civil session of Alamance County Superior Court. On 10 January 2014, the jury returned a verdict finding that Defendant had breached her fiduciary duty to Plaintiffs in the course of administering Ms. Longest's estate and awarding each Plaintiff $6,569.02 in compensatory damages and $300,000 in punitive damages. In addition, the jury awarded Plaintiff Lacey $50,000 in compensatory damages and $100,000 in punitive damages based upon her defamation claim.

At the conclusion of the trial, Defendant made oral motions to set aside the verdict and for a new trial, both of which the trial court

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1. Plaintiffs voluntarily dismissed a number of the other claims asserted in their complaint without prejudice on 11 February 2013.

2. Defendant did not contest her liability to Plaintiff Lacey on defamation-related grounds at the summary judgment hearing.

indicated would be denied. On 23 January 2014, Plaintiffs filed a motion seeking an award of attorneys' fees and costs that was accompanied by a number of supporting affidavits. On 24 February 2014, the trial court entered a written judgment based upon the jury's verdict.[3] On 10 March 2014, the trial court entered orders granting Plaintiffs' motion for an award of attorneys' fees, in part, and an order denying Defendant's post-trial motions. Defendant noted an appeal to this Court from the trial court's judgment, the order denying Defendant's post-trial motions, and the order awarding attorneys' fees and costs. On 28 March 2014, Plaintiffs filed a notice of cross-appeal from the trial court's attorneys' fee order.

II. Substantive Legal Analysis

[1] Although Defendant noted an appeal from the denial of the post-trial motions that she made pursuant to N.C. Gen. Stat. § 1A-1, Rules 50, 59, and 60, the arguments advanced in Defendant's brief before this Court are directed solely at the denial of the motion for a new trial that she made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. As a result, Defendant's appeal from the denial of her other post-trial motions is deemed abandoned. N.C. R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

"[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). As a result, "a trial judge's discretionary order pursuant to [N.C. Gen. Stat. §] 1A–1, Rule 59 for or against a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Id.* at 484, 290 S.E.2d at 603 (emphasis omitted). An abuse of discretion has occurred in the event that a trial court's discretionary decision is "manifestly unsupported by reason," a standard that requires the party seeking appellate relief to "show[] that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). " 'However, where the motion [made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59] involves a question of law or legal inference, our standard of

3. The trial court reduced the $300,000 punitive damage amount awarded to each Plaintiff by the jury based upon their breach of fiduciary duty claim as required by N.C. Gen. Stat. § 1D-25.

review is *de novo*.' " *N.C. Alliance for Transportation Reform, Inc. v. N.C. Dept. of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 107 (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (citation omitted)), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 812 (2007). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

A. Conduct of Trial Judge

In her initial challenge to the trial court's order, Defendant argues that she is entitled to a new trial on the grounds that the trial court made inappropriate remarks to and about Defendant and her counsel which deprived Defendant of her right to a fair trial. More specifically, Defendant argues that the trial court's repeated expressions of impatience with the manner in which Defendant and her counsel participated in the trial and expressions of opinions indicating that the trial court had a low opinion of Defendant's truthfulness unfairly prejudiced her chances for a more favorable outcome at trial. Defendant is not entitled to relief from the trial court's judgment on the basis of this set of arguments.

1. Relevant Legal Principles

"It is fundamental to due process that every defendant be tried 'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.' " *State v. Brinkley*, 159 N.C. App. 446, 450, 583 S.E.2d 335, 338 (2003) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). In view of the fact that " 'jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him,' " a trial judge " 'must abstain from conduct or language which tends to discredit or prejudice' any litigant in his courtroom." *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *Carter*, 233 N.C. at 583, 65 S.E.2d at 10). Put another way, "[t]he expression of opinion by the trial court on an issue of fact to be submitted to a jury . . . is a legal error." *Nowell v. Neal*, 249 N.C. 516, 520, 107 S.E.2d 107, 110 (1959) (citations omitted). A trial court's "duty of impartiality extends [from the litigant] to [her] counsel," so that a trial judge "should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in [the party's] behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983), *cert. denied*, 311 N.C. 404, 319 S.E.2d

275 (1984). However, a trial judge is permitted to "question a witness for the purpose of clarifying his [or her] testimony and promoting a better understanding of it." *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986).

" '[N]ot every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error.' " *Brinkley*, 159 N.C. App. at 447-48, 583 S.E.2d at 337 (quoting *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990) (citation omitted)). We use a totality of the circumstances test in evaluating whether a judge's comments were improper and will consider any erroneous statement to be harmless "[u]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)). Among the factors that have been considered in determining the prejudicial effect of a trial judge's comments are "whether the comment occurred in isolation, any ambiguity in the comment, and the degree to which the comment suggested lack of impartiality." *Marley v. Graper*, 135 N.C. App. 423, 426, 521 S.E.2d 129, 132 (1999), *cert. denied*, 351 N.C. 358, 542 S.E.2d 214 (2000). "Where a construction can properly and reasonably be given to a remark which will render it unobjectionable, it will not be regarded as prejudicial[,]" *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 104, 310 S.E.2d 338, 345 (1984), with the burden of establishing that the trial judge's remarks were prejudicial resting on Defendant. *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985).

2. Trial Court's Statements to Defendant

a. "Tell the Truth"

[2] In her brief, Defendant challenges the comment that the trial court made to Defendant during the following exchange, which addressed the ownership of a particular asset held by the estate:

> [Plaintiffs' Counsel]: So when you got this letter, did you understand that Ms. Lacey was just asking for information about the estate?
>
> [Defendant]: Not when there were things on here that Ms. Lacey knew were not true.
>
> [Plaintiffs' Counsel]: Objection, move to stike.

> [The Court]: Overruled, go ahead.
>
> [Defendant]: Does that mean I'm supposed to go ahead?
>
> [The Court]: You can answer the question.
>
> [Defendant]: Okay. For instance, the coin collection that was supposed to be Mother's, that was not Mother's. They should have known it had belonged to Daddy.
>
> [The Court]: Your father is dead.
>
> [Defendant]: Do you want me to finish or not?
>
> [The Court]: I want you to tell the truth. Your father was dead –
>
> [Defendant]: That's what I'm –
>
> [The Court]: -- and your mother had inherited the coin collection, correct?
>
> [Defendant]: Right.
>
> [The Court]: So it was your mother's, correct?
>
> [Defendant]: At that point in time, yes. But it said it was always owned by her. To me that means she's the one who started the coin collection. I'm sorry I made that distinction.

Although Defendant vigorously asserts that the trial court's instruction to Defendant to "tell the truth" constituted an expression of opinion to the effect that Defendant had testified in a perjurious manner, we do not find this argument persuasive. As we read the record, Defendant's statement that the coin collection belonged to her father could have potentially confused the jury given the fact that the death of Defendant's father meant that he could not have owned the property in question. In light of this risk of confusion, the trial court acted within lawful bounds by seeking clarification concerning the fact that Ms. Longest, instead of Defendant's father, owned the coin collection at the time of her death. When taken in context, we believe that the trial court's decision to urge Defendant to "tell the truth" was nothing more than an effort to persuade Defendant to refrain from giving what she should have known to be legally confusing answers and did not constitute a comment concerning Defendant's credibility.

b. "Then You've Got a Problem"

[3] Secondly, Defendant challenges certain remarks made by the trial court during the following colloquy between Defendant and her trial counsel:

> [Defendant's Counsel]: And so you were in a quandary, weren't you? I mean, you wanted to administer your mother's estate, didn't you?
>
> [Defendant]: Yes, I did. And I kept asking after the bank had told me that it belonged to me –
>
> [Defendant's Counsel]: Don't say what the –
>
> [Plaintiffs' Counsel]: Objection, move to strike, Your Honor.
>
> [The Court]: Sustained. And, ma'am, you cannot say what the bank said. I don't know whether the bank said that or not. Quit talking about what the bank said.
>
> [Defendant]: I don't know how to tell you what happened if I –
>
> [The Court]: Then you've got a problem.

According to Defendant, the trial court's statement that Defendant had a "problem" implied that Defendant was being deceptive and would have difficulty in proving her case. However, the record clearly reflects that, just prior to the making of this statement, the trial court had sustained an objection directed to Defendant's attempt to testify concerning a statement that had been made to her by a bank employee on hearsay-related grounds. After Defendant's trial counsel and the trial court instructed Defendant to refrain from testifying about what other people had told her, Defendant indicated that the limitations to which she was being subjected would make it difficult to explain what had happened, an interjection that resulted in the making of the challenged comment. When read in that context, the challenged comment seems to represent nothing more than a reiteration of the trial court's prior statement that Defendant should refrain from testifying about statements made by other people rather than an assertion that Defendant's position had no merit or that Defendant was being deceptive. As a result, given the fact that "a construction can properly and reasonably be given to [the trial court's] remark which will render it unobjectionable," *Colonial Pipeline*, 310 N.C. at 104, 310 S.E.2d at 345, Defendant was not, at a minimum, prejudiced by the trial court's comment.

c. "Answer the Question First"

[4] Thirdly, Defendant challenges the trial court's repeated instruction that Defendant should "answer the question first" before attempting to explain her answer and certain comments in which, according to Defendant, the trial court answered certain questions that had been posed to Defendant. In support of this argument, Defendant directs our attention to the following portions of the record:

> [Plaintiffs' Counsel]: Isn't it true, ma'am, that until you were removed, you never filed a claim against the estate for the cash in the safe deposit box?
>
> [Defendant]: I didn't know I had to.
>
> [The Court]: So the answer is no.
>
> [Defendant]: No, yes, sir.
>
> [The Court]: It's yes. I never filed –
>
> [Defendant]: Yes, I never filed a claim.
>
> . . . .
>
> [Plaintiffs' Counsel] And these are all assumptions that you made about Mary, correct?
>
> [Defendant]: After a good while.
>
> [Plaintiffs' Counsel]: Pardon?
>
> [Defendant]: After a good while. After –
>
> [The Court]: So the answer is yes, they're assumptions.
>
> [Defendant]: Yes.

Although Defendant contends that these exchanges prejudiced Defendant in the eyes of the jury, we note that "[t]he trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d 841, 861, *cert. denied*, 516 U.S. 994, 116 S. Ct. 530, 133 L. Ed. 2d 436 (1995). A careful review of the record clearly shows that the comments at issue here represented nothing more than an attempt on the part of the trial court to address the problem created by Defendant's failure to directly answer the questions that had been posed to her. As evidence of the existence of this problem, we note that Defendant's trial counsel made similar comments to

Defendant on multiple occasions during the trial. In addition, the trial court instructed other witnesses in addition to Defendant to "[j]ust answer the question." As a result, given that the trial court's comments were made for a legitimate purpose and were consistent with the comments that the trial court made to other witnesses, we cannot conclude that the trial court erred by instructing Defendant to "answer the question" or by restating what Defendant's answers to the questions that had been posed to her actually were.

d. Comments Outside the Jury's Presence

[5] Fourth, Defendant objects to certain comments that the trial court made to Defendant outside the presence of the jury. Among other things, the trial court stated that Defendant was being "coy" and was wasting the jury's time. However, given that the particular comments at issue here were not made in the jury's presence and since Defendant has not otherwise shown that the trial court made impermissibly prejudicial comments to Defendant or her trial counsel, we conclude that Defendant has failed to establish that these comments prejudiced her chances for a more favorable outcome at trial. *State v. Hester*, 343 N.C. 266, 273, 470 S.E.2d 25, 29 (1996) (holding that the defendant suffered no prejudice from comments made outside of the jury's presence). As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of the making of these comments.

3. Trial Court's Statements to Defendant's Counsel

[6] In addition to contending that the trial court made inappropriate comments to or about Defendant, Defendant contends that the trial court made inappropriate comments to or about her trial counsel as well. In assessing this argument, we are required, once again, to determine whether "the cumulative nature of the trial judge's inappropriate comments to the defense counsel . . . tainted the atmosphere of the trial to the detriment of Defendant." *State v. Wright*, 172 N.C. App. 464, 470, 616 S.E.2d 366, 370, *aff'd in part*, 360 N.C. 80, 621 S.E.2d 874, *disc. review denied in part*, __ N.C. __, 624 S.E.2d 633 (2005).

In her brief, Defendant excepts to certain comments that the trial court made in the course of discussing certain letters that had been admitted into evidence, specifically:

> [The Court]: The letters speak for themselves. It's all established, it's all asked and answered. You've got your basis for your argument, can't you move on? The letters are in evidence, they speak for themselves. The dates speak for themselves.

> [Defendant's Counsel]: Well, she says she doesn't remember this stuff, she doesn't know. It's established through other testimony, but it's not established through her.
>
> [The Court]: It's established.
>
> [Defendant's Counsel]: So you don't want me to ask her these questions.
>
> [The Court]: No, because it's just repetitive. Under Rule 403, I'm going to limit that evidence because it's already in evidence, it's already before the jury. Go to your next topic.

In addition, Defendant challenges the appropriateness of the trial court's statement, in ruling on an objection, that "[i]t's sustained, Ladies and Gentlemen, and we're going to move on with the trial. I will remind you that the issue we're here to determine is whether or not the Defendant breached her fiduciary duty[.]" Although Defendant contends that these comments, which were made in the presence of the jury, cast her trial counsel in an unfair light, the record reflects that the trial court directed similar statements to Plaintiffs' counsel as well. For example, the trial court interrupted Plaintiffs' counsel during a particular line of questioning by saying, "Let's move on"; by telling Plaintiffs' counsel to refrain from "chas[ing] rabbits"; and by inquiring about whether a certain line of questioning being pursued by Plaintiffs' counsel was repetitive. All of these comments were made in the course of an appropriate exercise of the trial court's authority to ensure that the court's time was not wasted by properly controlling the manner in which various witnesses were examined. *White*, 340 N.C. at 299, 457 S.E.2d at 861. Although the record clearly indicates that the trial court exhibited a certain degree of impatience during the trial, it meted out equal treatment to counsel for both parties in light of this desire for expedition.[4] As a result, this aspect of Defendant's challenge to the trial court's order lacks merit.

In an attempt to persuade us to reach a different conclusion, Defendant argues that the facts of this case are analogous to those at issue in *McNeill*, in which the Supreme Court held that the cumulative

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4. In addition to the comments discussed in the text of this opinion, Defendant argues that the trial court made improper remarks to her trial counsel outside of the presence of the jury for the purpose of urging her trial counsel to proceed with the trial in a more expeditious manner. The comments upon which this aspect of Defendant's argument is based were directed to "all counsel" and could not, for that reason, have prejudiced Defendant.

effect of a series of remarks that the trial court directed toward the defendants' counsel created an appearance of antagonism and had the effect of depriving the defendant of a fair trial. *McNeill*, 322 N.C. at 427, 368 S.E.2d at 621. In seeking to persuade us of the validity of this analogy, Defendant notes that the trial judge whose conduct was at issue in *McNeill* interrupted the examination of a witness being conducted by the defendants' counsel and asked, "[w]hat in the world has that got to do with this case?" When the defendants' counsel stated, "I'm gonna' move on—I'm gonna' move on," the trial court responded, "I hope so." *Id.* at 428, 368 S.E.2d at 622. In addition, the trial court in *McNeill* interrupted the examination of another witness being conducted by the defendants' counsel and stated, "I'm bored with the repetition, frankly, and I think everybody else is. Let's get on to something that's got something to do with this case without repeating other things." *Id.* at 428-29, 368 S.E.2d at 622. When the defendant's counsel requested permission to approach the bench, the *McNeill* trial court replied, "[n]o, sir, not if you just want to tell me something I already know; that's what you're doing now. . . . But for the love of Mike, let's get down to something new." *Id.* at 429, 368 S.E.2d at 622.

Although there are limited similarities between the statements held impermissible in *McNeill* and the statements at issue here, we do not believe that *McNeill* is controlling in this case given that the Supreme Court's decision to reverse the trial court's judgment in *McNeill* rested on a number of factors that are not present in this case. For example, as the Supreme Court noted, *McNeill* involved a civil action between a governmental agency and a private citizen, a set of facts that created a risk that "[a]ny intimation by the trial court aligning itself with either side was certain to have effect in this environment." *Id.* at 428, 368 S.E.2d at 621. In addition, the trial court made several alcohol-related jokes during the course of the proceedings, causing the Supreme Court to note that, "[t]hroughout the trial, the court maintained an atmosphere of levity" which "diminished the seriousness of the mission assigned to the jury and gave the appearance of antagonism towards the defense attorney." *Id.* at 429, 368 S.E.2d at 622. Finally, the Supreme Court emphasized the fact that "[t]he same disaffection seemed not to be visited upon [the] plaintiff's witnesses." *Id.* Thus, given that the trial court in this case did not create "an atmosphere of levity" by making inappropriate jokes and made similar comments to counsel for all parties, we do not believe that *McNeill* requires an award of appellate relief in this case. As a result, Defendant's challenge to the comments that the trial court directed to her counsel does not justify a decision to overturn the trial court's order.

B. Damages for Breach of Fiduciary Duty

[7] Secondly, Defendant contends that the trial court erroneously denied Defendant's motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the grounds that the amount of compensatory damages awarded to Plaintiffs for breach of fiduciary duty lacked adequate record support and on the grounds that the amount of punitive damages awarded to Plaintiffs for breach of fiduciary duty was grossly excessive. More specifically, Defendant argues that the compensatory damage award was contrary to certain stipulations that had been entered into between the parties, that Plaintiffs failed to prove the damages that they sustained for breach of fiduciary duty with sufficient certainty, and that the amount of punitive damages that Plaintiffs were awarded was so grossly excessive as to be unconstitutional. Defendant's arguments lack merit.

1. Standard of Review

A trial court is entitled to grant a new trial in favor of any party in the event that "excessive or inadequate damages appear[] to have been given under the influence of passion or prejudice" or in the event that the evidence is insufficient "to justify the verdict or that the verdict is contrary to law." N.C. Gen. Stat. § 1A-1, Rule 59(a)(6)-(7). "Whether to grant a [motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1,] Rule 59 [] on the grounds of excessive or inadequate damages is within the sound discretion of the trial judge," *McFarland v. Cromer*, 117 N.C. App. 678, 682, 453 S.E.2d 527, 529, *disc. review denied*, 340 N.C. 114, 456 S.E.2d 317 (1995), with the same being true with respect to the decision to grant or deny a motion for a new trial on the grounds that the evidence is insufficient to justify the verdict. *Haas v. Kelso*, 76 N.C. App. 77, 82, 331 S.E.2d 759, 762 (1985). However, the extent to which the amount of damages "has been proven with reasonable certainty is a question of law we review *de novo*." *Plasma Centers of America, LLC v. Talecris Plasma Resources, Inc.*, __ N.C. App. __, __, 731 S.E.2d 837, 843 (2012) (citations omitted). We will now evaluate the validity of Defendant's challenge to the trial court's decision to deny Defendant's request for a new trial utilizing the applicable standard of review.

2. Relevant Facts

As we have already noted, Plaintiffs were entitled to fifty percent of Ms. Longest's estate, while Defendant was entitled to the other fifty percent. As executrix of Ms. Longest's estate, Defendant had a duty to expeditiously distribute the assets bequeathed in Ms. Longest's will to the appropriate beneficiaries. For a period that exceeded two years,

however, Defendant refused to distribute the property to which Plaintiffs were entitled, with this conduct resting on the fact that Defendant entertained certain beliefs about Plaintiffs' activities and other subjects that were completely devoid of factual support. For example, Defendant asserted that Ms. Longest had been poisoned; that Plaintiff Lacey had given food contaminated with cesium to Ms. Longest; that Plaintiff Lacey gave Ms. Longest an overdose of morphine during a 2004 hospital stay; that Plaintiff Lacey had caused the death of other family members; and that Ms. Longest had executed another will after the date upon which the will that had been admitted to probate had been executed. In addition, Defendant claimed that Plaintiffs had stolen certain items of Ms. Longest's property. The parties stipulated prior to the beginning of the trial that several of Defendant's assertions were not true.

Upon developing these suspicions, Defendant contacted the police. After thoroughly investigating Defendant's assertions, the police concluded that they had no merit. Once she had learned that the official investigation into the alleged murder and thefts had been closed, Defendant hired an independent testing company to check the food that had been contained in her mother's freezer for the presence of poisons. After viewing the test results and consulting with numerous medical professionals, the police concluded that, "[a]s a result of our investigation, [Defendant's] mother's death has been deemed [to have had] natural causes." Even so, Defendant persisted in her refusal to make any distribution to Plaintiffs from Ms. Longest's estate.

At the conclusion of a mediated settlement conference, the parties reached an agreement pursuant to which Plaintiffs were to drop their claims against Defendant in exchange for the distribution of their shares of Ms. Longest's estate. Defendant, however, refused to carry out her obligations under this agreement based upon her belief that Plaintiffs had stolen property from Ms. Longest even though Defendant never took any steps to recover the allegedly stolen property from Plaintiffs and even though there was no evidence whatsoever tending to show that Defendant's contention had any basis in fact.

During the estate administration process, Defendant learned that Plaintiff Lucas was having financial troubles and that he was involved in a foreclosure proceeding that threatened to result in the loss of his home. Even so, Defendant still refused to distribute his share of the estate. Instead, Defendant told Plaintiff Lucas' wife that, while Plaintiffs "were going to get a little bit from the estate," "they weren't going to get as much as they thought they were, because they should have come around more often."

During the time that she served as executrix of Ms. Longest's estate, Defendant kept over $160,000 in cash that belonged to the estate in a safety deposit box rather than placing that amount in an interest-bearing account.[5] In spite of the fact that Plaintiffs had inherited ownership interests in two houses under Ms. Longest's will, Defendant refused to allow Plaintiffs to have access to these houses and failed to distribute the rent that she collected from the occupants of these houses to Plaintiffs. After her removal as executrix on 29 August 2013, Defendant failed to promptly comply with instructions to turn over the estate's records and property to the successor administrator, an action that impaired the successor administrator's ability to administer the estate and make proper distributions to Plaintiffs. Finally, in spite of Defendant's assertions to the contrary, there was simply no evidence that Ms. Longest had ever executed another will that treated Defendant more favorably than the one that had been admitted to probate.

3. Analysis of Trial Court's Rulings

a. Compensatory Damages

In her brief, Defendant argues that the jury's decision to award $6,569.02 in compensatory damages to each Plaintiff based upon Defendant's breach of fiduciary duty was contrary to the stipulations into which the parties had entered and did not rest upon evidence that tended to show the amount of damages that Plaintiffs were entitled to recover with reasonable certainty.[6] Defendant's argument lacks merit.

According to well-established North Carolina law, a party seeking to recover damages bears the burden of proving the amount that he or she is entitled to recover in such a manner as to allow the finder of fact to calculate the amount of damages that should be awarded to a reasonable degree of certainty. *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 95, 618 S.E.2d 739, 744 (2005) (citing *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547–48, 356 S.E.2d 578, 586 (1987)), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). "While the claiming party must present relevant data providing a basis for a reasonable

5. At various times, Defendant attempted to claim that the cash contained in the safety deposit box belonged to her and, at other times, Defendant admitted that the cash belonged to the estate. A successor administrator rejected Defendant's claim to these funds.

6. Defendant does not contest the jury's decision to find her liable to Plaintiffs for breach of fiduciary duty or contend that Plaintiffs are not entitled to recover some amount of compensatory damages from her.

estimate, proof to an absolute mathematical certainty is not required." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 76, 574 S.E.2d 180, 188 (2002).

At trial, the parties stipulated that, if the jury found that Plaintiffs had suffered damages as a result of Defendant's failure to distribute the estate in accordance with her duties, their share of the estate would have earned interest at the rate of one percent per year from the date of "reasonable distribution." However, the date upon which distribution could reasonably have been made was left for the jury's determination. In addition, the parties stipulated that the $160,000 in cash that Defendant failed to deposit in an interest-bearing account would have earned between $3,369.54 to $6,093.85 in interest, depending on the manner in which that money was invested. Stan Atwell, who testified on Plaintiffs' behalf as an expert in estate administration, stated that all but about $50,000 of the value of the property contained in Ms. Longest's estate could have been safely distributed by October 2011[7], which was after the date by which Ms. Longest's creditors were required to assert any claims that they might have against the estate, and that the entire estate administration process could reasonably have been concluded by June 2012.

Although we are not, of course, privy to the exact manner in which the jury calculated the amount of damages that should be awarded to each Plaintiff, we are confident that the record contains sufficient evidence to support the award of $6,569.02 in compensatory damages that the jury made in favor of each Plaintiff. Had distribution been made at the earliest possible date for distribution set out in Mr. Atwell's testimony and had an appropriate amount of interest been earned on the $160,000 in cash that Defendant kept in the safety deposit box, Plaintiffs would have been able to earn a total of approximately $14,000 in interest, an amount slightly larger than the total amount of $13,138.04 in compensatory damages that the jury awarded to Plaintiffs.[8] As a result, the

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7. As of September 2011, the estate had a value of $769,139.97.

8. The value of the estate as of September 2011 was $769,139.97. In our view, the jury could have reasonably used this amount as the value of the estate as of October 2011, which represented the earliest date upon which distribution could have reasonably been made. After subtracting the $50,000 that needed to be withheld from any distribution made at that time, Plaintiffs' share of this value of the estate comes to $359,569.98. An application of the stipulated interest rate of 1% per year from the reasonable date of distribution until the date of the jury verdict, a period of 27 months, results in a rough total of $8,000 in interest. In addition, the cash that Defendant kept in the safe deposit box would have

record provides ample support for the total amount of compensatory damages awarded to Plaintiffs.

Defendant, however, argues that, since Plaintiffs stipulated that they were entitled to differing shares in Ms. Longest's estate, the jury's decision to award an identical amount of compensatory damages to each Plaintiff was contrary to the evidentiary record developed at trial. However, given that the total amount of damages awarded to Plaintiffs had adequate record support, Defendant has no right to complain about the manner in which the jury elected to apportion the overall damage amount between Plaintiffs given that "the defendant has no voice in the apportionment of damages between" multiple plaintiffs. *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N.C. 418, 428, 74 S.E. 331, 334 (1912) (citing *Hocutt v. Wilmington & Weldon Railroad Co.*, 124 N.C. 214, 217, 32 S.E. 681, 682 (1899)). In view of the fact that "[i]t is not for this Court to second-guess the means by which the jury calculated the award of damages," *Keels v. Turner*, 45 N.C. App. 213, 220, 262 S.E.2d 845, 848 (1980), and the fact that the evidentiary record supports the jury's overall damage award, the trial court did not err by denying Defendant's motion for a new trial with respect to this issue.

b. Punitive Damages

[8] Secondly, Defendant argues that the jury awarded a grossly excessive amount of punitive damages in connection with Plaintiffs' breach of fiduciary duty claim. According to Defendant, the punitive damage award was so large as to violate the due process clause of the Fourteenth Amendment to the United States Constitution. We are not persuaded by Defendant's argument.

N.C. Gen. Stat. § 1D–25(b) provides that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater," and that, "[i]f a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount." *Id.* In view of the fact that the jury awarded each Plaintiff $6,569.02 in compensatory damages, the trial court reduced the jury's punitive damage award of $300,000 for each

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earned up to $6,093.85 in interest had it been invested in a 24 month certificate of deposit. As a result, the evidence would have supported a jury determination that Defendant's failure to administer the estate in a proper fashion could have cost Plaintiffs roughly $14,000 in interest.

Plaintiff to $250,000 for each Plaintiff in compliance with N.C. Gen. Stat. § 1D–25(b). As a result, the ultimate issue raised by Defendant's challenge to the punitive damage award is whether an award of $250,000 in punitive damages for each Plaintiff contained in the final judgment is grossly excessive.

"When a punitive damages award is 'grossly excessive,' it violates the due process clause of the Fourteenth Amendment." *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 157, 683 S.E.2d 728, 740 (2009) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1596, 134 L. Ed. 2d 809, 822 (1996)). In determining whether an award of punitive damages is grossly excessive, we consider "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the compensatory and punitive damages awards; and (3) available sanctions for comparable conduct." *Id.* at 157-58, 683 S.E.2d at 740 (citing *BMW*, 517 U.S. at 574-75, 116 S. Ct. at 1598-99, 134 L. Ed. 2d at 826. The degree of reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 688, 562 S.E.2d 82, 94 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004) (citation omitted). The actual amount of punitive damages to be awarded in any particular case is committed to the jury's sound discretion. *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 231, 404 S.E.2d 664, 667 (1991).

In her brief, Defendant argues that, to the extent that she engaged in "reprehensible conduct," her actions were not particularly egregious given that she did not do anything more than "merely delaying distribution." In our view, this argument severely understates the nature and extent of Defendant's conduct. As the record clearly reflects, Defendant deliberately denied Plaintiffs access to property that had been bequeathed to them for an extended period time and engaged in this conduct at a time when at least one of them was suffering from significant financial difficulties without having any legitimate reason for acting in that manner. Defendant made baseless accusations that Plaintiffs had committed murder, attempted murder, and larceny in an attempt to avoid making any distribution of the assets of the estate to Plaintiffs even though these allegations were completely baseless. In the course of depriving Plaintiffs of their rightful inheritance, Defendant ignored official determinations that Ms. Longest had died of natural causes and that there was no evidence that any theft had taken place. Finally, Defendant refused to cooperate with the estate administration process even after her removal as executrix. The willfulness of Defendant's conduct was evidenced by her admission that Plaintiffs "weren't going to get as much

as they thought they were [from the estate], because they should have come around more often." In our view, Defendant's conduct is at least as reprehensible as the conduct at issue in the cases upon which Defendant relies, such as *Greene v. Royster*, 187 N.C. App. 71, 652 S.E.2d 277 (2007), in which we found sufficient reprehensible conduct to support a sizeable punitive damage award against individuals who knowingly sold cars that were unfit for operation on state roads and concealed information concerning the vehicles' net worth from prospective buyers. *Id.* at 80, 652 S.E.2d at 283. As a result, we hold that Defendant's conduct was, when considered in its entirety, exceedingly reprehensible.

[9] In addition, Defendant argues that the 38 to 1 ratio of punitive to compensatory damages present in this case establishes the excessiveness of the punitive damages award at issue here. This Court has, however, upheld punitive damage awards reflecting similar compensatory damages to punitive damages ratios. *Rhyne*, 149 N.C. App. at 689, 562 S.E.2d at 94 (upholding awards involving ratios of punitive damages to compensatory damages of 30 to 1 and 23 to 1 and describing these ratios as "relatively low"); *Maintenance Equip. Co. v. Godley Builders*, 107 N.C. App. 343, 353–54, 420 S.E.2d 199, 204–05 (1992) (upholding the trial court's decision to deny a new trial motion based on the assertion that a $175,000 punitive damages award was excessive when compared to a $4,550 compensatory damages award). As a result, given that the ratio of compensatory damages to punitive damages present in this case is fully consistent with ratios that have been held not to be excessive in other cases, we find no basis for overturning the punitive damages award in this case based on the relative levels of compensatory and punitive damages awarded by the trial court.[9]

[10] Finally, Defendant argues that, since she was not subjected to criminal liability for her conduct, the jury's punitive damages award was grossly excessive. Aside from the fact that nothing in our decisional law makes the availability of a criminal sanction necessary to justify a decision to uphold a punitive damage award, the fact that Defendant was merely subject to a civil, rather than a criminal, sanction for her conduct does not in any way serve to mitigate the reprehensibility of what she did. As a result, since the jury's punitive damages award stemming from Defendant's breach of fiduciary duty involved conduct that was exceedingly reprehensible and involved a ratio of punitive

9. As Plaintiffs note, Defendant's assertion that a ratio of 38 to 1 is "eight times" greater than a ratio of 30 to 1 is mathematically incorrect.

damages to compensatory damages that was quite similar to ratios that have previously been held not to be grossly excessive, we conclude that the trial court did not err by denying Defendant's motion for a new trial with respect to the amount of punitive damages awarded in connection with Plaintiffs' breach of fiduciary duty claim.

C. Damages for Defamation

[11] Finally, Defendant contends that the trial court erred by denying her motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on the grounds that the $50,000 in compensatory damages awarded in connection with Plaintiff Lacey's defamation claim lacked sufficient evidentiary support and was otherwise unlawful.[10] More specifically, Defendant argues that the amount of damages that the jury awarded for defamation was not established with the required reasonable certainty. Once again, we conclude that Defendant's argument lacks merit.

1. Relevant Facts

As the record reflects, Defendant told numerous third parties, including several of the parties' relatives, that Plaintiff Lacey had either murdered or poisoned Ms. Longest or that Defendant had reason to believe that Plaintiff Lacey had caused Ms. Longest's death. In addition to admitting that she had made these statements, Defendant stipulated that these statements were not true. Plaintiff Lacey testified that Defendant's accusations caused her to be upset, hurt, and embarrassed; that certain family members would not speak to her after learning of Defendant's assertions; and that she was concerned about the impact that having been accused of murdering Ms. Longest would have on her business, her relationship with other members of the family, and her reputation in the community. The evidence clearly showed that Defendant was aware of the impact that the making of such statements would have upon Plaintiff Lacey's friends and family members.[11]

2. Compensatory Damages

According to well-established North Carolina law, oral defamation claims can be classified as either slander *per se* or slander *per quod*. *Donovan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994). Slander *per se* consists of " 'an oral communication to a third party which

10. Defendant does not challenge the $100,000 in punitive damages that was awarded in connection with Plaintiff Lacey's defamation claim.

11. In her brief, Defendant concedes that she made statements that damaged Plaintiff Lacey's reputation.

amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.' " *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 281, 648 S.E.2d 261, 263 (2007) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002), *disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003)), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). A plaintiff may obtain a damage recovery on the basis of a slander *per se* theory without specifically pleading or proving special damages. *Donovan*, 114 N.C. App. at 528, 442 S.E.2d at 575; *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (stating that, in a slander *per se* action, damages are presumed upon proof of publication, with no further evidence of injury being required to support a damage award).

As we have already noted, Defendant made oral communications to several people in which she accused Plaintiff Lacey of having murdered Ms. Longest. It would be difficult to conceive of a criminal offense that involves greater moral turpitude than murdering someone through the use of poison. *Losing*, 185 N.C. App. at 281, 648 S.E.2d at 263. For that reason, any failure on Plaintiff Lacey's part to establish that she sustained pecuniary loss as a result of Defendant's statements is simply irrelevant. *Donovan*, 114 N.C. App. at 528, 442 S.E.2d at 575. However, the testimony that Plaintiff Lacey provided at trial was more than sufficient to establish that she experienced significant emotional trauma stemming from Defendant's false accusations. As a result, the trial court did not err by denying Defendant's motion for a new trial relating to this issue.

D. Attorneys' Fee Award

[12] In their sole challenge to the trial court's order, Plaintiffs contend that the trial court erred in the course of ruling on their request for an award of attorneys' fees and the costs. More specifically, Plaintiffs assert that the trial court lacked the authority to reduce the amount of attorneys' fees that it awarded to Plaintiffs based on the fact that Plaintiffs were the beneficiaries of a large punitive damages award. Plaintiffs' argument has merit.

1. Standard of Review

"The award of attorney's fees is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion." *Town of N. Topsail Beach v. Forster-Pereira*, 194 N.C. App. 763, 766, 670

S.E.2d 590, 592 (2009). However, "the trial court's discretion [in awarding attorney's fees] is not unrestrained." *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001), *disc. review denied*, 355 N.C. 500, 563 S.E.2d 191 (2002). For example, attorneys' fees may not be awarded in the absence of express statutory authority. *Smith v. Smith*, 121 N.C. App. 334, 338, 465 S.E.2d 52, 55 (1996). If the trial court decides to award a reasonable attorneys' fee, it must make findings of fact that support the award, including the " 'time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629 (quoting *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989)). In addition, a trial court is entitled to examine a number of other factors in the course of determining the reasonableness of an attorneys' fee award, including "the nature of litigation[,] nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, [and] the success or failure of the attorney's efforts." *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592 (citation and quotation omitted). As a result, "our review [of an order awarding attorneys' fees] is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *Id.* (quoting *Robinson v. Shue*, 145 N.C. App. 60, 65, 550 S.E.2d 830, 833 (2001) (citation omitted)).

2. Analysis of Attorneys' Fee Award

In its motion seeking an award of attorneys' fees and the costs, Plaintiffs sought to collect a total of $262,744.64, plus any additional amounts incurred from the date of the filing of the motion until the date upon which the motion in question was heard. In its order, the trial court found that, even though the evidence clearly established her liability for breach of fiduciary duty and defamation, Defendant had persisted in defending against Plaintiffs' claims, thereby necessitating the incurrence of the expenses associated with a four day jury trial. In addition, the trial court found that Defendant's conduct during the course of the litigation of this case had caused Plaintiffs to unnecessarily incur substantial additional attorneys' fees, including, but not limited to, fees stemming from Defendant's failure to comply with the applicable discovery rules; the fact that Defendant repeatedly changed her legal position; the fact that Defendant employed four different attorneys, effectively delaying final resolution of this matter; the fact that Defendant gave nonresponsive and evasive answers to questions posed to her during her deposition;

and the fact that Defendant repudiated the mediated settlement agreement. Finally, the trial court found that Plaintiffs had incurred attorneys' fees and expenses that could properly be taxed pursuant to N.C. Gen. Stat. § 7A-305(d) in an amount that exceeded $255,000, that the fees charged by Plaintiffs' attorneys were comparable to those customarily charged for similar work, and that the fees charged by Plaintiffs' counsel were reasonable in light of all of the surrounding circumstances. After making these findings, however, the trial court awarded Plaintiffs $93,709 in attorneys' fees, noting that it would have awarded a much greater amount in attorneys' fees except for the fact that Defendant had been ordered to pay a substantial amount of punitive damages.

As a preliminary matter, we note that Plaintiffs have not challenged any of the trial court's findings of fact as lacking in sufficient evidentiary support. For that reason, the trial court's findings are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Furthermore, Plaintiffs have refrained from challenging the majority of the trial court's conclusions of law. For that reason, Plaintiffs have accepted these unchallenged conclusions as well. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) (stating that "[f]ailure to [challenge a conclusion] constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts).

As Defendant acknowledges, the trial court had the authority to make an award of attorneys' fees in favor of Plaintiffs pursuant to a number of statutory provisions, including N.C. Gen. Stat. §§ 1D-45, 6-20, 6-21, 6-21.5, and 7A-305(d).[12] In addition, the trial court found, based on the evidence that Plaintiffs presented, that the amount of attorneys' fees that Plaintiffs sought to collect was consistent with the level of fees that was customarily charged in the relevant area for similar work and was reasonable given the totality of the surrounding circumstances. Finally, the trial court found, based on sufficient record evidence, that Plaintiffs

12. As Defendant suggests, the provisions of N.C. Gen. Stat. § 6-18 support an award of costs to Plaintiff Lacey in connection with her defamation claim. However, N.C. Gen. Stat. § 6-18 does not authorize an award of attorneys' fees in such cases. See *McKissick v. McKissick*, 129 N.C. App. 252, 254, 497 S.E.2d 711, 712 (1998) (stating that, since "there is not specific authorization that costs in the context of [N.C. Gen. Stat. § 6-18] are to include attorneys' fees, costs awarded [pursuant to that statutory provision] cannot include an award of attorneys' fees"). Thus, to the extent that any attorneys' fees were awarded to Plaintiff Lacey based solely on N.C. Gen. Stat. § 6-18, that award must be vacated on remand.

had incurred in excess of $255,000 in attorneys' fees. However, instead of awarding the requested amount of attorneys' fees, the trial court awarded a substantially lower amount.

The trial court approved a lower-than-requested attorneys' fee award based on the following logic, which is set forth in the relevant findings of fact:

> 19. Pursuant to N.C. [Gen. Stat.] §§6-18, 6-21.5, 7A-305(d) and 1D-45, the Court finds that Mary Lacey should be awarded attorney's fees in the amount of $18,741.80 and costs in the amount of $2,490.50 (for a total of $21,232.30) for the defamation claim. The Court finds that this amount is fair and reasonable in light of the circumstances of the case, the time expended, the labor required, the experience and skill applied, the number and complexity of factual and legal questions involved, the fees normally and customarily charged by WNHP and by other law firms in the locality for similar legal services, and the results obtained and the jury verdict.
>
> 20. Pursuant to N.C. [Gen. Stat.] §§6-20, 6-21, 6-21.5, 7A-305(d) and 1D-45 The Court finds that the Plaintiffs should be awarded attorney's fees in the amount of $74,967.20 and costs in the amount of $9,961.98 (for a total of $84,929.18) for the breach of fiduciary duty claim, to be allocated equally between the two Plaintiffs. The Court finds that this amount is fair and reasonable in light of the circumstances of the case, the time expended, the labor required, the experience and skill applied, the number and complexity of factual and legal questions involved, the fees normally and customarily charged by WNHP and by other law firms in the locality for similar legal services, and the results obtained and the jury verdict.
>
> 21. The Court further notes that the undersigned would have awarded a much greater amount in attorneys' fees to the Plaintiffs under these facts were it not for the amount of punitive damages assessed against the Defendant by the Jury.

As a result, the trial court appears to have refused to make the attorneys' fee award that it would have otherwise made based on the fact that Plaintiffs received a large punitive damages award.

The issue of whether, as Plaintiffs contend, the trial court abused its discretion by reducing the amount of attorneys' fees awarded to Plaintiffs based on the fact that they were the recipients of a large punitive damages award appears to be a question of first impression in this jurisdiction. Although our attorneys' fee jurisprudence gives trial judges substantial discretion in determining what amount of attorneys' fees to award in any particular case, we believe that the use of a substantial punitive damages award as the sole reason for reducing an otherwise reasonable attorneys' fee award involved reliance upon a factor that has no reasonable bearing on the making of a proper attorneys' fee award and, for that reason, constitutes an abuse of the trial court's discretion.

In making its attorneys' fee award in this case, the trial court properly considered and made findings of fact concerning the " 'time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *Stilwell*, 148 N.C. App. at 131, 557 S.E.2d at 629. In addition, the trial court properly considered a number of other relevant factors, including the nature of the litigation, the complexity and amount of discovery involved in the case, and the success of the attorneys' efforts. *Topsail Beach*, 194 N.C. App. at 766, 670 S.E.2d at 592. Each of these factors has direct relevance to the reasonableness of the level of attorneys' fees that should be awarded in any particular instance. The fact that Plaintiffs received a large punitive damages award is not, however, similarly relevant to a proper attorneys' fee calculation. We reach this conclusion for several related reasons.

As an initial matter, we note that the underlying purposes sought to be effectuated by an award of attorneys' fees and an award of punitive damages are different. In essence, an award of attorneys' fees is intended to address costs that arise in the course of the litigation of a particular case while punitive damages are intended to punish a litigant for conduct that had already occurred by the time that the litigation had commenced. In other words, punitive damages "are awarded as punishment due to the outrageous nature of the wrongdoer's conduct," *Juarez–Martinez v. Deans*, 108 N.C. App. 486, 495, 424 S.E.2d 154, 159–60, *disc. review denied*, 333 N.C. 539, 429 S.E.2d 558 (1993); *see also Nance v. Robertson*, 91 N.C. App. 121, 123, 370 S.E.2d 283, 284 (stating that "[t]he purpose of punitive damages is to punish wrongdoers for misconduct of an aggravated, extreme, outrageous, or malicious character"), *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988); *Rhyne*, 358 N.C. at 166, 594 S.E.2d at 6 (stating that "North Carolina courts have consistently awarded punitive damages 'solely on the basis of [their] policy to punish intentional wrongdoing and to deter others from similar

behavior' ") (citation omitted)), while an award of attorneys' fees serves an entirely different set of purposes, including "restor[ing] Plaintiffs to the same position they would have been in had no breach of fiduciary duty occurred" in the instances to which N.C. Gen. Stat. § 6-20 and 6-21 apply or "discourag[ing] frivolous legal action" in instances governed by N.C. Gen. Stat. § 6-21.5. *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990). The Supreme Court recognized the difference between punitive damages awards and attorneys' fees awards in *United Labs. v. Kuykendall*, 335 N.C. 183, 193, 437 S.E.2d 374, 380 (1993), in which it stated that, "[s]ince [attorney fees and punitive damages] serve different interests and are not based on the same conduct," a "plaintiff is not required to elect between them to prevent duplicitous recovery." As a result of the different purposes sought to be achieved by punitive damages and attorneys' fee awards, a decision to reduce an attorneys' fee award based on the fact that a party received a large punitive damages award would necessarily serve to thwart the purposes sought to be achieved by allowing the recovery of punitive damages without serving any purpose sought to be achieved by an award of attorneys' fees. Thus, the trial court abused its discretion to the extent that it reduced the amount of attorneys' fees that it would have otherwise awarded to Plaintiffs based solely on the fact that Plaintiffs received a large punitive damages award. *State v. Tuck*, 191 N.C. App. 768, 771, 664 S.E.2d 27, 29 (2008) (stating that, "[w]hen discretionary rulings are made under a misapprehension of law, this may constitute an abuse of discretion") (citations omitted).

In seeking to persuade us to reach a different result, Defendant argues that the trial court's decision represented a proper exercise of the discretion available to trial judges in making attorneys' fee awards and amounted to consideration of the nature and amount of the award that Plaintiffs received. However, for the reasons that we have previously discussed, the trial court's discretion in setting attorneys' fee awards must be based on a consideration of factors that are relevant to the reasonableness of the fee award rather than upon factors that have no bearing on the establishment of a proper attorneys' fee award. In addition, allowing the trial court to reduce the amount of attorneys' fees awarded to a prevailing plaintiff based on the fact that the plaintiff persuaded the trier of fact to approve a large punitive damages award would turn the logic of allowing consideration of the nature and amount of the substantive award in awarding attorneys' fees on its head, punishing, rather than rewarding, a successful litigant for prevailing with respect to his or her substantive claims. As a result, since the trial court erred to the extent that it reduced the amount of attorneys' fees awarded

to Plaintiffs solely on the basis of the amount of punitive damages that had been awarded to them, the trial court's attorneys' fee order must be reversed and this case must be remanded to the Alamance County Superior Court for the entry of a new attorneys' fee order that is based on a consideration of relevant factors and that contains proper findings of fact and conclusions of law.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment and orders have merit and that the trial court erred by considering an impermissible factor in determining the size of Plaintiffs' attorneys' fee award. As a result, the trial court's judgment and the order denying Defendant's motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, should be, and hereby are, affirmed; the trial court's attorneys' fee order should be, and herby is, vacated; and this case should be, and hereby is, remanded to the Alamance County Superior Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge ELMORE and Judge DAVIS concur.

LE OCEANFRONT, INC. v. LANDS END OF EMERALD ISLE ASS'N, INC.

[238 N.C. App. 405 (2014)]

LE OCEANFRONT, INC.; RICHARD W. WILLIAMS; NORA J. WILLIAMS; KAREN W. JOHNSON; HORACE M. JOHNSON, PLAINTIFFS
v.
LANDS END OF EMERALD ISLE ASSOCIATION, INC., DEFENDANT

No. COA14-287

Filed 31 December 2014

1. Associations—homeowners—ownership dispute—prior conveyance—disputed property not included

In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, the trial court erred by granting summary judgment in favor of the HOA. Although the HOA claimed that it acquired the land from the developer by deed in 1988, the documents referenced by the 1988 deeds showed that the oceanfront strip was not intended to be included in the conveyance. The HOA had no claim to the strip of land based on the 1988 deeds.

2. Corporations—quitclaim deed—dissolved corporation to de facto corporation—effective conveyance

In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, a 2011 quitclaim deed from the developer to the corporate plaintiff was valid. Even though the quitclaim deed was filed forty-nine minutes after plaintiff's articles of incorporation, plaintiff was a de facto corporation because a bona fide effort was made to incorporate and the persons affected acquiesced to the action. In addition, even though the developer was under revenue suspension and otherwise administratively dissolved, the conveyance was permissible as an act of winding up the corporation's affairs. Therefore, the 2011 quitclaim deed, along with the unchallenged 2013 quitclaim deed, transferred whatever interest the developer had in the oceanfront strip to plaintiff.

3. Associations—homeowners—counterclaims—prescriptive easement—slander of title—trespass—issues of fact remaining—remanded to trial court

In an action involving a dispute between homeowners and a homeowners' association (HOA) over ownership of an oceanfront strip of land, there were issues of fact regarding the HOA's counterclaim for a prescriptive easement and plaintiffs' claims for slander

of title and trespass. The COA remanded the matter to the trial court for determination of these claims.

Appeal by Plaintiffs from judgment entered on 2 October 2013 by Judge Phyllis Gorham in Carteret County Superior Court. Heard in the Court of Appeals 27 August 2014.

Ragsdale Liggett PLLC, by Amie C. Sivon, for Plaintiffs-appellants.[1]

Ward and Smith, P.A., by Ryal W. Tayloe, Alexander C. Dale, and Christopher M. Hinnant, for Defendant-appellee.

DILLON, Judge.

Corporate Plaintiff Le Oceanfront, Inc. and individual Plaintiffs Karen W. Johnson, and Horace M. Johnson[2] appeal from a trial court's ruling granting summary judgment in favor of Defendant Lands End of Emerald Isle Association, Inc. ("the HOA"), declaring the HOA to be the fee simple owner of a certain strip of land adjacent to the Atlantic Ocean's mean high water mark in Emerald Isle. For the following reasons, we vacate the trial court's judgment and remand for further proceedings consistent with this opinion.

I. Background

A. Summary

The Defendant HOA is a homeowners association for the Lands End residential subdivision (the "Subdivision") in Emerald Isle and owns all of the Subdivision's common areas. The individual Plaintiffs are owners of beachfront lots in the Subdivision. The corporate Plaintiff is an entity set up by the individual Plaintiffs.

The subject matter of this action is a strip of land, consisting of over 14 acres, which lies between the Subdivision and the Atlantic Ocean. (This strip of land is hereinafter referred to as "the Oceanfront Strip.") The HOA claims that the Oceanfront Strip is actually *part of* the

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1. Originally, James L. Conner, II, was also counsel of record for Plaintiffs-appellants for this appeal and presented oral argument before this Court. However, this Court granted Plaintiffs-appellants' motion for substitution of counsel and notice of appearance which stated that Mr. Conner had changed firm affiliations and was no longer representing Plaintiffs-appellants.

2. Plaintiffs Richard W. Williams and Nora J. Williams, parties to the original complaint, did not appeal from the trial court's judgment.

Subdivision's common area, which it acquired by deeds from developers of the Subdivision (hereinafter "the Developer[3]") in 1988 (hereinafter "the 1988 deeds") or, in the alternative, that the HOA has an easement to use the strip. Plaintiffs, however, claim that the 1988 deeds did *not* include the Oceanfront Strip and that the corporate Plaintiff became the owner of the Oceanfront Strip through three quitclaim deeds from the Developer delivered, one in 2011 and two in 2013 (hereinafter "the quitclaim deeds").

We hold that the 1988 deeds conveying land to the HOA did *not* include a conveyance of the Oceanfront Strip. We hold that the quitclaim deeds conveyed all interest the Developer had in the Oceanfront Strip to the corporate Plaintiff. We make no determination as to the nature of rights or interests the HOA has or may have with respect to the Oceanfront Strip or any portion thereof based on other theories, *e.g.*, adverse possession, prescriptive easement, etc. Accordingly, we vacate the trial court's grant of summary judgment in favor of the HOA and remand this matter to the trial court for further proceedings consistent with this opinion.

B. Subdivision History

In 1973, the Developer acquired adjacent tracts of land which would encompass the Subdivision proper and the Oceanfront Strip. This acreage is located on Bogue Banks, a narrow barrier island which extends east to west, with the Atlantic Ocean to its south.

The acreage is bounded on the north by Coast Guard Road.

The southern boundary of this acreage is the mean high water mark of the Atlantic Ocean. *See* N.C. Gen. Stat. § 77-20(a) (2011) (defining the seaward boundary of all property in North Carolina as "the mean high water mark").

The acreage is bounded on the east and west by what is now other residential subdivisions.

After acquiring the acreage, the Developer proceeded with the development of the Subdivision. In 1974, the Developer filed eight maps ("the 1974 maps"), each depicting a different section of the to-be-developed

3. The Subdivision was developed by a series of entities over two decades. The property which makes up the Subdivision proper and the Oceanfront Strip, or portions thereof, were transferred on a number of occasions between different developer entities during this time. As used herein, "Developer" refers to any one or all of these entities.

Subdivision, which laid out the location of the proposed lots, streets, common areas, open spaces, and other features within that section. Two of these eight maps depict the sections of the Subdivision that are adjacent to the Oceanfront Strip. The other six maps depict sections that are inland and, therefore, are not relevant to this appeal. At this time, the Developer also recorded a Declaration of Covenants and Easements ("the 1974 Declaration"), which referenced the 1974 maps.

In the 1980's, the Developer filed four maps ("the 1980's correction maps"), correcting certain aspects of four of the original eight 1974 maps. Two of these maps correct the two 1974 maps which depict the sections of the Subdivision adjacent to the Oceanfront Strip.

The aforementioned maps represented that the Subdivision would contain approximately 300 individual home lots, forty-five of which were to be "beachfront," bounded on the south by the Oceanfront Strip. Other parcels within the Subdivision were also depicted to be bounded on the south by the Oceanfront Strip, including a lot for the proposed Subdivision clubhouse (which was completed in 1981) and areas of open space and strips of common area land leading from a Subdivision street to the northern border of the Oceanfront Strip.

In 1986, the HOA was formed. During this time, the Developer sold lots to individual homeowners.

In 1988, the Developer[4] executed the 1988 deeds, essentially conveying the open spaces and common areas depicted on the recorded maps to the HOA.

In 2004, the individual Plaintiffs purchased two of the Subdivision's beachfront lots. In their Complaint, the individual Plaintiffs allege that they believed the lots they were buying extended through the Oceanfront Strip all the way to the Atlantic Ocean's mean high water line. There is evidence that over the course of time, the individual Plaintiffs installed sand fences; planted sea oats; built decks, walkways and gazebos; paid beach nourishment assessments to the Town of Emerald Isle as oceanfront owners; and gave the Town easements for beach nourishment projects with respect to land within the Oceanfront Strip in front of their residence.

In 2005, the HOA, in response to inquiries regarding the installation of structures by homeowners encroaching on the Oceanfront

4. At this time in 1988, there were three Developer entities who owned some interest in the Subdivision common areas and the Oceanfront Strip.

Strip, sent letters to all beachfront lot owners claiming ownership of the Oceanfront Strip. Further, in 2010, the individual Plaintiffs observed that the HOA had pumped excess storm water into the Oceanfront Strip in front of their residence. The HOA presented evidence that it had, in fact, been pumping excess storm water into the Oceanfront Strip from time-to-time since the 1990's.

In 2011, the individual Plaintiffs formed the corporate Plaintiff and contacted the Developer – who had not been involved in any Subdivision matters in over a decade – to acquire legal title to the Oceanfront Strip. The three Developer entities, who executed the 1988 deeds, delivered the quitclaim deeds in 2011 and 2013, quitclaiming whatever interest these Developer entities had in the Oceanfront Strip.

C. Procedural History

In 2011, Plaintiffs filed suit against the HOA, raising claims (1) to quiet title (based on the quitclaim deeds); (2) for slander of title (claiming ownership); (3) for equitable estoppel (based on alleged conduct by the HOA when selling the beachfront lots in acting in a manner to lead purchasers to believe that those lots extended all the way to the ocean's mean high water mark); (4) for nuisance (based on the storm water pumped into the Oceanfront Strip); and (5) for trespass; and requesting *inter alia* "[t]he Court declare that [the corporate Plaintiff] is the owner of the Oceanfront Strip[.]" The HOA filed its answer including counterclaims for declaratory judgment that it was the owner of the Oceanfront Strip, a claim to quiet title, and, in the alternative, for an easement over the Oceanfront Strip.

In 2013, the HOA filed a motion for summary judgment on all claims and counterclaims. After a hearing on the motion, the trial court granted the HOA's motion for summary judgment. The judgment declared that the Developer deeded the Oceanfront Strip to the HOA in fee simple in 1988 and that the Oceanfront Strip is part of the "common area" of the Subdivision; and dismissed all other claims and counterclaims with prejudice, except Plaintiffs' claims for nuisance based on the storm water pooling in front of their residences. Plaintiffs took a voluntary dismissal of their nuisance claims and, subsequently, filed their notice of appeal from the trial court's judgment.

II. Analysis

On appeal, Plaintiffs contend that the trial court erred in granting summary judgment in favor of the HOA. A motion for summary judgment is appropriately granted where "the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). We review the trial court's summary judgment order *de novo*. *Foster v. Crandell*, 181 N.C. App. 152, 164, 638 S.E.2d 526, 535 (2007).

An action to quiet title "may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" N.C. Gen. Stat. § 41-10 (2011); *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983) (stating that "[t]he beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion"). As ownership of the Oceanfront Strip by the operation of the 1988 deeds conveying land from the Developer to the HOA would preclude any claim by the corporate Plaintiff based on the 2011 and 2013 quitclaim deeds, we first turn to address the parties' arguments regarding the 1988 deeds.

A. The 1988 Deeds to the HOA

[1] The HOA claims that it acquired fee simple title in the Oceanfront Strip through the 1988 deeds. We disagree.

The 1988 deeds do not explicitly reference the Oceanfront Strip, and there are no metes and bounds description for the Oceanfront Strip. Rather, the 1988 deeds reference three other recorded documents. Specifically, the 1988 deeds convey to the HOA "[a]ll streets and other common areas as described" in (1) the 1974 Declaration; (2) an amendment to the 1974 Declaration; and (3) relevant to this appeal, the two 1980's correction maps depicting the sections of the Subdivision adjacent to the Oceanfront Strip.

"When courts are called upon to interpret deeds or other writings, they seek to ascertain the intent of the parties, and, when ascertained, that intent becomes the deed . . . ." *Franklin v. Faulkner*, 248 N.C. 656, 659, 104 S.E.2d 841, 843 (1958). "The language of the deed being clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise." *County of Moore v. Humane Soc'y of Moore County, Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003). "The grantor's intent must be understood as that expressed in the language of the deed[.]" *Id.*

In this case, we must examine these other documents[5] referenced in the 1988 deeds to determine whether the Developer conveyed the Oceanfront Strip to the HOA.

1. The 1974 Declaration

First, the 1988 deeds convey all the "common areas" as described in the 1974 Declaration. The 1974 Declaration defines "common area" as being: "[a]ll of that area *dedicated* to the private use of the lot owners of 'Lands End of Emerald Isle' and that portion *referred* to as 'open spaces' on [the 1974 maps]." (Emphasis added.) Additionally, the 1974 Declaration "more particularly describe[s]" the term "common area" as "all the lands contained in the [1974 maps] [except for] the platted [individual] lots." The HOA describes this definition of "common area" in its brief as "all the lands contained in the eight [1974] plats, except for the lots."

We have held that "a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein[,]" *Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901), becoming "part of the description and is subject to the same kind of construction as to errors [as the deed]." *Parrish v. Hayworth*, 138 N.C. App. 637, 640, 532 S.E.2d 202, 205 (2000), *disc. review denied*, 353 N.C. 379, 547 S.E.2d 15 (2001). Here, we conclude, however, that the 1974 maps do not contain anything to indicate that any of these maps – most notably the two maps depicting the beachfront sections of the Subdivision - were intended to affect any right or interest of the Developer in the Oceanfront Strip. In other words, there is nothing in any of the 1974 maps to indicate that the Oceanfront Strip were to be considered part of the section of the Subdivision that any of the said maps was intended to include. In fact, we conclude these maps show a contrary intent.

First, each of the 1974 maps contains a small "location map[6]," which unambiguously shows that the Oceanfront Strip was outside the

5. The description in the 1988 deeds separate each document with the word "and." Plaintiffs argue, therefore, that the 1988 deeds only convey those "streets" and "common areas" which are depicted in *all three* described documents. The HOA argues that we must only find the Oceanfront Strip described in any one of the three documents. However, we do not have to reach this issue, as we do not believe that *any* of the three documents referenced in the 1988 deeds adequately demonstrate that the Developer intended to convey the Oceanfront Strip.

6. In addition to the actual survey, a survey map typically contains other items such as a map legend, notes of the surveyor, and a small "location map." To better describe what is meant by "location map," a large survey map of Central Park might contain a small map – the "location map" - in the corner depicting all of Manhattan with Central Park shaded in.

intended scope of the area being surveyed. Specifically, each of the two 1974 maps depicting the beachfront sections of the Subdivision - namely the maps recorded in Book of Maps 11, Pages 77 and 78 - contains a "location map." Each of these "location maps" depicts the entire Subdivision divided into eight sections, numbered 1-8, with one of the sections shaded in; Coast Guard Road to the north of the Subdivision; the Oceanfront Strip and the Atlantic Ocean to the south of the Subdivision; and parts of the adjacent tracts located to the east and west of the Subdivision. The location maps on each of the eight 1974 maps has a different section of the Subdivision shaded in, depending on which section said map was surveying. Each location map contained the words "This Sheet[,]" with an arrow pointing from those words to the shaded area of the location map, which we believe expressed an intention of what area was to be affected by the map. Therefore, we conclude that these location maps are clear and unambiguous in depicting that the rights and interests of the Developer in the Oceanfront Strip were not intended to be affected by any of the 1974 maps. Specifically, none of the location maps have the Oceanfront Strip or any portion thereof shaded in to indicate that the strip was intended to be part of any of the 1974 maps. Accordingly, the location maps which are a part of the 1974 maps themselves unambiguously show that the Oceanfront Strip was not intended to be part "of the lands contained in [the maps referenced in the 1974 Declaration]."

Further, there is nothing else on the 1974 maps to overcome this clear lack of intent to include the Oceanfront Strip as part of the area affected thereby. For example, even though the mean high water mark is a recognized, although shifting, boundary, *see Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 277 N.C. 297, 303-04, 177 S.E.2d 513, 516-17 (1970), the maps omit much of this boundary. Additionally, while all of the 1974 maps depict different areas as streets, "open space[s]" or "common area[s]," there is no such designation on any portion of the Oceanfront Strip depicted on these 1974 surveys. *See Harry v. Crescent Resources*, 136 N.C. App. 71, 523 S.E.2d 118 (1999) (holding that because the free use of property is favored in this State, the depiction of remnant parcels on the plat was insufficient to show a clear intent by the developer to grant an easement setting them aside as open space).

2. Amendment to the 1974 Declaration

The 1988 deeds refer to the amendments to the Covenants "by instrument recorded in Book 564 at Page 273[.]" However, none of the parties make reference to this document in their briefs. Therefore, we do not consider it.

3. The Correction Maps

Finally, the 1988 deeds refer to eight maps. Of importance among here are the two 1980's correction maps - Book of Maps 24, Page 135 and Book of Maps 19, Page 7 - correcting the two 1974 maps depicting the sections of the Subdivision adjacent to the Oceanfront Strip. However, like the 1974 maps, we believe that these 1980's correction maps are unambiguous in demonstrating an intent by the Developer not to include the Oceanfront Strip as part of the area affected by those maps.

First, these 1980's correction maps contain "notes" to show that they intend to "correct" certain aspects of the two 1974 maps; however, there is nothing in these notes which indicate that one of the corrections was to enlarge the scope of the 1974 maps to include the Oceanfront Strip.

Further, while the 1980's correction maps depict various portions of the Oceanfront Strip, much of this strip is covered by the survey's seal and notary signature. Further, these correction maps fail to depict the Oceanfront Strip's eastern boundary. Rather, the maps depict the eastern boundary *of the Subdivision* running from Coast Guard Road to the northern boundary of the Oceanfront Strip, but this boundary line does not extend to the mean high water mark of the Atlantic Ocean. This failure to depict the entire southern boundary of the Oceanfront Strip or *any* of its eastern boundary provides additional indication that the Developer did not intend to include the Oceanfront Strip in the conveyance.

Also, though there are many areas on the 1980's correction maps which are designated as "commons [sic] area" and as "open space," there is no such designation on any portion of the Oceanfront Strip. Finally, while each correction map contains a statement of dedication, neither refers to any dedication of the Oceanfront Strip.

In conclusion, the 1988 deeds and the documents referenced therein fail to refer to anything to show that the Oceanfront Strip was intended to be part of the conveyance.[7] Accordingly, any claim by the HOA in the Oceanfront Strip *by virtue of the 1988 deeds* fails.

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7. Included in the record are other deeds conveying various portions of the original acreage to and among the Developer entities and some of these deeds include the Oceanfront Strip as part of the property being conveyed. However, none of these deeds are referenced in the 1980's deeds, restrictive covenants, or plats and, therefore, cannot be considered.

B. The 2011 Quitclaim Deed to the Corporate Plaintiff

[2] The HOA argues that the 2011 quitclaim deed from one of the Developer entities to the corporate Plaintiff was invalid because, at the time the deed was filed, the corporate Plaintiff was not yet a legal entity and, alternatively, the Developer entitled had been dissolved. The HOA does not argue that any such disabilities existed at the time of the 2013 quitclaim deeds and, therefore, it does not challenge the validity of those deeds.

1. Developer 2011 Quitclaim Deed to Corporate Plaintiff

The HOA argues that the corporate Plaintiff's articles of incorporation were filed forty-nine minutes after the 2011 quitclaim deed from the Developer to the corporate Plaintiff was recorded and, therefore, the corporate Plaintiff as grantee was not a "legal person" as required for the conveyance. Plaintiffs contend that the transaction occurred on the same day such that the entity could be considered a *de facto* corporation, validating the conveyance.

N.C. Gen. Stat. § 55A-2-03(a) (2011) states that "[u]nless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed." We have stated that "[t]o be operative as a conveyance, a deed must designate as grantee [a living or] a legal person." *Piedmont & Western Inv. Corp. v. Carnes-Miller Gear Co.*, 96 N.C. App. 105, 107, 384 S.E.2d 687, 688 (1989), *disc. review denied*, 326 N.C. 49, 389 S.E.2d 93 (1990). The documents included in the record on appeal show that the 2011 quitclaim deed was filed before the articles of incorporation for the corporate Plaintiff were filed with the Secretary of State. The evidence in the record shows that Plaintiffs' counsel sent the articles by courier to the Secretary of State's Office hours prior to the recordation of the deed in the Register of Deeds, but that the articles were not actually filed until later that day.

Our Supreme Court has stated that

> [i]f there has been a *bona fide* effort to comply with the law to effectuate an incorporation, and the persons affected thereby have acquiesced therein, and have exercised the functions pertaining to the corporation, it becomes a *de facto* corporation, whose corporate existence cannot be litigated in actions between private individuals nor between private individuals and the assumed corporation. And, again, if a corporation *de facto* exists, it may exercise the powers assumed, and the question of its having a right

> to exercise them will be deemed one that can be raised only by the State.

Wood v. Staton, 174 N.C. 245, 253, 93 S.E. 790, 794 (1917). Here, we hold that a *bona fide* effort was made to comply with the law to incorporate and that "the persons affected" — which would include the Developer and the corporate Plaintiff — acquiesced in the action. Accordingly, we hold that the corporate Plaintiff was a *de facto* corporation at the time of the conveyance.

2. The Developer's Expired Articles of Incorporation

Lastly, the HOA contends that the Developer could not convey property because it was under revenue suspension by the Secretary of State in 2011, pursuant to N.C. Gen. Stat. § 105-230(b), and otherwise administratively dissolved and that it had not been reinstated pursuant to N.C. Gen. Stat. § 105-232. Plaintiffs respond that N.C. Gen. Stat. § 105-232 is inapplicable because the Developer conveyed the Oceanfront Strip *as an act of winding up its corporate affairs* pursuant to N.C. Gen. Stat. § 55-14-05.

N.C. Gen. Stat. § 105-230(b) (2011) states that "[a]ny act performed or attempted to be performed during the period of suspension is invalid and of no effect, unless the Secretary of State reinstates the corporation . . . pursuant to G.S. 105-232." However, N.C. Gen. Stat. § 55-14-05(a) (2011) states that

> (a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
>
> . . . .
>
> (2) Disposing of its properties that will not be distributed in kind to its shareholders;
>
> . . . .
>
> (5) Doing every other act necessary to wind up and liquidate its business and affairs.

Therefore, even if the Developer was under revenue suspension, it could still transfer its property if done so pursuant to winding up its affairs.

Although *acquisition* of new property is not an incident to winding up, see *Piedmont & Western Inv. Corp.*, 96 N.C. App. at 108, 384 S.E.2d at 689, we hold that the disposition of property in this case is

precisely what N.C. Gen. Stat. § 55-14-05(a)(2) or (5) was enacted to allow. We note that Ronald Watson, who signed all the 2011 quitclaim deed on behalf of the Developer entities, stated that it was his intention to transfer the entire Oceanfront Strip to the corporate Plaintiff as part of winding up the entities. Further, there is no indication that any of the Developer entities were still engaging in any development activities or had any intent to do so in the future. Accordingly, the HOA's arguments are overruled.

As the corporate Plaintiff was a *de facto* corporation when the deed was signed and the Developer transferred corporate property pursuant to winding up its affairs, we hold that the corporate Plaintiff acquired, through the 2011 quitclaim deed and the 2013 quitclaim deeds, whatever interest the Developer had in the Oceanfront Strip.

C. Easement Counterclaim

[3] We clarify that our ruling does not take a position on any easement claims that the HOA has relating to the Oceanfront Strip or any portion thereof. Here, the trial court's judgments dismissed all claims and counterclaims, including the HOA's counterclaim, in the alternative, for an easement over the Oceanfront Strip.

In order to establish an easement by prescription, the claimant must meet the six criteria set out in *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985):

> 1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.
>
> 2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.
>
> 3. The use must be adverse, hostile, or under a claim of right. . . .
>
> 4. The use must be open and notorious. . . .
>
> 5. The adverse use must be continuous and uninterrupted for a period of twenty years. . . .
>
> 6. There must be substantial identity of the easement claimed. . . .

Id. at 49-50, 326 S.E.2d at 610-11 (emphasis added) (quoting *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974)). Additionally,

we have recently stated that to establish an implied easement by necessity

> one must show that: (1) the claimed dominant parcel and the claimed servient parcel were held in a common ownership which was ended by a transfer of part of the land; and (2) as a result of the land transfer, it became 'necessary' for the claimant to have the easement." *Wiggins v. Short*, 122 N.C. App. 322, 331, 469 S.E.2d 571, 577-78 (1996)(internal quotations and citations omitted).
>
> > [I]t is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the [land] in the same manner and to the same extent which his grantor had used it . . . .
>
> *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438-39 (1961).

Barbour v. Pate, ___ N.C. App. ___, ___, 748 S.E.2d 14, 18 (2013).

These issues do not appear to be well developed in the record in this case. There appear to be issues of fact as to whether the HOA has an easement or easements over the Oceanfront Strip and as to the scope and nature of any such easements. For example, there is evidence that the HOA has been using the Oceanfront Strip since the 1990's to pump storm water after large rain storms. There is some evidence that the HOA members have been using the Oceanfront Strip as a means of access to the Atlantic Ocean. Accordingly, we remand this matter to the trial court for further proceedings to determine the rights of the parties in the Oceanfront Strip consistent with this opinion.

We note there was evidence that other lot owners built improvements on the portion of the Oceanfront Strip in front of their residences. However, the trial court presently has no jurisdiction to determine the easement rights of the owners of individual lots as they have not been joined as parties to this action.

III. Conclusion

In conclusion, we hold that the Developer did not convey the Oceanfront Strip to the HOA by virtue of the 1988 deeds. Further, we hold that when the Developer delivered the 2011 and 2013 quitclaim deeds,

the Developer conveyed all of its interest it still had in the Oceanfront Strip at those times to the corporate Plaintiff. Finally, we hold that there are issues of fact regarding the HOA's easement claims and regarding Plaintiffs' claims for slander of title and trespass. Accordingly, we vacate the trial court's judgment, and we remand this matter for proceedings consistent herewith.

VACATED and REMANDED.

Judge HUNTER, Robert C. and Judge DAVIS concur.

SIVARAMALINGAM MANICKAVASAGAR, M.D., Plaintiff-Appellant
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DR. ARMAYNE DUNSTON (in her official capacity and in her individual capacity), and BIANCA HARRIS (in her official capacity and in her individual capacity), Defendants-Appellees

NO. COA14-757

Filed 31 December 2014

1. Employer and Employee—retaliatory discharge—letter to supervisor—grievance rather than report of discrimination

Plaintiff's claim that he was fired in retaliation for reporting discrimination based on race or national origin was without merit and was properly dismissed by the trial court. It was clear that plaintiff-physician's letter to the medical director of the facility constituted an employee grievance rather than his reporting of racial discrimination and that he did not believe that he was ever discriminated against because of his race or national origin in his employment at this facility.

2. Employer and Employee—retaliatory discharge—reasons for discharge pretextual—no reviewable arguments—summary judgment

Plaintiff's claim for retaliatory discharge was properly dismissed by the trial court where plaintiff did not provide reviewable arguments that defendants' articulated reasons for firing him were pretextual.

Appeal by Plaintiff from order entered 25 March 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 17 November 2014.

Monteith & Rice, PLLC, by Charles E. Monteith, Jr. and Shelli Henderson Rice, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Tamika L. Henderson, for Defendants-Appellees.

McGEE, Chief Judge.

Dr. Sivaramalingam Manickavasagar ("Plaintiff") was hired by the North Carolina Correctional Institution for Women ("NCCIW") as a Physician III-A, and was fired from that position while still on "probationary/trainee" status. Plaintiff then filed a complaint against the North Carolina Department of Public Safety, NCCIW's medical director, Dr. Armayne Dunston ("Dr. Dunston"), and NCCIW's warden, Bianca Harris ("Warden Harris") (together, "Defendants"). Plaintiff sued Dr. Dunston and Warden Harris in both their official and individual capacities. Plaintiff's complaint alleged that he was fired in retaliation for reporting (1) racial discrimination and (2) fraud, misappropriation of state resources, and gross institutional mismanagement at NCCIW. Defendants moved for summary judgment, which was granted by the trial court. We affirm.

I. Background

Plaintiff was born in Sri Lanka, but is a naturalized American citizen and has been practicing medicine since 1959. Plaintiff began employment with NCCIW as a Physician III-A on 30 January 2012. Plaintiff was to be on "probationary/trainee" status for the first nine months of his employment with NCCIW.

During NCCIW's "new hire orientation," Dr. Dunston received a report from a doctor hired at the same time as Plaintiff, Dr. Stanley Wilson ("Dr. Wilson"). Dr. Wilson stated that Plaintiff often arrived late to their training. On 21 February 2012, less than a month into his employment with NCCIW, Plaintiff reported to Dr. Dunston that Dr. Wilson had recently greeted him by saying "Namasthay," [sic] which Plaintiff felt was insulting because Plaintiff was "an American and . . . speak[s] only English." Plaintiff also reported he felt that Dr. Wilson was second-guessing him and telling him what to do. Subsequently, Dr. Dunston spoke with Dr. Wilson about his greeting, and Dr. Wilson never said "Namasthay" [sic] to Plaintiff again. Dr. Dunston also spoke with Plaintiff about the "very collaborative approach to medicine" at NCCIW and told Plaintiff he would need to be able to "welcome feedback" from his colleagues.

Throughout the next several months, Dr. Dunston received numerous reports from NCCIW medical personnel that Plaintiff was combative and refused to follow NCCIW protocol. When other doctors or medical staff attempted to inform Plaintiff about proper NCCIW protocol, Plaintiff's reported "response to everyone" was simply to dismiss them and state that he had been practicing medicine for over fifty years.

NCCIW's nurse supervisor, Pamela Freeman-Caviness, reported to Dr. Dunston on 25 June 2012 that Plaintiff was asleep in the front Provider Office of the prison ("the 25 June sleeping incident"). Dr. Dunston went to the front Provider Office and saw another doctor enter and bump into Plaintiff; Plaintiff then opened his eyes. Dr. Dunston told Plaintiff that he had been sleeping and asked Plaintiff to come to her office. Dr. Dunston later explained to Plaintiff that "sleeping was inappropriate in the prison setting" and that it was a safety and security breach. Plaintiff did not deny that he was sleeping and instead stated: "No one was going to hurt me, I know the housekeeper, she is a patient of mine and I ask her how she is doing."

Plaintiff later "admit[ted] to" the 25 June sleeping incident in a letter to Warden Harris dated 25 September 2012 ("the 25 September letter"). However, during deposition, Plaintiff clarified his statement by saying: "I admit the allegation, but not [the] description of that as sleeping on the job." To say that he was "sleeping," Plaintiff argued, would require a "differential diagnosis" from a doctor. Plaintiff further stated that he actually could not "remember . . . [the] [e]vents surrounding [the 25 June sleeping] incident and what happened after that, a few days after even," because he was on numerous medications that may have affected his cognitive state and also because he was not eating at the time in order to "remain alert."

Plaintiff wrote Dr. Dunston a letter on 2 July 2012 ("the 2 July letter"), which contained a number of grievances against Dr. Dunston. The 2 July letter generally outlined what Plaintiff saw as mismanagement of NCCIW by Dr. Dunston. It also alleged that Dr. Dunston "engaged in discriminatory activity against" Plaintiff by not assigning him to certain duties at the prison. Dr. Dunston forwarded Plaintiff's 2 July letter up the chain of command to the Equal Employment Opportunity office of the North Carolina Department of Correction ("EEO") because it "contained allegations [that] could be perceived as [racial] discrimination" by Dr. Dunston.

Nonetheless, during the EEO's subsequent investigation into the allegations in the 2 July letter, Dr. Dunston explained that she did not

assign Plaintiff to certain duties because she was concerned about what she saw as Plaintiff's clashes with staff members and refusal to follow NCCIW protocol. Moreover, Plaintiff expressly stated to EEO investigators that he had "never faced discrimination [based on] race[] [or] religion" at NCCIW. As such, the EEO report concluded that any intimation of racial "discrimination" in Plaintiff's 2 July letter was unsubstantiated. If anything, the report noted, Plaintiff "communicated [his own] biases of a racial nature and generalized stereotypes of African-Americans as he referenced Dr. Dunston and her health" during the investigation.

Dr. Dunston continued to receive reports of Plaintiff clashing with staff members and not following NCCIW protocol through July of 2012. Dr. Dunston also received a second report of Plaintiff sleeping on the job, this time from Dr. Wilson, on 18 July 2012 ("the 18 July sleeping incident"). Dr. Dunston and NCCIW's deputy warden, John Habuda, met with Plaintiff and Dr. Wilson the following day to discuss the 18 July sleeping incident ("the 19 July conference"). Plaintiff reportedly did not deny that he was asleep, and instead stated: "[A]fter eight hours, I can do what I want[.] [If] there is no work I can sleep, snooze, I can do whatever I want until the telephone rings and I pick it up."

They also discussed a recent argument between Plaintiff and Dr. Wilson, and Plaintiff stated that Dr. Wilson generally acted with an attitude of "white supremacy." Plaintiff also said of Dr. Dunston, his direct supervisor:

> Why should I get any advice from her[.] [S]he is an administrator, she is not a practicing physician. I am the man with the boots on the ground[.] I practice medicine, I do not need to get advice from her. . . . I will not take any clinical advice from her; I am not going to do that[.]"

After receiving a report concerning the 19 July Conference, Warden Harris ordered an internal investigation of Plaintiff due to reports that Plaintiff was still sleeping on the job and after "becoming aware of other worrisome behavior" by Plaintiff.

While the investigation of Plaintiff was pending, Plaintiff sent Dr. Dunston another letter, dated 23 July 2012. In that letter, Plaintiff accused Dr. Wilson of having "the audacity and courage to act out as a Master towards a 'Slave' only as a result of the treatment I had received from this administration since I joined the Department of Corrections about [six] months ago." Dr. Dunston also forwarded this letter up the chain of command to the EEO, which was received while the EEO was conducting its investigation into the 2 July letter.

Warden Harris informed Plaintiff, in writing, that Plaintiff was being placed on "investigatory status" effective 9 August 2012. As a result, Plaintiff would receive pay while he was being investigated, but he was not to report for duty. Plaintiff subsequently delivered another letter to the EEO on 4 September 2012. This letter reportedly documented seventeen instances where Plaintiff felt inmates had received "substandard clinical care" at NCCIW.

Plaintiff was notified by Warden Harris of his pre-disciplinary conference through a letter dated 20 September 2012. The pre-disciplinary conference was held on 24 September 2012. During the conference, Plaintiff was given the opportunity to submit a written response to the allegations against him, and he responded in the 25 September letter to Warden Harris, discussed previously. Again, Plaintiff "admit[ted] to" the 25 June sleeping incident in the 25 September letter. Plaintiff also stated he "became alert" when Dr. Dunston approached him to speak about his allegedly sleeping on the job. Plaintiff did not address the 18 July sleeping incident and stated that: "No other allegations of similar incidents have been brought to my attention[.]" Plaintiff acknowledged that he had an "adversarial relationship" with Dr. Wilson and declined to comment further except to note that he felt the issue "remain[ed] largely unresolved because of the lack of any efforts to resolve it by Dr. Dunston or anyone else in the chain of command." In a subsequent affidavit filed by Plaintiff, he took issue with the incidents involving Plaintiff and other NCCIW staff members being characterized as "confrontations" and stated that he "did not engage in 'confrontations' " with staff members at NCCIW. Instead, Plaintiff averred, "[a]ny disagreements that occurred between Dr. Stanley Wilson and I were initiated by [Dr Wilson]."

Warden Harris mailed Plaintiff written notice of Plaintiff's termination from NCCIW on 24 October 2012 ("the termination letter"). The termination letter briefly summarized many of the reports that Dr. Dunston received from NCCIW staff regarding Plaintiff's general conduct. The termination letter then set out several categories of "unacceptable personal conduct" as provided in the Department of Correction Personnel Manual ("DOC manual"), specifically,

> 4. Participating in any action that would in any way seriously disrupt or disturb the normal operation of the agency, or any sub-unit of the Department of Correction or State government.
>
> . . . .

> 16. . . . intimidation of fellow employees
>
> . . . .
>
> 20. . . . engaging in undue familiarity with inmates
>
> . . . .
>
> 28. Knowingly making false or malicious statements with intent to harm or destroy the reputation, authority, or official standing of an individual or the Department.
>
> . . . .
>
> 33. Willful failure to complete reports[or to] accurately reflect information on reports . . . where such failure could result in harm to employees, inmates, probationers, parolees, property, or other individuals.

The termination letter continued by stating that

> [t]he incidents outlined above clearly indicate an ongoing pattern of behavior that cannot be tolerated. This behavior includes your unwillingness and/or inability to accept direction or training in facility procedures from your supervisor or your colleagues; your inappropriate hostility and aggression in your interactions with other employees and in front of inmates, which disrupts the normal operations of the unit; your failure to recognize and accept such basic security protocols as the requirement to remain alert while on duty; and your unwillingness and/or inability to change your behavior despite numerous counseling attempts.

Plaintiff filed a complaint against the North Carolina Department of Public Safety, Dr. Dunston, and Warden Harris, alleging that he was fired in retaliation for reporting (1) racial discrimination and (2) fraud, misappropriation of state resources, and gross institutional mismanagement at NCCIW. Plaintiff's claims were based entirely on his reporting the contents of the 2 July letter.[1] Defendants filed a motion for summary judgment as to all of Plaintiff's claims, which was granted by order filed 25 March 2014. Plaintiff appeals.

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1. On appeal, Plaintiff argues that he was also fired in retaliation for reporting what he viewed as substandard medical care of some NCCIW inmates. However, this issue is waived because Plaintiff did not raise it at trial. *See* N.C. R. App. P. 10(a)(1).

II. Standard of Review

The North Carolina Supreme Court has stated clearly that

> [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations and internal quotation marks omitted).

III. Analysis

North Carolina's Whistleblower Act ("the Act"), codified at N.C. Gen. Stat. §§ 126-84 *et seq.* (2013), provides that

> State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;
>
> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C.G.S. § 126-84(a). Section 126-85 states that

> [n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to

> report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C.G.S. § 126-85. In order to succeed on a claim for retaliatory termination,

> the Act requires plaintiffs to prove, by a preponderance of the evidence, the following three essential elements: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

Newberne v. Dep't of Crime Control & Pub. Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005). However, complaints merely "concerning employee grievance matters" are not protected by the Act. *Hodge v. N.C. Dep't of Transp.*, 175 N.C. App. 110, 117, 622 S.E.2d 702, 707 (2005). Moreover,

> [a] party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by N.C. Gen. Stat. § 1A-1, Rule 56(e), showing that there is a genuine issue of material fact for trial.

Strickland v. Doe, 156 N.C. App. 292, 294-95, 577 S.E.2d 124, 128 (2003) (citation omitted).

A. Reporting Racial Discrimination

[1] Plaintiff first contends that he was discharged from NCCIW "because he had [reported] that he was being discriminated against on account of his race and national origin" in violation of N.C.G.S. § 126-85. Although Plaintiff's complaint states that he was reporting racial discrimination in the 2 July letter, we find no evidence in the record to support this claim. With the exception of his complaint, Plaintiff has never stated that he was actually discriminated against because of his race, religion, or national origin, or that he was reporting as such. During the EEO's investigation into the 2 July letter, Plaintiff told EEO investigators that he had "never faced discrimination [based on] race[] [or] religion" at NCCIW. In the affidavit Plaintiff submitted to the trial court, Plaintiff never stated he felt he was discriminated against because of his race, religion, or national origin, and instead stated that he had "used the word 'discrimination' because [he] was not able to determine any other explanation for

the disparate treatment that [he] received." During deposition, Plaintiff repeatedly refused to state that there was any racial motivation behind this alleged "discrimination," as seen through the following exchanges:

> A: The statistics are startling because it clearly shows a pattern of conduct by your clients. There was something that I couldn't explain except to use the word "discrimination." Now, is it based on race or religion, sex or -- I don't know.
>
> . . . .
>
> A: I have explained to you I don't know whether it was discrimination based on the religion or some -- but I know there was discrimination or disparate treatment. . . . But whether it is based on race, this and that, I don't know.
>
> . . . .
>
> Q: [During a particular argument with Dr. Wilson], did [Dr. Wilson] make any reference to your race or national origin?
>
> A: I don't think so.
>
> Q: Okay. So do you think that interaction regarding the time sheet was motivated by your race or national origin?
>
> A: I never said that.
>
> Q: Okay.
>
> A: I never said that. I don't know why he reacted that way.
>
> . . . .
>
> Q: And at any time during that interaction [involving another argument with Dr. Wilson,] did he reference your race or your national origin?
>
> A: No.
>
> Q: Okay.
>
> A: But he told me . . . "Maybe you have done too much of this, too much of this work before."
>
> Q: You took that to be a reference to your race or national origin?

A: I don't think so. . . . I mean I don't know. This -- as I said, I haven't understood racism in the United States, ma'am . . . . You may have a better idea of racism than I do. . . . But I haven't understood racism here. . . . [N]ever in my life, never during [my time at] the NCCIW that I ever thought Dr. Dunston would do a thing like that to me, because she -- her ancestors probably were slaves here, who were treated by the whites with unusual cruelty.

. . . .

Q: Is it your position that Dr. Dunston didn't assign you to be on call because of your race and national origin?

A: You know, I told you before at the beginning, I don't understand racism in the United States. I only recognize disparate or discriminatory treatment. And I had enough evidence to show it was discriminatory treatment.

. . . .

Q: [] I'm asking you about your allegations that [Dr. Dunston] discriminated against you based on your . . . race and national origin.

A: I cannot -- I don't understand the meaning of discrimination, how it is interpreted in the legal circles. You cannot put that word -- because I don't understand that. . . . What is discrimination? Discrimination can take many forms. . . . It may not be on race, this, that, and so on. . . . I am only saying discrimination. Did I say race -- this is on July 2nd letter? I may have said that. . . . I don't know. . . . I don't know what is discrimination.

Q: Well, answer the question based on your understanding . . . of what discrimination is.

A: The -- my understanding of discrimination is that if between physicians you have -- you are not treated -- if you have six physicians and you single out one, like me, I am different, and give shifts that point to a differential treatment, not fair and equitable, then I would say I have no other word to use . . . than discrimination. . . .

Q: [W]hen you say you're different, you're referring to your race and national origin, I assume; is that correct?

> A: I'm not sure of that, but -- difference [maybe] -- [maybe] some other things, ma'am.
>
> Q: Like what?
>
> A: Maybe I'm intellectually superior[.]
>
> . . . .
>
> Q: Dr. Manick, you've made the very serious allegation that [Dr. Dunston] discriminated against you [based on race or national origin.]
>
> A: (interposing) I didn't make that allegation. I only said discrimination. . . . For lack of a better word, I called it discrimination[.]

At one point, after opposing counsel again specifically asked Plaintiff about the allegation in his complaint that he was discriminated against based on race or national origin, Plaintiff stated that he could not respond, pointed to his lawyer, and stated "[t]hat's what he wrote."

Based on these statements by Plaintiff, it is clear Plaintiff did not believe, even leading up to trial, that he was ever discriminated against because of his race or national origin at NCCIW. As such, Plaintiff's 2 July letter did not involve his reporting racial discrimination at NCCIW, and instead constituted an employee grievance matter, which was not protected by the Act. *See Hodge*, 175 N.C. App. at 117, 622 S.E.2d at 707. Therefore, Plaintiff's claim that he was fired from NCCIW in retaliation for reporting discrimination based on race or national origin is without merit and was properly dismissed by the trial court.

B. Reporting Fraud, Misappropriation, and Mismanagement

[2] Plaintiff next argues he was fired for reporting fraud, misappropriation of state resources, and gross mismanagement of NCCIW in the 2 July letter. Again, to establish a *prima facie* claim for retaliatory termination, a plaintiff must establish

> (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.

Newberne, 359 N.C. at 788, 618 S.E.2d at 206. Regarding this third element for establishing a *prima facie* claim,

> [t]here are at least three distinct ways for a plaintiff to establish a causal connection between the protected activity and the adverse employment action under the Whistleblower Act. First, a plaintiff may rely on the employer's admi[ssion] that it took adverse action against [the plaintiff] [solely] because of the [plaintiff's] protected activity.
>
> . . . .
>
> Second, a plaintiff may seek to establish by circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual. Cases in this category are commonly referred to as "pretext" cases.
>
> . . . .
>
> Third, when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken.

Id. at 790–91, 618 S.E.2d at 207–08 (citations and internal quotations omitted). Plaintiff's complaint alleges that Defendants' stated reasons for firing him were pretextual and, thus, his claim falls within the second category of cases described above.

> ["Pretext" cases] are governed by the burden-shifting proof scheme developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981) . . . . Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Id. at 790-91, 618 S.E.2d at 207-08 (citations omitted).

Even if we were to assume *arguendo* that Plaintiff has established a *prima facie* claim, his suit against Defendants was still properly disposed of through summary judgment. Defendants have articulated some legitimate, non-retaliatory reasons for terminating Plaintiff's employment with NCCIW, specifically his reported clashes with NCCIW personnel and ongoing refusal to follow NCCIW protocol. Therefore, under the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, Plaintiff would have to raise a factual issue regarding whether these proffered reasons for firing Plaintiff were pretextual. "To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive." *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002).

Although Plaintiff argues at length in his brief that he has established a *prima facie* claim against Defendants, Plaintiff has provided this Court with no express argument that the Defendants' stated reasons for firing him were pretextual, nor has he even directly attacked the validity of most of Defendants' articulated reasons for firing him. Plaintiff does not refute the documented instances of his sleeping on the job; instead, he has stated that he either did not remember whether he was asleep or he challenges the characterization of his "non-alert[ness]" as "sleeping." Plaintiff does not dispute the repeated occurrences of his clashing with NCCIW staff; he either does not remember these occurrences or challenges their being characterized as "confrontations."

Instead, Plaintiff argues on appeal that the trial court should not have even considered the numerous reports from NCCIW staff regarding Plaintiff's conduct at NCCIW -- i.e., all of the legitimate articulated bases for firing Plaintiff -- because those reports constituted hearsay. Plaintiff has waived this argument on appeal, as he did not raise it with the trial court. *See* N.C.R. App. P. 10(a)(1). In any event, Plaintiff's claim is without merit; "[s]tatements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990) (citation and internal quotation marks omitted).

Plaintiff does provide this Court with another argument that could be interpreted as an argument that Defendants' articulated reasons for firing him were pretextual. Plaintiff points to a part of the dismissal letter that cites several of the DOC Manual's enumerated forms of "unacceptable personal conduct." Specifically, Plaintiff's dismissal letter notes that the conduct of "[k]nowingly making false or malicious statements with

intent to harm or destroy the reputation, authority, or official standing of an individual or the Department" may have been relevant in NCCIW's determination to fire Plaintiff. Plaintiff argues that "a reasonable juror could infer that Warden Harris was referring to Plaintiff's reports of . . . waste and mismanagement of state resources . . . when she referenced false and malicious statements in Plaintiff's dismissal letter."

Notwithstanding the fact that the termination letter documents a number of inflammatory statements made by Plaintiff about other NCCIW staff members,[2] Plaintiff's own characterization that this is something that a juror "could infer," acknowledges that this is not a non-speculative fact that might establish pretext by Defendants. Because Plaintiff has not provided this Court with any further reviewable arguments that Defendants' articulated reasons for firing him were pretextual, we find that Plaintiff's claim was properly dismissed by the trial court.

Affirmed.

Judges HUNTER, Robert C. and BELL concur.

2. Dr. Dunston's deposition also revealed that Plaintiff had previously made an unfounded report to Dr. Dunston that Dr. Wilson was only giving out narcotics to white inmates, although this instance is not documented in the dismissal letter.

MYC KLEPPER/BRANDON KNOLLS L.L.C., D/B/A KLEPPER OUTDOOR ADVERTISING, PETITIONER

v

THE BOARD OF ADJUSTMENT FOR THE CITY OF ASHEVILLE, RESPONDENT

No. COA14-539

Filed 31 December 2014

1. Jurisdiction—subject matter jurisdiction—failure to join necessary party

The trial court did not err by denying a Board of Adjustment's motion to dismiss a petition for lack of subject matter jurisdiction based on failure to name the City of Asheville (City) as respondent in the petition. Failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of a proceeding. Further, the City's participation in the proceedings cured the defect in the petition.

2. Zoning—billboard sign—city ordinance—legal nonconforming signs could not be reestablished after discontinued use for more than a year

The trial court did not err by concluding that a billboard sign was not allowed based on a variance granted in 1992 for a sign located on the same property. The City's ordinance provided that legal nonconforming signs may not be reestablished after discontinued use for more than a year, and the pertinent structure was not in use for more than two years. The sign was installed without a permit and was larger than allowed by ordinance.

3. Zoning—billboard sign—cannot rely on misrepresentations of city official

Although petitioner argued that the City Attorney failed to inform him that the previous billboard sign could not be reestablished, representations by a city official cannot immunize a petitioner from violations of zoning ordinances. It is undisputed that the sign was installed without a permit and was larger than allowed by ordinance.

Appeal by petitioner from order entered 27 January 2014 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 October 2014.

Kelly & Rowe, P.A., by James Gary Rowe, for petitioner-appellant.

City Attorney Robin T. Currin and Assistant City Attorney Jannice Ashley, for respondent-appellee.

GEER, Judge.

Petitioner MYC Klepper/Brandon Knolls L.L.C., d/b/a Klepper Outdoor Advertising appeals an order affirming the decision of respondent the Board of Adjustment for the City of Asheville ("the Board") upholding the issuance of a Notice of Violation ("NOV") for a billboard sign owned by petitioner. On appeal, petitioner primarily argues that the sign should be allowed pursuant to a variance granted in 1992 for a sign located on the same property. However, the City of Asheville's Code of Ordinances provides that legal nonconforming signs may not be reestablished after discontinued use for more than a year. Thereafter, the use of the structure must conform to the zoning ordinance. The prior sign was removed in 2007 and the structure was not in use for more than two years. Therefore, any newly constructed sign was required to conform to the zoning ordinance.

Although petitioner argues that the City Attorney failed to inform him that the previous sign could not be reestablished, representations by a city official cannot immunize a petitioner from violations of zoning ordinances. Because it is undisputed that the sign was installed without a permit and is larger than allowed by ordinance, we affirm.

Facts

On 27 October 2010, the City of Asheville issued an NOV to R.L. Jordan SV STA N.C. Inc., the owner of the property located at 1069 Sweeten Creek Road, Asheville, North Carolina ("the property"), for installing an off-premise sign without first obtaining a sign permit. Petitioner, the owner of the sign, appealed the NOV to the Board. The evidence at the hearing before the Board showed the following facts.

In 1992, Donald Feldbusch was granted a variance to erect a 199.88 square foot billboard on the property. Although the order granting the variance does not indicate that it was subject to any conditions, the ordinance in effect in 1992 required that all nonconforming billboards be removed or amortized within seven years of 1990, and the minutes from the board meeting when the variance was granted state that the variance was "good only through amortization period." Nevertheless, the

sign was not removed when the amortization period ended in 1997, and no notice of violation was issued by the City of Asheville.

Sometime in 2007, the sign was removed and only poles remained. On 2 September 2010, petitioner purchased the billboard structure from James and Inger Campen. The sales contract described the billboard structure as one "once known to have been . . . located" on the property. After purchasing the billboard structure and related equipment, petitioner erected a 288 square foot billboard sign on the property.

On 11 October 2010, during a routine inspection of the area, the Asheville City Development Review Specialist, Shannon Morgan, noticed the billboard on the property for the first time. Mr. Morgan searched the City's system and discovered that no sign permit application had ever been submitted for the billboard and that no sign permit for the billboard had ever been issued by the City. Consequently, on 27 October 2010, the City issued an NOV to the property owner for the installation of an off-premise sign without first obtaining a sign permit.

Following the hearing, the Board made the following pertinent findings in an order dated 28 March 2011:

> 6. Prior to 2007 a billboard did exist at the location of the sign that is the subject of the Notice of Violation, but at some time no later than the end of 2007 the sign had been removed, leaving only the poles that had supported the sign.
>
> 7. That a sign at that location had been erected and maintained pursuant to a variance granted in 1992, but the minutes from the hearing at which such variance was granted reflect that the permit issued pursuant to such variance was still subject to the amortization rules of the sign ordinance requiring all non-conforming signs to be removed in 1997.
>
> 8. That no sign existed at that location between some time in 2007 and the time the current sign was erected, a period of between two and three years.
>
> 9. That even if the current sign could be maintained as a non-conforming sign, its use was discontinued for over two years and cannot be re-established. (UDO Section 7-13-8(f)(5) and Section 7-17-3 (a)).

10. That the current sign ordinance allows off premise signs of no more than 12 square feet at the location of the subject sign, whereas the current sign is 288 square feet. (UDO Section 7-13-5(b)(1)).

11. That no permit for the current sign exists, and although the Appellant asserts that a permit was applied for in September of 2010, such permit would not have been issued for the sign that was constructed.

12. The Appellant spoke of use of the sign for a "Cap and Trade" transaction whereby he would either take down the subject sign so as to be allowed to erect a sign at another location, or that he would take down a sign at another location so as to be able to keep this sign, but illegal signs cannot be used to "trade" for signs elsewhere, and illegal signs cannot be erected and made "legal" as the result of having been the result of the removal of a legal sign elsewhere.

Based upon these findings, the Board concluded that:

1. The sign that presently exists at 1069 Sweeten Creek Road is an unlawful sign under the current sign ordinance, being larger than allowed by current code and having been constructed without a permit being obtained from the City.

2. That any previously existing legal sign of the size and at the location of the present sign should have been removed in 1997.

3. That if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be re-established after being removed for more than two years.

4. The Appellant has presented no competent evidence to support his argument for reversal of the decision of City staff to issue a Notice of Violation.

The Board, by a vote of five to zero, upheld the NOV.

Petitioner filed a petition for writ of certiorari seeking review of the Board's decision pursuant to N.C. Gen. Stat. § 160A-393. The petition was granted and a hearing on the matter was held in Buncombe County Superior Court on 19 December 2013. On 27 January 2014, the superior

court entered an order affirming the Board's decision. Petitioner timely appealed the order to this Court.

I

[1] We first address the Board's contention that the trial court erred in denying its motion to dismiss the petition for lack of subject matter jurisdiction. This Court reviews the trial court's decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction de novo. *Hardy v. Beaufort Cnty. Bd. of Educ.*, 200 N.C. App. 403, 408, 683 S.E.2d 774, 778 (2009).

Quasi-judicial decisions by a city's Board of Adjustment are "subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393." N.C. Gen. Stat. § 160A-388(e2)(2) (2013). N.C. Gen. Stat. § 160A-393(e) (2013) provides that "[t]he respondent named in the petition shall be the city whose decision-making board made the decision that is being appealed[.]" In this case, petitioners named the Board of Adjustment for the City of Asheville as respondent instead of naming the City of Asheville, as required by N.C. Gen. Stat. § 160A-393(e). The Board contends that this failure deprived the trial court of subject matter jurisdiction. We disagree.

The defect in the petition in this case amounts to a failure to join a necessary party. *See Mize v. Cnty. of Mecklenburg*, 80 N.C. App. 279, 283, 341 S.E.2d 767, 769 (1986) (holding that petitioner failed to join a necessary party when petition for writ of certiorari named only the County of Mecklenburg as respondent and did not name Mecklenburg County Zoning Board of Adjustment when seeking review of the Zoning Board's decision). This Court has expressly held that "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793 (1986). *See also Phillips v. Orange Cnty. Health Dep't*, No. COA13-1463, ___ N.C. App. ___, ___ S.E.2d ___, 2014 WL 6435697, *3, 2014 N.C. App. LEXIS 1142, *8 (Nov. 18, 2014) (rejecting defendant's argument that trial court lacked subject matter jurisdiction in part "because failure to join a necessary party does not negate a court's subject matter jurisdiction"); *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 8, 545 S.E.2d 745, 750 (holding "despite Lee Cycle's failure to name Lee Motor as a plaintiff, the trial court had subject matter jurisdiction over the action"), *aff'd per curiam*, 354 N.C. 565, 556 S.E.2d 293 (2001).

Accordingly, we hold that petitioner's failure to name the City of Asheville as respondent in the petition did not deprive the trial court

of subject matter jurisdiction over the proceedings. Additionally, we note that the Board does not dispute the trial court's finding that "the City was on notice of this action and participated in the defense thereof." Because the City's participation in the proceedings cured the defect in the petition, we hold that the trial court did not err in denying the Board's motion to dismiss the petition. *Cf. In re J.T.(I)*, *J.T.(II)*, *A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009) (holding failure to name juveniles as respondents in summons as required by the juvenile code was cured by participation of juveniles' GAL in the proceedings).

The Board, nevertheless, cites two recent unpublished decisions, *Whitson v. Camden Cnty. Bd. of Comm'rs*, ___ N.C. App. ___, 748 S.E.2d 775, 2013 WL 3770664, 2013 N.C. App. LEXIS 766 (2013) and *Philadelphus Presbyterian Found., Inc. v. Robeson Cnty. Bd. of Adjustment*, ___ N.C. App. ___, 754 S.E.2d 258, 2014 WL 47325, 2014 N.C. App. LEXIS 51, *disc. review denied*, ___ N.C. ___, 758 S.E.2d 873 (2014), in support of its argument that the trial court lacked subject matter jurisdiction. In each of these cases, the petitioner, an outside party, sought review of the decision-making board's grant of a conditional use permit ("CUP") to an applicant, but failed to name the applicant as a respondent in the petition as required by N.C. Gen. Stat. § 160A-393(e). The respondents moved to dismiss pursuant to Rule 12(b)(7) for failure to join a necessary party, and the trial courts granted their motions. This Court affirmed, and additionally held that the trial courts lacked subject matter jurisdiction.

We first note that these are unpublished opinions and therefore not binding on this Court. Secondly, to the extent that these cases hold that failure to join a necessary party deprives the trial court of subject matter jurisdiction, they are contrary to this Court's holding in *Stancil*. Finally, there is no indication that the defects in the petitions in *Whitson* or *Philadelphus* were cured by the unnamed respondents' notice of and participation in the proceedings, as was the case here. Accordingly, we are not persuaded that the trial court erred in denying respondent's motion to dismiss the petition, and we will review the merits of petitioner's appeal.

II

In a proceeding in the nature of certiorari, the superior court reviews the board of adjustment's decision to determine whether the decision was:

a. In violation of constitutional provisions, including those protecting procedural due process rights.

b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.

c. Inconsistent with applicable procedures specified by statute or ordinance.

d. Affected by other error of law.

e. Unsupported by substantial competent evidence in view of the entire record.

f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k). " 'The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal.' " *Myers Park Homeowners Ass'n v. City of Charlotte*, ___ N.C. App. ___, ___, 747 S.E.2d 338, 341 (2013) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

Questions of law are reviewed de novo, while questions whether the decision is supported by the evidence or is arbitrary or capricious are reviewed under the whole record test. *Id.* at ___, 747 S.E.2d at 342.

> "Under a *de novo* review, the superior court considers the matter anew[] and freely substitut[es] its own judgment for the agency's judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence. The whole record test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*."

Id. at ___, 747 S.E.2d at 342 (quoting *Mann Media, Inc.*, 356 N.C. at 13-14, 565 S.E.2d at 17-18). This Court reviews the superior court's order to determine whether it applied the correct standard of review and, if so, whether it did so properly. *Id.* at ___, 747 S.E.2d at 342.

[2] In this case, the Board upheld the NOV based upon its finding that the sign is larger than permitted by the ordinance and was constructed without a permit. Petitioner does not dispute this finding, but argues that the sign should be allowed based on the 1992 variance, which, petitioner contends, was not subject to the amortization rules. Alternatively, petitioner argues that the sign should be deemed legal because the City

failed to notify petitioner or any prior owner of the sign of the "cap and replace" provisions adopted by the City in 2004.[1]

These first two arguments are immaterial in light of Asheville, N.C., Code of Ordinances §§ 7-13-8(f)(5) and 7-17-3 (2014). Section 7-13-8(f)(5) provides that a legal nonconforming sign cannot be reestablished after its discontinued use for 60 days. As further explained in section 7-17-3(a), "[a] nonconforming use shall be deemed discontinued after a period of 365 consecutive days regardless of any substantial good faith efforts to re-establish the use. Thereafter, the structure or property associated with the use may be used only for conforming use." Thus, if a nonconforming sign that has been deemed legal by the granting of a variance or through a "cap and replace" agreement is not used for 425 consecutive days, the sign loses the benefit of the variance or the "cap and replace" agreement, and any new sign must comply with all ordinances.

Here, it is undisputed that the prior sign was removed from the property in 2007 and that no sign existed on the property until the current sign was built in 2010. Because the sign was not in use during a period of more than 425 consecutive days, the new sign constructed in 2010 was required to conform with the ordinance. Accordingly, the Board correctly found that even "if the sign had been a non-conforming sign that could have continued in use after 1997, it still could not be reestablished after being removed for more than two years."

[3] Petitioner next argues, without citing any authority, that he should be able to reestablish the sign because he relied upon the advice of the City Attorney, Mr. Oast. Petitioner consulted Mr. Oast during the time the previous sign was not in use and was being considered for replacement. Mr. Oast did not inform petitioner that there was a time limit for re-establishing the sign and in fact told petitioner that he was proceeding properly.

It is well established, however, "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such

1. The "cap and replace" provisions, set forth in Section 7-13-8(g) of the City's Code of Ordinances, provide an option whereby certain qualified nonconforming signs may enter an agreement with the City providing for the removal, relocation, or reconstruction of the sign. Section 7-13-8(g)(2) requires the City planning and development director to notify the owners of nonconforming signs of the adoption of the "cap and replace" option. A sign cannot qualify for the program unless the owner registers the sign with the City's planning and development office within 180 days of receipt of the notice. Asheville, N.C., Code of Ordinances § 7-13-8(g)(2)(b) (2014).

ordinance in times past." *City of Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). This is because "[i]n enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State[,]" and such power "cannot be bartered away by contract, or lost by any other mode." *Id.*

Accordingly, Mr. Oast's mistaken representations do not immunize petitioner from liability for zoning violations. *See also Helms v. City of Charlotte*, 255 N.C. 647, 652, 122 S.E.2d 817, 821 (1961) (holding fact that city official mistakenly issued to plaintiff permit to install subterranean oil tanks on his property in violation of city ordinance and plaintiff incurred expenses in reliance on permit did not estop City from seeking to enforce ordinance); *Overton v. Camden Cnty.*, 155 N.C. App. 391, 398, 574 S.E.2d 157, 162 (2002) (holding that county was not estopped from enforcing uniform development ordinance against plaintiff even though it had not done so at earlier hearing).

In reviewing the decision of the Board, the trial court applied whole record review and determined that the Board's findings were supported by substantial evidence in the record. It applied de novo review to the questions of law and determined that the Board correctly interpreted and applied the applicable provisions of the city Code of Ordinances and did not commit any errors of law. We hold that the trial court applied the correct standard of review, and, for the foregoing reasons, did so correctly.

Affirmed.

Judges STROUD and BELL concur.

NORRELL v. KEELY

[238 N.C. App. 441 (2014)]

TERESA J. NORRELL, PLAINTIFF
v.
WILLIAM MILES KEELY, DEFENDANT

No. COA14-433

Filed 31 December 2014

1. Constitutional Law—First Amendment—no contact order

The trial court properly denied defendant's motions to dismiss and for a directed verdict in a case involving a civil no contact order where defendant contended that the order violated his First Amendment rights. While some of plaintiff's allegations were based upon statements made by defendant, the trial court found that defendant revved his engine and charged his car toward plaintiff in such a manner that she jumped into a ditch, and that defendant fraudulently contacted the sheriff's department regarding plaintiff. It was noted that plaintiff's complaint was filed before 1 October 2013, the effective date of an amendment to N.C.G.S. § 50-7.

2. Stalking—harassment—knowing conduct directed at specific person

The trial court properly concluded that defendant's conduct of charging at plaintiff with a vehicle and making false claims about her to a sheriff's department were forms of harassment. N.C.G.S. § 14-277.3A(b)(2) only requires knowing conduct directed at a specific person.

3. Stalking—harassment—intent

The trial court did not err in determining defendant intended to harass plaintiff in a case involving a no contact where the trial court had found that defendant's "purpose" was to harass plaintiff. A finding regarding defendant's "purpose" was the equivalent of a finding regarding his "intent."

4. Stalking—civil no contact order—emotional distress

In an action for a civil no contact order, the trial court properly found that defendant caused plaintiff substantial emotional distress where the complaint was completed on an AOC form with the words "tormented," "terrorized," and "terrified" underlined; plaintiff wrote detailed allegations in the blanks on the form; While both plaintiff's and her husband's testimony could have been more descriptive of emotional distress, the trial court had the opportunity to see the parties; to hear the witnesses; and the trial court's

ultimate determination that plaintiff was caused substantial emotional distress was supported by the findings.

5. Stalking—emotional distress—substantial

A no contact order was properly entered where defendant contended that the trial court improperly found "considerable emotional distress" rather than "substantial emotional distress." The law in this type of case is not treated as a "magic words" game, and a finding of "considerable emotional distress" is no different than a finding of "substantial emotional distress."

Appeal by defendant from order entered 19 November 2013 by Judge C. Christopher Bean in District Court, Currituck County. Heard in the Court of Appeals 9 October 2014.

No brief filed on behalf of plaintiff-appellee.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr. and Lloyd C. Smith, III, for defendant-appellant.

Defendant appeals no-contact order. For the following reasons, we affirm.

I. Background

On 9 September 2013, plaintiff filed a complaint for a no-contact order pursuant to North Carolina General Statute Chapter 50C; her complaint for the North Carolina General Statute Chapter 50C no-contact order was on a form provided by the administrative office of the courts. The form complaint, AOC-CV-520, Rev. 2/06, had pre-printed language with boxes to check if the sentences following the box are applicable; under certain boxes spaces are provided for writing in additional details. Plaintiff checked box 4 which states,

> The defendant has followed on more than one occasion or otherwise tormented, terrorized, or terrified the plaintiff named above with the intent to place the plaintiff in reasonable fear for the plaintiff's safety or the safety of the plaintiff's immediate family or close personal associates or with the intent to cause, and which did cause, the plaintiff to suffer substantial emotional distress by placing the plaintiff in fear of death, bodily injury, or continued torment or terror in that: *(give specific dates and describe in detail what happened and how it placed the*

plaintiff in fear of safety or how it caused substantial emotional distress)[.]

Plaintiff underlined the words "tormented," "terrorized," and "terrified." Plaintiff then wrote under box 4:

> The defendant's stalking, harassing, and threatening/intimidating conduct has continued over a 5 year period of time; More specifically has escalated to the following more recent incidents:
>
> 7/16/13 at approximately 7:00 AM – Came to the entrance of my drivewa[y] starring [(sic)] in an intimidating manner and stating, "Don't think that[t] fence is going to stop me."
>
> 7/25/13 at approximately 11:00 AM – I was walking my dog down Rocky Top Ro[ad] he was driving toward me, stopped appx 40 ft from me, revve[d] his engine & sped directly toward me as if he was going to run me over; then slowed beside me & was laughing uncontrollably.
>
> 7/29/13 – Subpoenaed for a case I had Nothing to do with just to cause me to lose time for work.

On the following page plaintiff continued:

> 8/17/13 at approximately 10:30-11:00AM, the defendant falsely called & reported to the Currituck County 911/Sherriff's Dept, that I was screaming at him from our residence. This is a total false accusation, as my husband and I were in Virginia. This incident was investigated by Deputy Starcher of the Currituck Cty Sherriff's Dept and was closed due to it being unfounded.
>
> 9/7/13 at approximately 9:30-10:00AM. My husband and I were walking down Rocky Top Rd. The defendant was in a car with RoseAnn Wright-Fulp. They were exiting the neighborhood on Rock Top Rd, but stopped when they saw us walking on Matildas Trace toward Rocky Top. They waited for us to get next to their vehicle, Bill Keely rolled down his window and was holding his cell phone up as if to be videoing us. We walked past the car and they finally left the neighborhood. By the time we got to the end of the street and was coming back, they had turned around & came back & backed into the entrance of the[i]r driveway waiting for us. As we passed them, the defendant and

> RoseAnn were both holding their cell phones out the window and making derogatory comments & laughing. They continued following us, in the vehicle, until we turned off Rocky Top Rd back onto Matilda's Trace.
>
> 9/9/13 – Subpoenaed for case – No involvement to cause loss of work.
>
> Note: Every day when I'm in my yard or in view of his house he comes out or hides behind bushes and screams derogatory and disparaging comments to me.

On 3 October 2012, defendant answered plaintiff's complaint by denying most of the substantive allegations, moved for dismissal based upon North Carolina General Statute § 1A-1, Rule 12(b)(6) and the constitutional protections of the First Amendment, and requested sanctions.

On 19 November 2013, the trial court entered a no-contact order because

> [o]ver a period of five (5) years, Defendant has on a continuous basis yelled at Plaintiff with degrading names such as "whore", "faggot", "loser", and on July 25, 2013 while Plaintiff was walking her dog, Defendant revved the engine of his car and sped toward Plaintiff, causing Plaintiff to jump into a ditch; and on August 18, 2013, Defendant made a false report to the Currituck County Sherriff's Department regarding Plaintiff's alleged conduct. Such conduct by Defendant was for the purpose of harassing Plaintiff and has in fact caused her considerable emotional distress.

On 16 December 2013, the trial court entered an order stating that "[a]t the close of the Defendant's evidence, the Defendant made a motion for a directed verdict on the grounds that the statute that as applied in this case violates his rights of free speech" and thereafter denied the motion in its order. Defendant appeals the no-contact order and the order denying his motion for a directed verdict.

II. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support

those findings, conclusions of law are reviewable *de novo*." *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and quotation marks omitted). Furthermore, "[t]he trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 360, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). Here, except as specifically noted, defendant does not challenge the findings of fact made by the trial court, so they are binding on this Court; *see id.*, defendant's arguments instead are that the findings of fact do not support its conclusions of law, and these arguments we review *de novo*. *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311.

III. Constitutionality of the No-Contact Order

[1] Defendant first contends that the no-contact order is unconstitutional as applied to him because his "language [did] not rise to the level of 'fighting words' and therefore is protected by the First Amendment[.]"

> [A]ppellate courts must "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002); *see also Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) ("Courts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue."); *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) ("[A] constitutional question will not be passed on even when properly presented if there is also present some other ground upon which the case may be decided."); *State v. Muse*, 219 N.C. 226, 227, 13 S.E.2d 229, 229 (1941) (an appellate court will not decide a constitutional question "unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment.").

James v. Bartlett, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005).

It is true that some of plaintiff's allegations were based upon verbal statements which defendant made to her, but defendant here fails to mention in his argument that the trial court also found that defendant revved his engine and charged his car toward plaintiff in such a manner that she jumped into a ditch and fraudulently contacted the sheriff's department regarding plaintiff. Accordingly, even if some of defendant's

statements to plaintiff would be protected under the First Amendment, there were other unchallenged findings of fact regarding defendant's conduct to support the issuance of the no-contact order. *See* N.C. Gen. Stat. § 50C-7 (2011) ("Upon a finding that the victim has suffered unlawful conduct committed by the respondent, a permanent civil no-contact order may issue[.]")[1] As such, the trial court properly denied defendant's motions to dismiss and for a directed verdict on these grounds, and we need not consider defendant's constitutional argument. *See generally id.* This argument is overruled.

IV. Harassment

[2] Defendant contends that "the trial court erred in determining that defendant's actions constitute harassment as defined in North Carolina General Statute § 14-277.3(A)(2)." (Original in all caps.) North Carolina General Statute § 50C-7 states that "[u]pon a finding that the victim has suffered unlawful conduct committed by the respondent, a permanent civil no-contact order may issue[.]" N.C. Gen. Stat. § 50C-7. "Unlawful conduct" is defined as "[t]he commission of one or more of the following acts[:] . . . [s]talking." N.C. Gen. Stat. § 50C-1(7) (2013). "Stalking" is defined as

> [o]n more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2), another person without legal purpose with the intent to . . .
>
> . . . .
>
> b. [c]ause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress."

N.C. Gen. Stat. § 50C-1(6) (2013). "Harassment" is defined as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2013). Thus, the ultimate determination here is whether defendant engaged in "[k]nowing conduct . . . directed at a

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1. North Carolina General Statute § 50-7 (2013) now reads, "Upon a finding that the victim has suffered *an act of* unlawful conduct committed by the respondent, a permanent civil no-contact order may issue[.]" N.C. Gen. Stat. § 50-7 (2013) (emphasis added). However, the italicized change was "applicable to actions commenced on or after October 1, 2013." *Id.*, Editor's Note. As plaintiff's complaint was filed in September of 2013, the change is not applicable. *See id.*

specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.*

Here, the trial court found that defendant's conduct that constituted harassment included,

> [o]ver a period of 5 (5) years, Defendant has on a continuous basis yelled at Plaintiff with degrading names such as "whore", "faggot", "loser", and on July 25, 2013 while Plaintiff was walking with her dog, Defendant revved the engine of his car and sped toward Plaintiff, causing Plaintiff to jump into a ditch; and on August 18, 2013, Defendant made a false report to the Currituck County Sherriff's Department regarding Plaintiff's alleged conduct.

Even if we were to assume *arguendo* that defendant's speech was protected by the First Amendment as he contends in his first argument, the trial court still found that defendant acted as though he were going to hit plaintiff with his car and engaged law enforcement on a fabricated claim.

Defendant contends that charging his car at plaintiff and making false reports to law enforcement is not a form of "communication" directed toward plaintiff, and therefore not harassment. However, we need not engage in a lengthy analysis determining what conduct may constitute an exercise of communication as North Carolina General Statute § 14-277.3A(b)(2) only requires "[k]nowing conduct . . . directed at a specific person[.]" *Id.* While North Carolina General Statute § 14-277.3A(b)(2) enumerates various kinds of "communications" that may constitute knowing conduct, by its very terms the statute clearly covers both communications and conduct. *See id.* ("Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.") Conduct, including communications, which is "directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose" is covered by North Carolina General Statute § 14-277.3A(b)(2). *Id.* The trial court properly concluded that defendant's conduct of charging at plaintiff with a vehicle and making false claims about her to a sheriff's department are forms of harassment in that they were "[k]nowing conduct . . . directed at a specific person that

torments, terrorizes, or terrifies that person and that serves no legitimate purpose." *Id.* This argument is overruled.

V. Intent to Harass

[3] Defendant also contends that "[t]he trial court erred in determining defendant intended to harass plaintiff." (Original in all caps.) Defendant provides this Court with a lengthy legal analysis regarding the trial court's need to find an intent to harass but does little to address the facts of this case. Here, the trial court found that defendant's "purpose" was to harass plaintiff based in part on his decision to act as though he was going to run plaintiff over with his car and frivolously contacting the sheriff's department for a fraudulent claim. A finding regarding defendant's "purpose" is the equivalent of a finding regarding his "intent" in this instance. This argument is overruled.

VI. Substantial Emotional Distress

[4] Defendant next argues that "the trial court erred in determining defendant in fact caused plaintiff . . . considerable substantial emotional distress." (Original in all caps.) Defendant challenges the trial court's finding of ultimate fact that his conduct "in fact caused her considerable emotional distress." As best we can tell, defendant's argument seems to present three sub-issues: (1) plaintiff did not make sufficient allegations of emotional distress in her complaint; (2) plaintiff did not present sufficient evidence of substantial emotional distress; and (3) the trial court was required to make more detailed findings of evidentiary facts regarding plaintiff's substantial emotional distress.

> Neither North Carolina General Statutes Chapter 50B or 50C define substantial emotional distress; however, North Carolina General Statute § 14–277.3A, entitled stalking defines substantial emotional distress as significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

Tyll v. Willets, ___ N.C. App. ___, ___, 748 S.E.2d 329, 332 (2013) (citation, quotation marks, and brackets omitted).

Regarding defendant's first contention, that plaintiff did not make sufficient allegations of emotional distress, it is imperative to note, as we have in the background section of this case, that a complaint for a civil no-contact order is normally filed on a form provided by the administrative office of the courts; it differs greatly from a civil claim in which a plaintiff is starting with a blank page and makes any allegations she

deems pertinent. In addition, most no-contact complaints are filed by *pro se* plaintiffs, just as plaintiff in this case. On the form complaint here, AOC-CV-520, Rev. 2/06, plaintiff was provided with boxes to check as applicable; under certain boxes some space is provided for writing in additional details. Plaintiff checked box 4 which states,

> The defendant has followed on more than one occasion or otherwise tormented, terrorized, or terrified the plaintiff named above with the intent to place the plaintiff in reasonable fear for the plaintiff's safety or the safety of the plaintiff's immediate family or close personal associates or with the intent to cause, and which did cause, the plaintiff to suffer substantial emotional distress by placing the plaintiff in fear of death, bodily injury, or continued torment or terror in that: *(give specific dates and describe in detail what happened and how it placed the plaintiff in fear of safety or how it caused substantial emotional distress)*[.]

(Emphasis in original.) Here, plaintiff underlined the words "tormented," "terrorized," and "terrified[.]" While underlining the words in the form may not be the best way to convey plaintiff's emotional distress, her emphasis on these words is relevant, particularly when read in conjunction with her factual allegations. As directed by the italicized language on the form, plaintiff gave "specific dates" and described "what happened" and "how it caused substantial emotional distress." The underlining of these words was part of plaintiff's attempt to "describe in detail" her "substantial emotional distress," and this must be read in conjunction with her detailed allegations written in the blanks on the form. We do not believe that plaintiff is required to make detailed allegations of her emotional state upon each act of defendant's alleged conduct, especially where common sense is all that is needed to understand why the conduct alleged would be distressing to any reasonable person. For example, if a person has been daily yelling derogatory language at an individual and then acts as though he will run over her with a vehicle, "tormented, terrorized, [and] terrified" are reasonable ways to describe the "substantial emotional distress" such conduct would cause; as such, plaintiff has adequately alleged "significant mental suffering [and] distress[;]" *i.e.*, "substantial emotional distress." *Id.*

[5] The second sub-issue raised by defendant's argument is whether plaintiff actually presented sufficient evidence of substantial emotional distress. At the hearing for the no-contact order, plaintiff testified that defendant had put her "in fear of [her] life" and plaintiff's husband testified that the "toll" on his wife was so severe she was "having problems

sleeping, eating, [and] concentrating." While both plaintiff's and plaintiff's husband's testimony could have been more descriptive of emotional distress, the trial court had the "opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[,]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation and quotation marks omitted). Accordingly, there was evidence presented of "significant mental suffering [and] distress" and thereby "substantial emotional distress." *Id.*

The third sub-issue is whether the trial court's ultimate determination that plaintiff was caused substantial emotional distress was supported by the findings of fact. We first note that the trial court found that defendant over the course of five years yelled derogatory language at plaintiff, acted as though he was going to hit her with a vehicle, and falsely made a report to the sheriff's department regarding her; as these findings are unchallenged they are binding on appeal. *See Peltzer*, ___ N.C. App. at ___, 732 S.E.2d at 360.

Furthermore, although North Carolina General Statute § 50C-1(6) refers to "substantial emotional distress[,]" the trial court found that defendant had caused plaintiff "considerable emotional distress[,]" but this is a distinction without a difference. N.C. Gen. Stat. § 50C-1(6). In this context, "[s]ubstantial is defined as *considerable* in value, degree, amount or extent[,]" and thus, in this case, "considerable emotional distress" is the equivalent of "substantial emotional distress." *Ramsey v. Harman*, 191 N.C. App. 146, 150, 661 S.E.2d 924, 927 (2008) (emphasis added) (citation, quotation marks, and brackets omitted).

In *Ramsey*, this Court addressed "substantial emotional distress[,]" *id.* and there found that "the record [was] wholly devoid of any evidence" the plaintiffs suffered substantial emotional distress due to the defendant's comments made on a website. *Id.* at 151, 661 S.E.2d at 927. Specifically, in *Ramsey*, the

> [p]laintiffs, [a mother and daughter,] alleged defendant had posted information on her website stating that [the plaintiff daughter] . . . harasses other children and accused [the plaintiff daughter] of being the reason kids hate to go to school. Plaintiffs also alleged that on numerous occasions defendant had referred to [the plaintiff daughter] on her website as endangered, offspring, bully and possum, which caused [the plaintiff daughter] to suffer emotional distress.

Id. at 146, 661 S.E.2d at 924-25 (quotation marks omitted). This Court ultimately determined that the no-contact order should not have been granted because

> [w]hile [the plaintiff mother's] self-serving testimony indicated that she felt threatened by the messages, the trial court expressly stated the messages posted on defendant's website did not contain language threatening to inflict bodily harm or physical injury. Plaintiffs' only other assertion was that [the plaintiff daughter] became embarrassed when she had allegedly observed teachers viewing defendant's website in her school's library.

Id. at 151, 661 S.E.2d at 927 (quotation marks omitted). In *Tyll v. Willets*, a brother requested a no-contact order be enforced against his sister because she threatened "to make statements about plaintiff to various others, including plaintiff's employer and the Department of Social Services." ___ N.C. App. ___, 748 S.E.2d 329 (2013). This Court again found there was no substantial emotional distress based upon these facts. *Id.* Both *Tyll* and *Ramsey* are distinguishable from this case, both as to the facts and as to the evidence presented regarding the impact of the defendant's conduct on the plaintiffs. *Id.*; *Ramsey*, 191 N.C. App. 146, 661 S.E.2d 924.

In *Ramsey*, the trial court "expressly stated" that no physical threats had been made and the defendant's conduct had resulted only in "embarrass[ment;]" here, however, plaintiff was physically threatened by defendant when he acted as though he was going to run over her with a car. *Ramsey*, 191 N.C. App. at 151, 661 S.E.2d at 927; *contrast Tyll*, ___ N.C. App. ___, 748 S.E.2d 329 (threatening behavior was only regarding communication to third parties). Furthermore, here, defendant's conduct was not on the internet, but in person where defendant harassed plaintiff over the course of five years to the point that plaintiff's daily functions such as eating, sleeping, and concentrating were impaired. *Contrast Ramsey*, 191 N.C. App. at 146, 661 S.E.2d at 924; *Tyll*, ___ N.C. App. ___, 748 S.E.2d 329. Based upon the trial court's findings, over the course of five years, defendant has made frequent contact with plaintiff in person, screaming derogatory language at her. Defendant has gone so far as to involve law enforcement by making false reports to the Currituck County Sherriff's Department, and most disturbingly, physically threatened defendant by charging a moving vehicle at her; such behavior "tormented, terrorized, [and] "terrified" plaintiff to the point that her daily life was affected by defendant's conduct. Under these

circumstances, the trial court properly found that defendant has caused plaintiff substantial emotional distress, *i.e.*, "significant mental suffering or distress[.]" *Tyll*, ___ N.C. App. at ___, 748 S.E.2d at 332. This argument is overruled.

VII. Considerable Emotional Distress

Lastly, defendant contends that because the trial court found "considerable emotional distress" rather than "substantial emotional distress" the no-contact order could not properly be entered. As we have already noted, our case law defines "substantial" in the context of emotional distress as "considerable[.]" *Ramsey*, 191 N.C. App. at 150, 661 S.E.2d at 927. The law in this type of case is not treated as a "magic words" game, and a finding of "considerable emotional distress" is no different from a finding of "substantial emotional distress." This argument is overruled. *See id.*

VIII. Conclusion

For the foregoing reasons, affirm.

AFFIRMED.

Judges GEER and BELL concur.

JERRY SEAMON, Plaintiff-Appellant
v.
INGERSOLL RAND, Employer, and TRAVELERS, Carrier, Defendants

No. COA14-324

Filed 31 December 2014

1. Workers' Compensation—findings of fact—nature of job and cause of injuries—supported by competent evidence

In a workers' compensation case, the Industrial Commission's findings of fact challenged by defendant were supported by plaintiff's testimony regarding the manner in which he performed his job and by his doctor's testimony regarding the nature and cause of the injuries.

2. Workers' Compensation—conclusions of law—compensable injury—supported by findings of fact

In a workers' compensation case, the Industrial Commission did not err by concluding that plaintiff had suffered from a compensable work-related injury. The Commission's findings of fact supported its conclusions that plaintiff suffered from a bilateral peripheral vascular disorder that (1) was characteristic of someone working in his particular job balancing air compressor units, (2) was not an "ordinary disease of life," and (3) was caused by plaintiff's job.

3. Workers' Compensation—findings of fact challenged by plaintiff—manner of work attempt to return to work

In a workers' compensation case, the Industrial Commission's findings of fact challenged by plaintiff were supported by competent evidence. Plaintiff misread or misinterpreted the findings regarding the manner in which he performed his job. In addition, there was no evidence in the record that plaintiff attempted to return to work, or that he had a pre-existing condition that would make it futile for him to do so.

4. Workers' Compensation—conclusions of law—failure to make reasonable efforts to return to work—supported by findings of fact

In a workers' compensation case, the Industrial Commission's findings of fact supported its conclusion that plaintiff failed to establish that he suffered from a continuing disability after 16 November 2011. The Commission found that plaintiff did not make reasonable efforts to return to work after 16 November 2011 and did not have a pre-existing condition that would make it futile for him to do so.

5. Workers' Compensation—credit for payments made before award—from plan entirely funded by employer—not abuse of discretion

In a workers' compensation case, the Industrial Commission did not abuse its discretion by awarding defendant employer a credit for certain disability payments it made to plaintiff before workers' compensation benefits were awarded. Plaintiff's election to pay approximately $10.00 per month for an additional twenty percent of coverage in addition to the forty percent coverage provided by defendant did not render the insurance plan "no longer fully employer funded." In addition, the payment of the employer-funded coverage by insurance carrier Cigna was not a payment

from an outside source. Because the plan was employer-funded, the Commission had the discretion to award a credit to defendant.

Appeal by plaintiff-appellant and defendants-appellants from Opinion and Award entered by the North Carolina Industrial Commission on 17 March 2014. Heard in the Court of Appeals 19 November 2014.

WALLACE and GRAHAM, PA, by Whitney V. Wallace, for plaintiff-appellant and for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Neil P. Andrews, M. Duane Jones, and Amanda A. Johnson, for defendants-appellants and for defendants-appellees.

ELMORE, Judge.

Ingersoll Rand ("defendant-employer") and Travelers (collectively "defendants") appeal from the North Carolina Industrial Commission's ("the Commission" or "the Full Commission") Opinion and Award on the grounds that the Commission erred in finding and concluding that plaintiff suffered a compensable work-related injury under the North Carolina Workers' Compensation Act. Jerry Seamon ("plaintiff") appeals from the Commission's Opinion and Award on the grounds that the Commission erred in finding and concluding that he was not completely disabled after 16 November 2011. After careful consideration, we affirm the Full Commission's Opinion and Award.

I. Background

Plaintiff, a sixty-year-old man, began his employment with defendant-employer in 1972. Defendant-employer manufactures compressor units for commercial use. During the course of his employment, plaintiff worked in various capacities for defendant-employer. From 2001 to 27 April 2011, plaintiff worked as a machinist in the CENTAC Balance Room. Plaintiff was responsible for balancing the air compressor units to customer specifications. A machinist must balance the units using hand-held grinders. The units that came into the CENTAC Balance Room ranged from four inches in diameter to twenty-five inches in diameter, but the most common units were eight inches in diameter. Plaintiff was responsible for balancing two to three of the small to medium sized units per day. Once a unit became balanced, plaintiff had to disassemble the unit using a rubber mallet. The disassembly process had to be done gently to prevent damaging the unit. Plaintiff testified that he often used

the palms of his hands rather than a rubber mallet to dislodge the parts from the units due to the close proximity of the compartments.

In late 2010, plaintiff began waking during the night with pain in his hands. His symptoms worsened in February 2011, when he began to experience numbness in his left index and middle finger. By April 2011, plaintiff's nails were turning black and he was in extreme pain. Plaintiff's primary care physician referred him to Dr. Scott Brandon, an orthopedic specialist, for further evaluation. Dr. Brandon was concerned that plaintiff had a vascular insufficiency and he referred plaintiff to Dr. Louis Andrew Koman, a board-certified orthopedist with a certificate subspecialty in hand surgery. Dr. Koman had been treating patients with hand abnormalities for over thirty years, and he had invented operations for the treatment of peripheral hand-related vascular problems. Dr. Koman diagnosed plaintiff as most-likely suffering from a vaso-occlusive disease and an aneurysm in his hand which was throwing clots into his fingers. Dr. Koman referred plaintiff to Dr. Matthew Edwards, a vascular surgeon, for an arteriography to further evaluate plaintiff's condition. Dr. Edwards diagnosed plaintiff with "ulnar artery aneurysm to the right hand and with distal occlusion and thrombosis to the left hand ulnar artery with aneurysm and distal occlusive disease." Dr. Edwards performed thrombolytic therapy to remove the clots from plaintiff's fingers. On 2, 3, and 5 May 2011, Dr. Koman performed multiple surgical procedures on plaintiff, which included amputations of plaintiff's left index and middle finger.

Plaintiff reached maximum medical improvement on 16 November 2011, at which point Dr. Koman assigned a thirty percent rating to each of defendant's hands and imposed a permanent work restriction of lifting no more than thirty pounds or carrying more than twenty pounds. Dr. Koman advised plaintiff to avoid any physical stress to his hands, including exposure to vibrations or cold. Dr. Koman opined to a reasonable degree of medical certainty that plaintiff's condition was work-related due to plaintiff's use of the palms of his hands to dislodge the rotatory assemblies. He believed plaintiff's use of tools that vibrated exacerbated plaintiff's condition. Dr. Koman testified that it was unnecessary for plaintiff to hit the assembled parts using his palm with much force to cause the injury because it was the repetitive trauma, not the amount of force used, that caused the disease and the necessary finger amputations. On 20 May 2011, Dr. Koman put into writing his diagnosis that plaintiff's condition was work-related. On 16 June 2011, plaintiff filed a Form 18 alleging that he suffered from a work-related injury/disease involving his upper extremities.

William Tom McClure performed an ergonomic evaluation and assessment of the CENTAC Balance Room machinist position to determine whether the machinist position increased plaintiff's risk of developing an upper-extremity musculoskeletal and/or cumulative trauma disorder. Mr. McClure did not have the opportunity to observe plaintiff perform his job duties, but he did watch another machinist use a rubber mallet to disassemble a unit. Based on his observations, Mr. McClure concluded that a machinist did not use forceful exertion of his hands or fingers and was not at an increased risk of developing upper-extremity musculoskeletal and/or cumulative trauma disorders.

Defendants retained Dr. Frank R. Arko, III, a vascular surgeon, to provide his opinion concerning the cause of plaintiff's condition. Dr. Arko did not personally examine plaintiff but he did review plaintiff's medical file, Mr. McClure's findings, and a video of a machinist performing his job duties. Dr. Arko opined to a reasonable degree of medical certainty that plaintiff's job did not cause his condition and did not place him at an increased risk of developing the condition from which he suffered as compared to members of the general public not so employed.

Dr. Brandon testified that he would defer to Dr. Koman's opinion concerning the issue of causation in plaintiff's case. Despite deferring to Dr. Koman on the question of causation, Dr. Brandon did opine that plaintiff's use of tools such as a rubber mallet and low vibration grinding tools placed plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder.

Based upon a preponderance of the evidence in view of the entire record, the Full Commission gave greater weight to the opinions and findings of Dr. Koman than to the contrary testimony and opinions of Dr. Arko and Mr. McClure. The Commission found that plaintiff suffered from a bilateral peripheral vascular disorder/condition and that plaintiff's duties as a machinist caused or significantly contributed to the development of this condition. The Commission also found that plaintiff's job duties placed him at an increased risk of developing a bilateral peripheral vascular disorder as compared to members of the general public not so employed. The Commission determined that from 27 April 2011 to 16 November 2011, plaintiff was physically incapable of earning any wages in any employment as a result of his compensable occupational disease. In addition, it determined that plaintiff failed to prove by a preponderance of the evidence that beginning 16 November 2011, when he was capable of some work, that he made reasonable efforts to find other employment or that such effort would have been futile. Both

plaintiff and defendants appeal from portions of the Full Commission's Opinion and Award.

II. Defendants' Appeal

This Court reviews an Opinion and Award of the Industrial Commission to determine whether any competent evidence exists to support the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285–86, 409 S.E.2d 103, 104 (1991). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139.

Defendants primarily argue on appeal that the Full Commission's determination that plaintiff suffered from a compensable occupational disease is unsupported by competent evidence. Specifically, defendants challenge findings of fact #5, #11, #12, #17, #19, #20, #22, #24, and #25 as being unsupported by competent evidence. Defendants likewise challenge the Commission's conclusions of law #2, #3, and #5 to the extent that the Commission concluded that plaintiff met his burden of proving the compensability of his medical condition. We conclude that the Commission did not err in finding and concluding that plaintiff suffered a compensable work-related injury.

For an injury or death to be compensable under the North Carolina Workers' Compensation Act "it must be either the result of an accident arising out of and in the course of the employment or an occupational disease." *Keel v. H & V Inc.*, 107 N.C. App. 536, 539, 421 S.E.2d 362, 365 (1992) (quotation and citation omitted). "Where the Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97–53(13), the opinion and award must contain findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision." *Hansel v. Sherman Textiles*, 304 N.C. 44, 54, 283 S.E.2d 101, 106-07 (1981).

A. Challenged Findings of Fact

[1] Initially, we will address defendants' challenges to the following findings of fact as being unsupported by competent evidence:

> 5. Once the unit was completely balanced, Plaintiff had to disassemble the unit. The disassembly process had to be

done gently to avoid damaging the part or nicking off any extra metal, which would affect the balance of the unit. While other machinists used a rubber mallet to remove the parts, Plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts.

11. After discussing with Plaintiff his job duties as a machinist, including his exposure to vibration and the use of the palms of his hands to dislodge rotatory assemblies, Dr. Koman advised Plaintiff that his condition was work-related.

12. On May 20, 2011, Dr. Koman followed up in writing with a letter stating that in his medical opinion, Plaintiff's condition was work-related. . . .

17. . . . Dr. Brandon testified that he would defer to Dr. Koman's opinion on causation in Plaintiff's case, but that he would not defer to the causation opinion of a vascular surgeon over Dr. Koman because "the hand is a little bit different organ system," and vascular surgeons are trained generally and do not have specialized hand training. Although Dr. Brandon was unable to state a causal opinion, he did opine, based upon his personal knowledge of a machinist's job duties, that Plaintiff's job as a machinist for 10 years in the CENTAC Balance Room utilizing tools, such as rubber mallets and low vibration grinding tools to balance parts, placed Plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder.

19. Plaintiff's condition is rare in that he does not have peripheral vascular disease, but he has a peripheral vascular disorder which includes aneurysm, thrombosis and embolism. The potential causes of his condition include abnormalities of collagen, clotting abnormalities or atherosclerosis. Dr. Koman ruled out these potential causes of Plaintiff's condition and opined that Plaintiff's vascular disorder was due to trauma based on his review of the arteriograms and the ergonomic reports, as well as "knowing how he [Plaintiff] actually fixed the impellers. . . ." More specifically, the way in which Plaintiff used the palms of his hands like a hammer to dislodge the assembled parts caused the ulnar vessel to dilate and then become turbulent. The turbulence caused thrombosis which led to the

formation of embolisms. The embolisms spread to the fingers, which led to the amputation of the dead portions of the fingers. Dr. Koman did not believe that it was necessary that Plaintiff hit the assembled parts with a lot of force with the palm of the hand. Rather, according to Dr. Koman, the most important factor was how Plaintiff hit the palm of his hand on the part, because the ulnar artery is only a few millimeters beneath the skin. The repetitive trauma to the palm caused the vessel to dilate resulting in the eventual amputation of the fingers. Dr. Koman's opinion was reinforced by the fact that he found no problems with the big blood vessels in his left arm, elbow or forearm, and the fact that aneurysms occur over time, suggesting lower impact but repeated trauma.

20. Dr. Koman opined to a reasonable degree of medical certainty that Plaintiff's history of using his hands as a hammer to dislodge the parts of the assembled units caused his bilateral ulnar artery thrombosis and placed him at an increased risk of developing the condition as compared to members of the general public not so employed. Dr. Koman agreed with Dr. Arko that Plaintiff's daily exposure to vibration from using grinders at work did not cause Plaintiff's bilateral hand condition.

22. Plaintiff's testimony that he used his hands to dislodge the assembled units after balancing is accepted as credible, even though the evidence would tend to show that other employees primarily used a mallet to dislodge the units.

24. The Full Commission finds that a preponderance of the evidence in view of the entire record establishes that Plaintiff suffers from a bilateral peripheral vascular disorder condition as described by Dr. Koman, and that dislodging the assemblies with his hands as part of his job duties as a machinist in the CENTAC Balance Room with Defendant-Employer caused or significantly contributed to the development of this condition.

25. The Full Commission also finds that dislodging the assemblies with his hands as part of his job duties in his position as a machinist in the CENTAC Balance Room for the past 10 years placed Plaintiff at an increased risk of

> developing bilateral peripheral vascular disorder as compared to members of the general public not so employed, and that such a condition is not an ordinary disease of life to which the general public is equally exposed.

Defendants challenge each of these findings only to the extent that the findings support the Full Commission's conclusion that plaintiff's job placed him at an increased risk of developing his vascular condition. We have carefully reviewed the record and conclude that each of these findings is supported by competent evidence. In support of finding #5, that plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts, plaintiff testified: "When you dissembled [the unit], sometimes you'd use your hands, palm of your hands, sort of bump it up a little bit to get it loose . . . you have to be real gentle with [the part] as far as getting it off."[1]

In support of finding #11, regarding the fact that Dr. Koman was of the opinion that plaintiff's medical condition was work-related, Dr. Koman testified that "to a reasonable degree of medical certainty [the injury] is post-traumatic work-related" and "this is a work[-]related injury."

In support of finding #12, the record reflects that Dr. Koman was asked, "I noted on two different occasions that it is written in your medical note that [plaintiff's] condition was work[-]related[?] That's in a 5/20/11 note." Dr. Koman agreed that his written records reflected his opinion that plaintiff's condition was work-related.

In support of finding #17, Dr. Brandon was asked, "[s]o would you be able to say more likely than not that this particular machinist job that [plaintiff] did placed him at an increased risk for the development of these diseases?" Dr. Brandon responded, "I would say it would put him at an increased risk."

Finding #19 is also supported by the record. When asked if he believed plaintiff's aneurisms were more likely than not caused by plaintiff's use of the palms of his hands as a hammer, Dr. Koman responded, "that's correct." He further opined, "[i]t doesn't take a whole lot of force

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1. Defendants take issue with the Commission's use of the word "hammer" in its findings of fact when there was no evidence that plaintiff used his hand as "hammer" to performing his job duties. We hold that the use of the word "hammer" is inconsequential. There is evidence that plaintiff used the palm of his hand to hit the parts. According to Dr. Koman's testimony, it was not the amount of force used but the repetitive trauma to the hand that led to the amputation of plaintiff's fingers.

depending on how you hit it. If your muscle [is] relaxed and you – I mean, your ulnar artery is only a few millimeters beneath the skin. It's not that far down there."

As to finding #20, Dr. Koman reiterated that plaintiff's use of his hands in the performance of his job duties placed him at an increased risk of developing his condition. When asked, "it's your opinion that the -- [plaintiff] using his hands as a hammer throughout his — your discussions with him about his employment, combined with or contributed to by his vibration exposure, would have been sufficient enough trauma to cause [plaintiff's] aneurysms?" Dr. Koman replied, "[t]hat's my opinion, and it's within a reasonable degree of medical certainty." Dr. Koman clarified that the vibration tools would not generally cause thrombosis but the use of the tools could "contribute" to it or "exacerbate" it.

Finding #22, that plaintiff used his hands to dislodge the assembled units, is supported by plaintiff's testimony that he would "work lose" the impellers by giving a "gentle" "bump" using his hands.

Finally, findings #24 and #25, that plaintiff suffered from a bilateral peripheral vascular disorder condition as described by Dr. Koman and that such a condition was not an ordinary disease of life to which the general public was equally exposed, are best classified as conclusions of law and are supported by the findings of fact discussed above. Upon review, we conclude that the challenged findings of fact are each supported by competent evidence in the record.

B. *Rutledge* Test

[2] To bring a successful workers' compensation claim, plaintiff must have shown that his condition was:

> (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the [claimant's] employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations and quotations omitted) (alteration in original). "To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. . . . Only such ordinary diseases of life to which the

general public is exposed equally with workers in the particular trade or occupation are excluded." *Id.* Accordingly, the first two elements of the *Rutledge* test are satisfied if, "as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). As for the third prong of *Rutledge*, "[t]his element of the test is satisfied if plaintiff's employment significantly contributed to, or was a significant causal factor in, the disease's development." *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562, 586 S.E.2d 557, 560 (2003) (quotation and citation omitted). "This is so even if other non-work-related factors also make significant contributions, or were significant causal factors." *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 370.

With respect to whether plaintiff's employment exposed him to a greater risk of suffering from the disorder than the public generally, Dr. Brandon opined that plaintiff's job as a machinist, utilizing tools such as a rubber mallet and low vibration grinding tools, placed plaintiff at an increased risk for the development of his bilateral peripheral vascular disorder (finding #17). Dr. Koman testified, and the Full Commission found, that plaintiff's job duties placed him at an increased risk of developing his medical condition as compared to members of the general public not so employed and that his condition is not an ordinary disease of life to which the public is equally exposed (findings #19, #25).

Based on these findings, which are supported by competent evidence, we hold that plaintiff satisfied the first two elements of *Rutledge*. With respect to whether plaintiff's employment significantly contributed to, or was a significant causal factor in the condition's development, Dr. Koman opined to a reasonable degree of medical certainty that plaintiff's history of using his hands while at work to dislodge the parts from the assembled units caused his condition (finding #20). Plaintiff established the requisite causal connection between the disease and his employment, thus satisfying the third element of *Rutledge*. Based on the record before us, we conclude that the Commission's conclusions of law #2, #3, and #5 are supported by the findings of fact. The Commission did not err in concluding that plaintiff sustained a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13) from 27 April 2011 through 16 November 2011.

III. Plaintiff's Appeal

A. Challenged Findings of Fact

[3] Plaintiff's primary contention on appeal is that the Full Commission erred in concluding that he was no longer disabled after 16 November 2011. Plaintiff first challenges six findings of fact as being unsupported by competent evidence: findings #5, #10, #22, #23, #29, and #34.[2] Plaintiff also challenges the Commission's conclusions of law #5, #6, #8 on the basis that the Commission erred in concluding that plaintiff was not disabled after 16 November 2011. We hold that the Commission's findings of fact are supported by competent evidence and that its conclusions of law are supported by the findings of fact. The Commission did not err in concluding that plaintiff was not disabled after 16 November 2011.

Initially, we will address plaintiff's challenges to the following findings of fact:

> 5. While other machinists used a rubber mallet to remove the parts, Plaintiff sometimes used the palms of his hands as a hammer to "bump" or dislodge the parts.
>
> 10. . . . Plaintiff has not returned to work or looked for work within the restrictions assigned by Dr. Koman.
>
> 22. Plaintiff's testimony that he used his hands to dislodge the assembled units after balancing is accepted as credible, even though the evidence would tend to show that other employees primarily used a mallet to dislodge the units.
>
> 29. Plaintiff has failed to prove by a preponderance of the evidence in view of the entire record, however, that beginning November 16, 2011, when he was capable of some work, that he has made reasonable efforts to find other employment or that it would have been futile because of preexisting conditions such as age, education and work experience for him to look for other employment.

Plaintiff challenges findings #5 and #22 on the same basis. He contends that, while the Commission properly found that plaintiff used the

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2. We decline to address plaintiff's challenge to finding #23. Plaintiff concedes that this finding is supported by competent evidence and merely suggests that the Commission include additional evidence presented by Dr. Koman. It is not the duty of this Court to supplement the Commission's findings of fact.

palm of his hands as a hammer to bump or dislodge the parts, he "disagrees there is any competent evidence that other machinists did not similarly use their hands to dislodge the parts, but rather used solely a rubber mallet." Plaintiff has either misread or misinterpreted findings #5 and #22. The Commission did not find that other machinists "solely" used a rubber mallet to dislodge the units, as plaintiff argues. In fact, finding #22 clearly states that other employees "primarily" used a mallet to dislodge the units. As discussed above, both findings #5 and #22 are supported by competent evidence in the record.

With respect to finding #10, that plaintiff has not looked for employment within the restrictions assigned by Dr. Koman, the record is devoid of evidence that plaintiff sought alternative employment after 16 November 2011. In addition, while plaintiff may have attempted to return to work with defendant-employer *before* 16 November 2011, at which time he was advised that there was no position for him given his medical restrictions, there is no evidence that plaintiff contacted defendant-employer about resuming his employment *after* 16 November 2011. During the hearing, plaintiff merely professed his willingness to return to work for defendant-employer should there be a suitable position. Finding #10 is supported by competent evidence.

Plaintiff argues that finding #29 is a conclusion of law and must be reviewed *de novo* by this Court. Plaintiff further contends that this conclusion of law is not supported by the findings of fact and therefore we must remand this case for additional findings of fact. We disagree with plaintiff and will review finding #29 to ascertain if it is supported by sufficient evidence in the record. Finding #29, that plaintiff failed to prove that he made reasonable efforts to find employment or that his efforts would have been futile, is supported by the record. Plaintiff presented no evidence that he made reasonable, yet unsuccessful efforts to obtain employment with another employer or return to his employment with defendant-employer after the 16 November 2011 date. In addition, plaintiff did not argue before the Commission that he suffered from a pre-existing condition such as age, limited education, or work history, which would make it futile for him to seek alternative employment opportunities. We conclude that finding #29 is supported by competent evidence. In sum, the findings of fact that plaintiff challenges are each supported by competent evidence in the record.

B. Continuing Disability

[4] In order to meet the burden of proving that he suffered from a continuing disability, plaintiff was required to prove that he was incapable

of earning pre-injury wages in either the same or in any other employment and that the incapacity to earn pre-injury wages was caused by the employee's injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982). *Russell v. Lowes Prod. Distribution* sets forth a four prong test delineating alternative ways that plaintiff could have satisfied this burden. 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). Plaintiff must have produced either:

> (1) medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment[;] (2). . . evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment[;] (3) . . . evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment[;] or (4) . . . evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. On appeal, plaintiff contends that the Commission's findings of fact are insufficient to support a determination as to whether plaintiff met his burden under the *Russell* prongs (2) or (3). Specifically, plaintiff contends that the Commission failed to include any findings of fact, other than #29, which he contends is a conclusion of law, that addressed plaintiff's efforts to return to work. Accordingly, plaintiff argues that the Commission erred by making conclusion #6, which states: "Having failed to prove disability under *Russell* after November 16, 2011, Plaintiff is entitled to permanent partial disability benefits pursuant to N.C. Gen. Stat. § 97-31(12) for a period of 120 weeks."

We disagree and hold that conclusion #6 is supported by the findings of fact. Specifically, finding #29 provides that plaintiff did not make reasonable efforts to obtain employment after 16 November 2011. As such, Plaintiff did not satisfy prong two of *Russell* because he failed to show that he made reasonable efforts to obtain employment. To satisfy prong three, plaintiff was required to show that it would have been futile for him to seek other employment due to certain pre-existing conditions such as age, education level, or inexperience. Plaintiff contends that the Commission neglected to make a finding that addressed whether he satisfied these pre-existing conditions. We disagree.

Finding #1 shows that the Commission considered the fact that plaintiff was sixty-years-old, left-hand dominant, and a high school

graduate who had worked for defendant-employer for over thirty-nine years. Thus, the Commission did consider plaintiff's age, education level, and work experience. The Commission also found that plaintiff failed to show that due to a pre-existing condition, his efforts to obtain employment would have been futile (finding #29). As such, there is no evidence in the record that plaintiff satisfied prong three of *Russell*. Given that plaintiff failed to satisfy the *Russell* test, the Commission did not err in determining that plaintiff was unable to establish that he suffered from a continuing disability after 16 November 2011.

C. Credit for Disability Payments

[5] Lastly, plaintiff argues that the Commission erred in awarding defendant-employer a credit for certain disability benefits paid by it to plaintiff. Specifically, plaintiff argues that the Commission's finding of fact #34 is unsupported by competent evidence and its conclusion of law #8 is unsupported by the findings of fact. We disagree and find no merit in plaintiff's argument.

Under the Workers' Compensation Act, the only statutes that allow the Commission to award credits are N.C. Gen. Stat. § 97-42 and N.C. Gen. Stat. § 97-42.1. *Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001). "These statutes allow for a credit for amounts voluntarily paid by the employer before the workers' compensation benefits are awarded." *Id.* The "laudable purpose" of this section is "to encourage voluntary payments to workers while their claims to compensation are being disputed and they are receiving no wages[.]" *Evans v. AT & T Technologies*, 103 N.C. App. 45, 48, 404 S.E.2d 183, 185 (1991).

> A "credit" is a deduction by the employer of a prior payment made to an injured employee from the compensation benefit that is now due the employee. . . . N.C.G.S. § 97-42 [] provides, in order to encourage voluntary payments by the employer while the worker's claim is being litigated and he is receiving no wages, that any payments made by the employer [(pursuant to an employer-funded salary continuation)] to the injured employee which were not due and payable when made, may in certain cases be deducted from the amount of compensation due the employee.

Gray v. Carolina Freight Carriers, 105 N.C. App. 480, 484, 414 S.E.2d 102, 104 (1992). "This credit applies to payments made by the employer, not to any and all other payments the employee may receive from outside sources." *Jenkins*, 147 N.C. App. at 426, 557 S.E.2d at 108-09. "The

decision of whether to grant a credit is within the sound discretion of the Commission" and "will not be disturbed on appeal in the absence of an abuse of discretion." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002).

Finding of fact #34 provides:

> 34. Defendants are entitled to a credit for the employer-funded short-term disability payments Plaintiff received, as well as that portion of the long-term disability benefits Plaintiff has received that were paid pursuant to the fully employer-funded 40 percent plan and which Plaintiff will not have to repay. Defendants are not entitled to a credit for any long-term disability benefits that were paid pursuant to the additional coverage Plaintiff purchased or that Plaintiff will have to repay to the long-term disability plan.

Conclusion of law #8 provides:

> 8. Defendants are entitled to a credit for that portion of short-term and long-term disability benefits that Plaintiff has received pursuant to plans that were fully funded by Defendant-Employer and that Plaintiff does not have to repay to the long term-disability benefit provider. N.C. Gen. Stat. § 97-42.

Plaintiff challenges the Commission's award of a credit for the long-term disability benefits funded by defendant-employer on the basis that (1) the plan is not considered "fully-funded" by the employer under N.C. Gen. Stat. § 97-42 if the employee contributes any monies to the plan, and (2) the employer cannot recover a credit if a third-party insurance carrier pays the benefit directly to the employee. Neither of plaintiff's arguments are supported by case law nor by statute.

Here, the Commission found as fact that plaintiff began receiving long-term disability benefits pursuant to a plan that was fully-funded by defendant-employer after his short-term disability benefits terminated. Specifically, defendant-employer paid the full premium for a long-term disability plan that would allow a disabled employee to collect up to forty percent of his regular earnings if he became disabled. Should an employee wish to collect an additional twenty percent of his regular earnings, making his total recovery sixty percent of his regular earnings, the employee was also permitted to purchase additional coverage.

In the instant case, plaintiff elected to pay approximately $10.00 per month to receive the additional coverage. On appeal, plaintiff contends

that because he purchased the additional insurance coverage, thus contributing to the plan, the plan was no longer fully employer-funded. Therefore, defendant-employer was no longer entitled to a credit. However, plaintiff is unable to direct this Court to any case law that supports his position. This is likely because neither case law nor N.C. Gen. Stat. § 97-42 requires that an employer forgo its right to receive a credit for benefits paid merely because an employee elects to purchase additional coverage in order to collect a greater portion of his salary than that which the employer-funded plan allows. For the purposes of N.C. Gen. Stat. § 97-42, an insurance plan is considered "employer-funded" when the employer pays the entire premium to fund the requisite amount of coverage the employer elects to provide. The fact that an employee purchases additional coverage beyond that which the employer offers has no bearing on whether the plan is employer-funded. We overrule plaintiff's first argument concerning this issue.

In addition, plaintiff's contention that defendants are not entitled to a credit because the insurance carrier CIGNA distributed plaintiff's disability funds is likewise unsupported by law. Plaintiff cites *Jenkins*, *supra*, for the proposition that a credit applies solely to payments made by the employer, not to any and all other payments the employee may receive from outside sources. While true, *Jenkins* is inapplicable to this case since *Jenkins* involved a situation in which the distribution of royalty income was at issue, not the payment of employer-funded disability benefits. Here, CIGNA was not an outside party that independently provided plaintiff with certain disability funds. We overrule plaintiff's second argument with respect to this issue.

It is undisputed that defendant-employer paid the full premium for the disability plan so that plaintiff could receive forty percent of his take-home pay. Upon reviewing the record, we conclude that there is competent evidence in the record to support finding of fact #34. In addition, conclusion of law #8 is supported by the findings of fact. Because the plan was entirely "employer-funded," it was within the Commission's discretion to award defendant-employer a credit for monies paid. There is no evidence that the Commission abused its discretion by approving such a credit. Plaintiff's arguments are without merit.

IV. Conclusion

Based upon our review of the evidence and the applicable law, we conclude that the Commission's findings of fact are supported by competent evidence and that its conclusions of law are supported by the findings of fact. Plaintiff suffered a compensable occupational disease

and was entitled to receive full disability benefits from 27 April 2011 to 16 November 2011. After the November date, plaintiff failed to meet his burden of showing that he was entitled to additional disability benefits. We affirm the Full Commission's Opinion and Award.

Affirmed.

Judges ERVIN and DAVIS concur.

SIX AT 109, LLC, A North Carolina limited liability company, Petitioner
v.
TOWN OF HOLDEN BEACH, North Carolina, Respondent

No. COA14-388

Filed 31 December 2014

1. Jurisdiction—subject matter jurisdiction—condemnation—statutory authority

Respondent Town had subject matter jurisdiction to condemn petitioner's ocean-side motel. The order of the Board of Commissioners was entered within its statutory authority and after a de novo hearing.

2. Cities and Towns—condemnation—demolition—motel—standard of review

The superior court did not err by affirming the 7 September 2012 order of the Board of Commissioners condemning petitioner's ocean-side motel and ordering the demolition of the property based on an alleged arbitrary and capricious standard. The decision of the Board of Commissioners was supported by substantial evidence.

3. Cities and Towns—condemnation—demolition—motel—decision not arbitrary and capricious

The Town of Holden Beach Board of Commissioners' decision to condemn petitioners' ocean-side motel and order its demolition was not arbitrary and capricious.

Appeal by petitioner from order entered 1 July 2013 by Judge Gary E. Trawick in Brunswick County Superior Court. Heard in the Court of Appeals 8 October 2014.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Matthew A. Nichols, for petitioner-appellant.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay Allen Collier and Jarrett W. McGowan, and H. Mac Tyson II, for respondent-appellee Town of Holden Beach.

BRYANT, Judge.

Because the Superior Court utilized the appropriate standard of review applicable to an appeal from an order of the Town of Holden Beach Board of Commissioners and did not err in affirming the order of the Board which affirmed an order condemning petitioner's ocean-side motel and authorizing its demolition, we affirm the Superior Court's order.

Petitioner Six at 109, LLC ("petitioner"), owns a building known as Captain Jack's Motel ("the motel"), located in the Town of Holden Beach ("the Town"). The structure is an oceanfront, four-unit motel built in 1989.

In 2008, petitioner received a building permit from the Town authorizing the making of non-structural improvements to the interior of the motel, including replacing exterior doors, door trim, baseboards, windows, cabinets, plumbing, an HVAC system, and electric wiring. Petitioner also received a Coastal Area Management Act ("CAMA") permit authorizing the making of the proposed improvements.[1] Work commenced pursuant to the building permit. On 8 December 2009, the Town Building Inspector issued a Certificate of Compliance relating to the work completed on the motel up to that time. The Certificate of Compliance stated that three of the four units in the motel were in compliance with the Town Building Code and that occupancy would be permitted.

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1. "CAMA" or "Coastal Area Management Act of 1974" is codified within Article 7 of Chapter 113A of our General Statutes and governs "the development and adoption of State guidelines for the coastal area and the development and adoption of a land-use plan for each county within the coastal area." N.C. Gen. Stat. §§ 113A-100, -106 (2013). "'Coastal area' means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean . . . ." *Id.* § 113A-103(2). "[E]very person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part." *Id.* § 113A-118(a).

On 3 August 2010, a new town building inspector, Timothy Evans, issued a stop work order relating to petitioner's motel property in response to a report that work was taking place on the motel that was not authorized by the building permit. The stop work order remained in place until the end of the year when Inspector Evans determined that all work done on the property had been performed in compliance with the building permit.

In early 2011, petitioner submitted an application for another building permit authorizing continued work on the motel, including: demolition and replacement of exterior siding, existing plumbing, electrical and heating fixtures, and non-load bearing walls. In August 2011, Inspector Evans notified petitioner that because the motel met the criteria for an unsafe building pursuant to North Carolina General Statutes, section 160A-426, it had been condemned.[2] On 17 November 2011, petitioner's permit application was denied and a condemnation notice was posted at the building site.[3] Afterwards, Inspector Evans provided petitioner with a memorandum outlining the basis for the notice and condemnation (citing violations of specific provisions of the N.C. Building Code) and advised petitioner that a hearing on the matter would be conducted before him as the Town Building Inspector.

In January 2012, a hearing was conducted before Inspector Evans in his capacity as Director of the Inspections Department for the Town of Holden Beach. Petitioner submitted documentary evidence in the form of exhibits and offered testimonial evidence through witnesses. Furthermore, Inspector Evans granted petitioner's request for additional time to supplement the record with further evidence, exhibits, arguments and authorities. On 12 March 2012, following the January hearing, Inspector Evans, on behalf of the Inspections Department, entered an order making the following ultimate findings of fact:

> [T]he structure is a hazard to the surrounding properties, that its current condition constitutes (among other things) a fire hazard, that the structure has attracted a criminal

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2. Pursuant to General Statutes, section 160A-426, "[e]very building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe . . . ." N.C. Gen. Stat. § 160A-426(a) (2013).

3. Petitioner did not appeal the denial of its building permit application to the North Carolina Department of Insurance as allowed pursuant to N.C. Gen. Stat. §160A-434, and petitioner failed to submit an application for a CAMA permit or request an exemption.

> activity and other activities which constitutes a nuisance, that the structure is likely to contribute to vagrancy and presents a threat of disease and is a danger to children and that the only option available under N.C.G.S. § 160A-429 is to order the demolition of the structure . . . .

Accordingly, Inspector Evans ordered that the motel be demolished, pursuant to N.C. Gen. Stat. § 160A-429.[4]

Petitioner appealed the inspector's order to the Town of Holden Beach Board of Commissioners pursuant to N.C. Gen. Stat. § 160A-430.[5] A hearing before the Board of Commissioners was conducted on 11-13 June 2012. Petitioner presented evidence by way of exhibits and witnesses and made arguments supported by authorities submitted to the Commissioners. The Commissioners also conducted a site visit as part of the hearing. By order dated 7 September 2012, the Board of Commissioners found that, viewed in the light most favorable to petitioner, the evidence supported the following factual finding:

> [T]he ocean side structure of the property is a hazard; that the structure has attracted criminal activity and other activities which constitute a nuisance; and, that the structure is likely to contribute to vagrancy and presents a threat of disease and is a danger to children . . . .

In accordance with these findings, the Board of Commissioners affirmed the order of the Inspections Department. Petitioner then petitioned the Brunswick County Superior Court to issue a writ of certiorari for the purpose of reviewing the proceedings below.

On 25 April 2013, in Brunswick County Superior Court, the Honorable Gary E. Trawick heard arguments from petitioner and the Town and, on 3 July 2013, entered an order upholding the 7 September 2012 order of the Board of Commissioners. Petitioner appeals.

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4. "If, upon a hearing held pursuant to the notice prescribed in G.S. 160A-428, the inspector shall find that the building or structure is in a condition that constitutes a fire or safety hazard or renders it dangerous to life, health, or other property, he shall make an order in writing, directed to the owner of such building or structure, . . . demolishing the building or structure . . . ." N.C. Gen. Stat. § 160A-429 (2013).

5. "Any owner who has received an order under G.S. 160A-429 may appeal from the order to the city council by giving notice of appeal in writing to the inspector and to the city clerk within 10 days following issuance of the order. In the absence of an appeal, the order of the inspector shall be final." N.C. Gen. Stat. § 160A-430 (2013).

On appeal, petitioner argues that (I) the Town lacked subject matter jurisdiction to condemn the property; (II) the Board of Commissioners used an improper standard of review in considering petitioner's June 2012 appeal; and (III) the Board of Commissioners' decision to condemn the property and order its demolition was arbitrary and capricious.

I

[1] Petitioner contends the Town did not have subject matter jurisdiction to condemn the ocean-side motel because the motel is located in a public trust area of Holden Beach and this Court has held that only the State has standing to enforce the public's claims in the public trust lands of the State. We disagree.

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. *In re Thompson*, ___ N.C. App. ___, ___, 754 S.E.2d 168, 172 (2014).

In *Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 723 S.E.2d 156, *appeal dismissed*, 366 N.C. 386, 732 S.E.2d 580, *and review denie*d, 366 N.C. 386, 733 S.E.2d 580 (2012), the plaintiff Town was granted summary judgment against the defendant homeowner with respect to a nuisance claim, resulting in the condemnation of the defendant homeowner's dwelling. The dwelling was reported to have been located "in its entirety on the wet sand beach," to be in a deteriorated and damaged condition, and to have restricted pedestrian access along the public trust beach area. *Id.* at 67-68, 723 S.E.2d at 157. In its motion for summary judgment, the plaintiff Town provided two bases for its nuisance claim: (1) the damaged structure or debris from it was likely to cause injury to persons or property; and (2) the structure "[was] located in whole or in part in a public trust area or on public land." *Id.* at 68-69, 723 S.E.2d at 157-58. On appeal, this Court considered the argument that the trial court erred in failing to grant the defendant's motion to dismiss because the plaintiff Town lacked jurisdiction to enforce the State's sovereign right to protect land held pursuant to the public trust doctrine. In pertinent part, we agreed, reasoning that "this is a case where [the Town of Nags Head] [was] attempting to take private property from an individual, destroy the dwelling, and claim the land on the basis that it currently lies within a public trust area." *Id.* at 74, 723 S.E.2d at 160. Acknowledging that our case law "heavily emphasizes the sovereignty of the State as being the only body which can affirmatively bring an action to assert rights under the public trust doctrine[,]" this Court reversed the trial court's decision to deny the defendant's motion to dismiss the

plaintiff Town's nuisance claim since the ruling was premised on protecting land in the public trust. *Id.* at 74-75, 723 S.E.2d at 161 (citing *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (2005), and *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002)); *see also* N.C. Gen. Stat. § 113-131 (2013) (recognizing public trust rights). However, while this Court held that the plaintiff Town could not assert its claim "based solely on public trust rights," the condemnation of property as a nuisance if the property created a "reasonable likelihood of personal or property injury" was held to be allowable. *Town of Nags Head*, 219 N.C. App. at 80, 723 S.E.2d at 164 (citing Town of Nags Head, N.C., Code § 16–31(6)(b) (2007)). The matter was remanded in part to the trial court for further proceedings.

Petitioner contends that an examination of findings of fact 1,[6] 7,[7] 18,[8] 19,[9] 20,[10] and 21,[11] contained in Inspector Evan's 12 March 2012 order, which mention "tidal action" and "proximity to the Atlantic Ocean," indicate that the Town's action was impermissibly premised on enforcing the public trust doctrine. We note that findings 1, 7, 19, and 21 contained in Inspector Evans' order relate to structural defects in the building and petitioner's failure to establish that repairs would decrease the danger of further damage due to the proximity of the structure to the ocean. Finding of fact 18 relates to the accessibility of the structure to persons involved in unacceptable, unsafe, and illegal activities as documented by law enforcement officers. Based on these findings of fact, Inspector Evans ordered the demolition of the ocean-side structure. Petitioner appealed the order to the Town of Holden Beach Board of Commissioners.

The Board of Commissioners' 7 September 2012 order to condemn the ocean-side structure was, like Inspector Evans' 12 March 2012 order,

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6. Finding of fact number 1 states that "[t]he loss of the frontal dune on the ocean side of the property has resulted in erosion of the foundation and caused pilings to list as much as 24%. This movement along with weathering of fasteners and bolts has caused the structure to sag and has resulted in floor level variations of as much as ¾ inch per 8 feet."

7. Finding of fact number 7 states that "[t]idal action regularly encroaches upon and under the structure, negatively affecting the pilings and structural support, and in such a manner as to require extensive modification of the existing electrical service to the property."

8. Finding of fact number 18 states that "[t]he location of the structure beyond the existing frontal dune allows for access to persons involved in unacceptable, illegal and unsafe activities which have been documented by local law enforcement and complaints of citizens."

based on findings that the structure was a hazard and that it had been the site of criminal conduct and other activities which constituted a nuisance. Furthermore, the Commissioners found that the structure was likely to contribute to vagrancy, presented a threat of disease, and was a danger to children.

We note that neither Inspector Evans, in his 12 March 2012 order; the Board of Commissioners, in its 7 September 2012 order; nor the Superior Court, in its 3 July 2013 order, reference the structure's location within the public trust area as a basis for its condemnation.

Pursuant to North Carolina General Statutes, section 160A-426, a municipality has jurisdiction to condemn a structure if it is unsafe. *See* N.C.G.S. §§ 160A-426 ("Every building that shall appear to the inspector to be especially dangerous to life because of its liability to fire or because of bad condition of walls, overloaded floors, defective construction, decay, unsafe wiring or heating system, inadequate means of egress, or other causes, shall be held to be unsafe . . . ."), -432(b) ("[A] city may . . . cause the building or structure to be removed or demolished."). The respective orders of Inspector Evans and the Board of Commissioners make clear that the ocean-side structure was condemned because it was determined to be unsafe. These orders were proper based on General Statutes, section 160A-205(a) ("A city may enforce any ordinance adopted pursuant to this section or any other provision of law upon the State's ocean beaches located within or adjacent to the city's jurisdictional boundaries to the same extent that a city may enforce ordinances within the city's jurisdictional boundaries."). Accordingly, we overrule petitioner's argument to the effect that the Board's action was based on an impermissible premise.

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9. Finding of fact number 18 states that "[t]he extent of damage and weathering suffered by the structure and sustained, at least in part, through mother nature, makes permitting any repair, remediation or reconstruction of the structure legally impossible under current local, state and federal rules, codes, guidelines, ordinances and statutes."

10. Finding of fact number 20 states that "[w]hile this (or arguably any) structure can be engineered back to compliance with the applicable state building code, Petitioner has failed to present sufficient evidence that the repair, renovation and reconstruction of this structure as proposed would comply with the applicable requirements of the local, state and federal rules, regulations, guidelines, ordinances, codes and statutes, including, by not necessarily limited to, the regulations of FEMA and CAMA."

11. Finding of fact number 21 states that "[p]etitioners have failed to establish that any repair, renovation or reconstruction of the structure would decrease the danger of further severe damage and failure due to its proximity to the Atlantic Ocean."

Petitioner also contends that because the 7 September 2012 order of the Board of Commissioners states that the order of the Town's Inspection Department "should be affirmed and/or the factual findings thereof adopted and incorporated herein[,]" the Board of Commissioners reviewed petitioner's appeal by seeking only to determine if the evidence supported Inspector Evans' findings rather than by granting petitioner a de novo hearing. We disagree, since the record establishes that the Commission engaged in de novo review.

At the outset of its 7 September 2012 order, the Board of Commissioners stated that the 12 March 2012 order of the Chief Building Inspector for the Town was before them pursuant to N.C.G.S. § 160A-430 "upon appeal de novo." By the consent of the parties and the permission of the Commissioners, both petitioner and the Inspection Department presented supplemental information, materials, arguments and authorities which were adopted as part of the record. *See generally*, *Morris v. Se. Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 440, 681 S.E.2d 840, 850 (2009) (granting the plaintiff's petition to supplement the record with material submitted to but not considered by the trial court for de novo review on the issue of whether the complaint met the Rule 9(j) compliance standard for allegations of medical malpractice). After a two-day hearing, which included a site visit, the Commission made an independent finding of fact (based on its de novo review) that the structure was a hazard, had attracted criminal activity, had attracted other activities which constituted a nuisance, was likely to contribute to vagrancy, presented a threat of disease, and was a danger to children. Thereafter, the Board of Commissioners affirmed the order of the Town of Holden Beach Planning and Inspection Department with modifications. *See* N.C.G.S. § 160A-430 ("The city council shall hear and render a decision in an appeal within a reasonable time. The city council may affirm, modify and affirm, or revoke the order [of the inspector]."). Therefore, the order of the Board of Commissioners was entered within its statutory authority and after a de novo hearing. *See id.* Accordingly, petitioner's argument is overruled.

II & III

[2] Next, petitioner argues that the Superior Court erred in affirming the 7 September 2012 order of the Board of Commissioners condemning petitioner's ocean-side building and ordering the demolition of the property based on an arbitrary and capricious standard. Specifically, petitioner contends the conclusions in the Building Inspector's order, as adopted by the Board of Commissioners, were "overwhelmingly refuted by evidence to the contrary"; that the Certificate of Compliance issued

for the work completed on the first three units of the ocean-side building indicated the prior Town building inspector's conclusion that the building was not a hazard or unsafe; and petitioner has a vested right to continue with the project. We disagree.

> When reviewing the decision of a decision-making board under the provisions of this section, the [superior] court shall ensure that the rights of petitioners have not been prejudiced because the decision-making body's findings, inferences, conclusions, or decisions were:
>
> a. In violation of constitutional provisions, including those protecting procedural due process rights.
>
> b. In excess of the statutory authority conferred upon the city or the authority conferred upon the decision-making board by ordinance.
>
> c. Inconsistent with applicable procedures specified by statute or ordinance.
>
> d. Affected by other error of law.
>
> e. Unsupported by substantial competent evidence in view of the entire record.
>
> f. Arbitrary or capricious.

N.C. Gen. Stat. § 160A-393(k) (2013). "On appeal to this Court, our review of a [superior] court's [review of a town board's] determination is limited to determining (1) whether the superior court applied the correct standard of review, and to determining (2) whether the superior court correctly applied that standard." *Myers Park Homeowners Ass'n, Inc. v. City of Charlotte*, ___ N.C. App. ___, ___, 747 S.E.2d 338, 342 (2013) (citation and quotations omitted).

Petitioner first contends that in adopting the conclusions of Inspector Evans, as stated in his 12 March 2012 order, the Board of Commissioners acted in an arbitrary and capricious manner.

"If the petitioner complains that the [decision-making board's] decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test." *Id.* at ___, 747 S.E.2d at 342 (citation omitted).

> [When a applying the whole record test] reasonable but conflicting views [may] emerge from the evidence[.] [T]he Court cannot substitute its judgment for the administrative

> body's decision. The Court, however, must take into account whatever in the record fairly detracts from the weight of the evidence which supports the decision. The Court must ultimately decide whether the decision has a rational basis in the evidence.

Id. at ___, 747 S.E.2d at 343 (citation omitted).

In its 1 July 2013 order, the Superior Court stated that in drawing its conclusions, the "whole record test" was applied. We note the following conclusions:

> a) The 7 September 2012 decision of the Board of Commissioners of the Town of Holden Beach was in conformity with applicable law;
>
> . . .
>
> d) The 7 September 2012 decision of the Board of Commissioners was based upon competent material and substantial evidence in the record;
>
> e) The 7 September 2012 decision of the Board of Commissioners was fair, reasonable and not arbitrary and capricious; and
>
> f) The 7 September 2012 decision was within the statutory authority conferred upon the Town and the Board of Commissioners.

Upon review of the record before us, we conclude the trial court did not err by determining that the decision of the Board of Commissioners was supported by substantial evidence. The evidence of record received at the hearing before the Board of Commissioners showed that storms, erosion, tidal action and/or other natural events materially changed the real property upon which the ocean-side structure was located; that these changes to the real property and the resulting impact on the structure created a hazard; and that the structure had attracted criminal activity. Therefore, we overrule petitioner's argument that the conclusion of the Board of Commissioners was arbitrary and capricious.

Next, petitioner contends that the Certificate of Compliance issued on 8 December 2009 by building inspector David Eakins with respect to the first three units of the four unit complex "is tantamount to a finding by the Town that the completed work complies with all applicable State and local laws and the terms of the [building] permit [issued to rehabilitate the property]." Petitioner does not cite any authority in support of

its assertion that the certificate of compliance issued on 8 December 2009 by the former building inspector precluded Inspector Evans from making a determination that the structure was unsafe on 3 August 2010, and we find none. Therefore, we overrule this argument.

[3] Lastly, petitioner contends that it has a vested right to continue with the project due to its investment in the property and the issuance of building permits and a CAMA permit in 2008. In its argument before the Superior Court and in its brief to this Court, petitioner contends that the rehabilitation of its property was to take place in phases. The evidence presented to the Board of Commissioners indicates that petitioner's 2008 building permit authorized non-structural improvements to the interior of the structure, including: replacement of exterior doors; door trim; baseboards; windows; cabinets; plumbing; an HVAC system; and electric wiring. On the other hand, the findings of Inspector Evans' 12 March 2012 order described major structural defects in the building, including: movement of the pilings supporting the structure; movement of fasteners and bolts which have caused the structure to sag, resulting in floor level variations within the structure; egress components described as structurally unsound; rotted girders and structural members unable to support uniform loading conditions; tidal action encroaching upon and under the structure, negatively affecting the pilings and structural support; rotted exterior siding that allowed water to seep into the interior of the structure; a buckled roof (likely due to the effect of the tidal action on the pilings); interior attic space containing extensive animal waste; weathered and corroded structural elements of the egress overhang; and deteriorated fasia members.

In its 7 September 2012 order, the Town of Holden Beach Board of Commissioners, like Inspector Evans, ordered the demolition of the structure. However, the Commission gave petitioner an opportunity to bring his motel into compliance prior to demolition. The Commission noted that it would allow petitioner to complete any work necessary to comply with the building inspector's 12 March 2012 order, provided such work could be "completed and inspected/approved by the Holden Beach Building Inspector by or before 1 April 2013."

Thus, petitioner has not been deprived of its right to rehabilitate the property. Rather, this right has simply been limited by the condemnation of the property as unsafe and the Board of Commissioners' authority to demolish the structure should petitioner fail to act. *See Warner v. W & O, Inc.*, 263 N.C. 37, 41, 138 S.E.2d 782, 785 (1964) ("The permit created no vested right; it merely authorized [the] permittee to act. If he, at a time when it was lawful, exercised the privilege granted him,

he thereby acquired a property right which would be protected; but he could not remain inactive and thereby deny to the municipality the right to make needed changes . . . ."). Accordingly, we overrule petitioner's argument and, thus, affirm the Superior Court's 3 July 2013 order upholding the 7 September 2012 order of the Town of Holden Beach Board of Commissioners.

Affirmed.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
MATTHEW STEPHAN COAKLEY

No. COA14-559

Filed 31 December 2014

1. Criminal Law—jury instruction—malicious maiming—disabled eye

The trial court did not err by instructing the jury that it could convict defendant under North Carolina's malicious maiming statute if it found that he had "disabled" the victim's eye. The total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" under N.C.G.S. § 14-30. Even assuming that the trial court erred by instructing the jury on an improper theory of disabling, any such error was harmless beyond a reasonable doubt.

2. Criminal Law—jury instruction—malicious maiming—put out or disabled eye

The trial court did not err by allegedly instructing the jury on a theory of malicious maiming that was not included in the indictment. Although the indictment charging defendant with malicious maiming only stated that defendant "put out" the victim's eye while the jury instructions stated that defendant had "disabled or put out" his eye, this distinction was illusory. The term "disabled," as applied to the facts, could only be interpreted to mean total loss of sight.

3. Sentencing—assault inflicting serious bodily injury—assault with deadly weapon inflicting serious injury—remanded for resentencing

The trial court erred by entering judgment for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. The assault inflicting serious bodily injury judgment was arrested and the case was remanded to the trial court for resentencing.

Appeal by defendant from judgments entered 21 November 2013 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 9 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for Defendant.

BELL, Judge.

Matthew Stephan Coakley ("Defendant") appeals from judgments sentencing him to an active term of 72 to 99 months imprisonment for malicious maiming and to a consecutive term of 24 to 41 months imprisonment suspended with supervised probation for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. On appeal, Defendant contends that the trial court erred by (1) instructing the jury that it could convict him under North Carolina's malicious maiming statute if it found that he had "disabled" Mr. Clark's eye; (2) instructing the jury on a theory of malicious maiming that was not included in the indictment; and (3) entering judgment for both assault inflicting serious bodily injury and assault with a deadly weapon inflicting serious injury. After a careful review of the record and applicable law, we conclude that Defendant's first two contentions lack merit. We agree with Defendant on his third ground for appeal and therefore arrest judgment on the conviction for assault inflicting serious bodily injury and remand this case to the trial court for resentencing.

I. Factual Background

A. State's Evidence

On 7 July 2012, Denny Clark ("Mr. Clark") went to The Brickhouse, a sports bar located in Raleigh, North Carolina, to visit his girlfriend,

Reina Diaz ("Ms. Diaz"), and watch an Ultimate Fighting Championship ("UFC") fight on pay-per-view. The Brickhouse had four large projector screens and eight flat screen televisions around the bar. On the night in question, the bar was filled to capacity.

Around 10:00 p.m., Mr. Clark was standing in the area next to the booth where Defendant was sitting. Mr. Clark heard Defendant cursing and demanding that he move out of Defendant's line of sight. Mr. Clark stated that he could not move anywhere else because of the crowded environment. This brief encounter ended shortly thereafter. Later that evening, Mr. Clark ran into his former co-worker, Zachary Smith ("Mr. Smith"), and told him about the incident with Defendant.

Around 1:00 a.m., Mr. Clark and Mr. Smith went to the restroom. Defendant and his friend, William Phillips ("Mr. Phillips"), also went into the restroom. When Mr. Clark exited the restroom stall, he saw Defendant and Mr. Phillips in the restroom. Defendant was staring at Mr. Clark with his fist clenched and a tense look on his face. Mr. Clark stated, "[R]eally, over a T.V.?" Defendant proceeded to repeatedly punch Mr. Clark in his eye. Mr. Clark was knocked unconscious and woke up on the floor of the restroom. He told Mr. Smith to go after Defendant and call the police. Mr. Smith ran out of the restroom and told Ms. Diaz to call the police. He then went outside and saw Defendant attempting to leave. Defendant was prevented from leaving the premises when a police vehicle blocked his path.

Mr. Clark was transported to Duke Hospital via ambulance. Tyler Clark ("Tyler"), Mr. Clark's brother, received a call from Ms. Diaz around 2:00 a.m. asking him to come to the hospital because his brother had been badly injured in a fight. Mr. Clark was not given any pain medication during his initial medical treatment and Tyler testified that he could hear his brother screaming from the other side of the door.

At the emergency room, Mr. Clark presented with severe trauma to and zero light perception in his left eye. He had a large scleral laceration from his cornea along the posterior side of his eyeball into his retina. The on-call resident was able to suture a large portion of the laceration but could not reach the back side of the eye where the laceration ended. As a result, the posterior of Mr. Clark's eye remained open. Mr. Clark's retina was also completely detached. Dr. Michael Richard ("Dr. Richard"), an optic plastic surgeon who treated Mr. Clark, testified that it was not possible to repair the damage to Mr. Clark's eye, which he described as "a devastating injury." Dr. Richard further testified that he consulted with a retina specialist who agreed with Dr. Richard that the

injury was irreparable. According to Dr. Richard, Mr. Clark was at risk of developing calcium build-up on the wall of his injured eye, a condition called phthisis bulbi. If Mr. Clark were to develop this condition, the eye would begin to atrophy and Mr. Clark would experience extreme pain. Dr. Richard also feared the onset of sympathetic ophthalmia, a condition that results from the body's immune system attacking the healthy eye due to fluids from the damaged eye seeping into the healthy eye. After observing Mr. Clark for approximately one month, Dr. Richard determined that Mr. Clark would never regain his vision and made the decision to surgically remove Mr. Clark's eye on 5 October 2012.

B. Defendant's Evidence

At trial, Defendant testified as follows: Defendant had practiced Brazilian Jujitsu and amateur cage-fighting for approximately six years.[1] Defendant trained in Brazilian Jujitsu "a couple times a week."

On the date of the incident, Defendant went to The Brickhouse with his girlfriend to meet friends from his training gym and watch the UFC fight. Defendant testified that prior to his encounter with Mr. Clark, two individuals had blocked his view of the projector screen on which he was watching the fight. Defendant had asked them to move and they complied. When Mr. Clark stood in that same location, Defendant informed him that he had just asked two other individuals to move out of his way. Mr. Clark replied that Defendant could watch the UFC fight on one of the several other televisions. After the two of them "went back and forth" with more words, a waitress told Mr. Clark to move.

When the UFC fight ended, Defendant and Mr. Phillips went to the restroom. While in the restroom, Mr. Phillips asked Defendant about the confrontation with Mr. Clark. As Defendant began to describe the incident, he "hear[d] some snickering in one of the stalls." While Defendant was waiting to wash his hands, Mr. Clark came out of the bathroom stall and walked towards Defendant. Defendant put his hands up in response. According to Defendant, Mr. Clark "grab[bed] [Defendant] by the throat, squeeze[d] [his] neck and start[ed] pushing [him] . . . against the wall." Defendant took a step back, "popped" Mr. Clark's elbow away from him, and struck Mr. Clark in the face. Mr. Clark attempted to strike Defendant, but Defendant evaded the punch and pushed Mr. Clark into a corner, facing the wall. Mr. Clark began to elbow Defendant on the top

1. Although at the time of trial, Defendant also practiced Muy Thai, which included mastering powerful strikes, he had not begun training in this martial arts practice at the time of the altercation.

of his head and the back of his neck. Defendant buried his head in Mr. Clark's underarm and hit Mr. Clark three more times with his left fist until Mr. Clark stopped fighting back. Defendant pushed Mr. Clark away from him and left the bathroom.

C. Procedural History

A warrant for Defendant's arrest was issued on 25 July 2012. On 10 September 2012, Defendant was indicted on charges of malicious maiming, assault with a deadly weapon inflicting serious injury, and assault inflicting serious bodily injury. The case came on for trial on 19 November 2013 in Wake County Superior Court. On 21 November 2013, the jury returned verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to an active term of 72 to 99 months imprisonment for his malicious maiming conviction. Defendant was also sentenced to a consecutive suspended term of 24 to 41 months imprisonment for assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. Defendant gave notice of appeal in open court.

II. Jury Instructions

[1] Defendant's first argument is that the trial court erred by disjunctively instructing the jury that it could convict him of malicious maiming if it found that he had "disabled or put out" Mr. Clark's eye. Defendant asserts that the "disabling" of an eye does not support a conviction for malicious maiming under N.C. Gen. Stat. § 14-30 because the statute requires physical removal of the victim's eye. Alternatively, Defendant argues that "disabling" includes temporary injuries and injuries less serious than the total loss of use of the eye. As such, Defendant contends, the trial court's jury instruction deprived him of his right to a unanimous jury verdict under N.C. Const. Art. I because (1) it permitted the jury to convict him under a theory unsupported by the statute; and (2) it was impossible to determine whether the jury relied on the proper theory when it found him guilty of malicious maiming.

A. Appealability and Standard of Review

We note that Defendant failed to object to the jury instructions given by the trial court. "As a general rule, [a] defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); *see also* N.C.R. App. P. 10(a). When, however, "the error violates [the] defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal." *Id.* "Issues

of unanimity have usually arisen in the appellate courts when the trial court gave a disjunctive jury instruction." *State v. Davis*, 188 N.C. App. 735, 740, 656 S.E.2d 632, 635, *cert. denied*, 362 N.C. 364, 664 S.E.2d 313 (2008). Therefore, this issue is properly preserved for appeal.

Having concluded that this matter is properly before us, we must determine the appropriate standard of review. "Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and internal quotation marks omitted). Arguments made on appeal "challenging the trial court's decisions regarding jury instructions are reviewed *de novo*." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). We note, however, that utilizing a *de novo* standard of review only determines whether an error has occurred. Defendant failed to argue whether the error will be subject to a harmless error analysis and, if so, which party bears the burden of proof on appeal.

This Court has held that

> [w]here the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error. The State bears the burden of showing that the error was harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.

State v. Wilson, 363 N.C. 478, 487, 681 S.E.2d 325, 331 (2009) (citations and internal quotation marks omitted). Thus, we apply a harmless error analysis to Defendant's contention that the trial court's instruction violated his right to a unanimous jury verdict.

The North Carolina Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. While our Courts have found that disjunctive jury instructions may jeopardize this right, our Supreme Court has held that not every disjunctive jury instruction violates this constitutional right. *State v. Lyons*, 330 N.C. 298, 299, 412, S.E.2d 308, 310 (1991).

In *Lyons*, our Supreme Court noted the difference between disjunctive jury instructions on alternative acts that will establish an element of the charged offense and disjunctive jury instructions that allow the jury to find a defendant guilty based on one of two underlying acts, *either of which is in itself a separate offense*. 330 N.C. 298, 299, 412 S.E.2d 308,

310 (1991). The former type of jury instruction does not violate a defendant's right to jury unanimity while this latter type of instruction may be fatally ambiguous if it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. *Id.* at 302-03, 412 S.E.2d at 312. Our Supreme Court stated that even those cases in which the jury was instructed on two underlying acts, each of which is a separate offense, are subject to a harmless error analysis, as "[a]n examination of the verdict, the charge, the initial instructions by the trial judge to the jury . . . , and the evidence may remove any ambiguity created by the charge." *Id.* at 307, 412 S.E.2d at 315 (alteration in original)(citation and quotation marks omitted). The Court cautioned that a case "where an examination of the whole of the trial leads to a conclusion that any ambiguity raised by the flawed instructions is removed" is exceptional. *Id.* at 309, 412 S.E.2d at 315.

B. "Physical Removal" Requirement

In the case *sub judice*, Defendant was charged with malicious maiming under N.C. Gen. Stat. § 14-30, which makes it a Class C felony "[i]f any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure." N.C. Gen. Stat. § 13-40 (2013). The trial court instructed the jury, in pertinent part, as follows:

> The Defendant has been charged with malicious maiming. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant disabled or put out Denny Clark's eye, thereby permanently injuring him.
>
> * * *
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant, with malice aforethought, unlawfully, and with the intent to maim Denny Clark disabled or put out Denny Clark's eye, thereby permanently injuring him, it would be your duty to return a verdict of guilty.

In his brief, Defendant first argues that by allowing the jury to return a guilty verdict if it found that Defendant had *either* disabled or put out Mr. Clark's eye, the trial court gave a fatally disjunctive instruction because the evidence did not support a finding that Defendant "put out or removed any eye in the altercation." Although Defendant abandoned this position during oral argument and the State offered a persuasive

argument that the term "put out" does not require proof of physical removal, we nonetheless address this question, as it currently stands unanswered by our case law.

Although the term "put out" is reasonably interpreted to involve the physical removal of the eye, the New Oxford American Dictionary defines to "put someone's eyes out" to mean to "blind someone, typically in a violent way." The New Oxford American Dictionary 1378 (2nd ed. 2005). Therefore, it is fair to conclude that the statute is ambiguous on its face and subject to two different reasonable interpretations. When "a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation and quotation marks omitted).

The offense of malicious maiming was first codified in North Carolina in the Seventeenth Century, originating from the common law crime of mayhem. *See State v. Bass*, 255 N.C. 42, 47, 120 S.E.2d 580, 584 (1961). In *Bass*, our Supreme Court recognized that the common law definition of mayhem encompassed "violently depriving another of the use of such of his members as may render him less able in fighting, either to defend himself, or to annoy his adversary." *Id.* at 45, 120 S.E.2d at 582. The focus of the crime was on the disabling effect on the victim, rather than the physical acts that took place. *See id.* (recognizing that "cutting off his ear, or nose, or the like, are not held to be mayhems at common law[] because they do not weaken but only disfigure him").

Additionally, we find guidance from other jurisdictions that have interpreted similar maiming statutes. For example, under California law, "[e]very person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." Cal. Penal Code § 203 (2014). In interpreting the statute, the California Court of Appeals held that "[t]he expression 'puts out an eye' means the eye has been injured to such an extent it cannot be used for the ordinary and usual practical purposes of life." *People v. Green*, 130 Cal. Rptr. 318, 319 (1976) (citation and internal quotation marks omitted).

Similarly, Texas courts require the "total destruction of the sight of an eye" to constitute maiming under the Texas statute. *Phillips v. State*, 143 S.W.2d 591, 592 (1940). Although the California court defined maiming to include something less than total blindness, while the Texas court required total destruction of sight, neither required the physical removal of the eye in order to support a conviction of maiming.

We agree with the holdings in these jurisdictions that the total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" and, therefore, is sufficient to support a conviction for malicious maiming under N.C. Gen. Stat. § 14-30. Therefore, this portion of Defendant's argument is without merit.

C. Scope of the Term "Disabled"

In the second part of his first argument, Defendant contends that because the term "disabled an eye" may encompass less serious injuries than total loss of vision, and because it was impossible to tell upon which theory the jury based its conviction, he should be granted a new trial.

Defendant relies on our Supreme Court's decision in *State v. Pakulski* as standing for the proposition that a trial court commits reversible error when it instructs a jury on disjunctive theories of a crime and one of the theories is improper. 319 N.C. 562, 356 S.E.2d 319 (1987). The defendant in *Pakulski* was convicted of first-degree murder pursuant to the felony murder rule, with felony breaking or entering and armed robbery as the predicate felonies. 319 N.C. at 564, 356 S.E.2d at 321. On appeal, the defendant argued that there was insufficient evidence to support a conviction for either underlying felony and that he was deprived of his constitutional right to a unanimous jury verdict when the trial court instructed the jury disjunctively on both offenses as the predicate for the felony murder charge. *Id.* Our Supreme Court concluded that, although there was sufficient evidence to submit the armed robbery charge to the jury, there was insufficient evidence to submit the charge of felony breaking or entering to the jury. *Id.* at 571-73, 356 S.E.2d at 325-26. In addressing whether the error was harmless, the Court held that it "will not assume that the jury based its verdict on the theory for which it received a proper instruction" if "the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted." *Id.* at 574, 356 S.E.2d at 326. The Court added as a caveat that such an approach only applies to circumstances in which it could not "discern from the record the theory upon which the jury relied." *Id.*

Defendant relies on the language quoted above as support for his position that this Court should grant him a new trial due to the lack of clarity in the record as to which theory — disabling or putting out — the jury relied on in convicting him under N.C. Gen. Stat. § 14-30. We find Defendant's reliance on *Pakulski* misplaced, as the Court in *Pakulski* stated:

> Because we must remand the case for a new trial on the first-degree murder charges for insufficiency of the evidence as to breaking or entering committed with the use of a deadly weapon, *we need not address* defendants' contentions concerning error in the charge relating to the use of the deadly weapon or *unanimity of the verdict upon submission of the case on alternative theories.*

Id. at 574, 356 S.E.2d at 326-27 (emphasis added). While we agree that the plain meaning of the term "disabled" may include temporary injuries as well as injuries not resulting in complete loss of vision, the facts before this Court in the present case do not require us to decide whether partial or temporary blindness constitutes malicious maiming under N.C. Gen. Stat. § 14-30.

Although Defendant contends that the term "disabled" is open to an interpretation that is both factually and legally inconsistent, and that such ambiguity was so severe that it created a fatally ambiguous jury verdict, the facts of this case do not support this contention. The evidence in the record showed that Mr. Clark completely lost his eyesight because of Defendant's actions.[2] Defendant would have us conclude that, despite the evidence before it, the jury interpreted the term "disabled" to mean something less than complete blindness and that some jurors convicted Defendant under this improper theory. We find this argument to be unsupported by the evidence presented at trial. We hold that because the evidence presented at trial only supported one interpretation of the term "disabled," and such an interpretation was legally sufficient to sustain a conviction under N.C. Gen. Stat. § 14-30, the trial court did not commit reversible error in its instruction to the jury.

Even assuming, without deciding, that the trial court erred by instructing the jury on an improper theory of disabling to support a conviction of malicious maiming, we believe any such error was harmless beyond a reasonable doubt. The evidence regarding the extent of Mr. Clark's injuries was overwhelming and undisputed. Therefore, we are

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2. Additionally, Defendant has offered no argument or support for a contention that he did not cause the removal of Mr. Clark's eye. Despite the fact that Mr. Clark's eye was physically removed by his treating doctor, the testimony at trial clearly established that the removal was a medical necessity and was a direct result of the actions of Defendant. Defendant has not convinced this Court that causation was not established. Therefore, we cannot conclude that, for purposes of N.C. Gen. Stat. § 14-30, a defendant has not "put out" the eye of a victim if the victim's eye is so severely damaged that it is rendered useless, but preserved for aesthetic purposes. Such a situation has the same practical effect as a situation in which the victim's treating physician decides to remove the injured eye.

able to unequivocally discern from the record that the jury based its verdict on a finding that Mr. Clark suffered a total and permanent loss of sight in his eye as a result of the assault by Defendant. Thus, we conclude that the instructions given to the jury were not "fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict." *Lyons*, 330 N.C. at 301, 412 S.E.2d at 311. This argument is overruled.

III. Conviction Under a Theory Not Alleged in Indictment

[2] Next, Defendant argues that the trial court committed plain error when it allowed him to be convicted under a theory of malicious maiming that was not alleged in the indictment. According to Defendant, because the indictment alleged malicious maiming by "putting out" Mr. Clark's eye and the trial court instructed the jury on both putting out and disabling, he is entitled to a new trial. For the following reasons, we disagree.

A. Standard of Review

Defendant did not object to the instruction on malicious maiming at trial. Therefore, this Court reviews for plain error and Defendant bears the burden of "showing that such an error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," meaning that the defendant must establish that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* at 518, 723 S.E.2d at 324 (citation and internal quotation marks omitted).

B. Substantive Legal Analysis

The indictment charging Defendant with malicious maiming alleged, in pertinent part, that:

> Defendant named above unlawfully, willfully, and feloniously did with malice *put out an eye of Denny Clark*, with the intent to maim or disfigure that person, and as a result did permanently injure the eye of that person.

(emphasis added). As previously noted, the trial court permitted the jury to convict Defendant if it believed, beyond a reasonable doubt, that he had "disabled or put out Denny Clark's eye."

Our Supreme Court has held that instructions that permit the jury "to predicate guilt on theories of the crime which were not charged in the bill of indictment and which [are] not supported by the evidence

at trial" constitutes plain error. *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) (citation and quotation marks omitted). In *Tucker*, the Court found plain error where, "[a]lthough the state's evidence supported [the court's] instruction, the indictment [did] not." *Id.* at 537, 346 S.E.2d at 420. Thus, it is clear that instructing a jury on a theory of an offense not alleged in the indictment may constitute plain error.

Although the indictment charging Defendant with malicious maiming only stated that Defendant "put out" Mr. Clark's eye while the jury instructions stated that Defendant had "disabled or put out" his eye, we agree with the State that this distinction is illusory. As we stated earlier in this opinion, the term "disabled," as applied to the facts in this case, can only be interpreted to mean total loss of sight. The trial court did not instruct the jury that it could find Defendant guilty if he "partially" or "temporarily disabled" Mr. Clark's eye. Further, the trial court's rationale for using another term in addition to "put out" is found in a review of the trial transcript.

The State requested that the trial court use the pattern jury instruction for malicious maiming, which included the term "disabled." The State explained that this request was to prevent the jury from becoming "confused since the eye isn't literally falling out on the floor in the bathroom." This explanation is consistent with our holding that the eye does not have to be physically removed from its socket in order to constitute maiming under N.C. Gen. Stat. § 14-30. The purpose of the language in the instruction was to clarify that permanently blinding Mr. Clark was sufficient to prove malicious maiming. We therefore conclude that the trial court did not instruct the jury on a theory that was not alleged in the indictment.[3] Defendant is not entitled to relief on this ground.

IV. Judgment and Sentence on Two Assault Convictions

[3] Defendant's final argument on appeal is that the trial court erred by sentencing him for both assault inflicting serious bodily injury and assault with a deadly weapon. The State concedes that the court acted contrary to the statutory mandate by entering judgment and sentencing Defendant on both assault offenses.[4] We agree.

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3. Again, we note that we do not decide whether the State was *required* to show total blindness to prove maiming. Such a decision is not necessary under the facts of this case.

4. Although the State initially conceded the issue in its brief, it held a position during oral argument that, although the sentence should be vacated, the judgment should stand.

First, we note that Defendant failed to object to this issue at trial. However, as Defendant has alleged a failure to comply with a statutory mandate, we nonetheless review the issue. *See State v. Jamison*, __ N.C. App. __, __, 758 S.E.2d 666, 671 (2014). Issues of statutory construction are questions of law, reviewed *de novo* on appeal. "Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citations and quotation marks omitted).

In the case *sub judice*, Defendant was charged with and convicted of two assault offenses arising out of the incident on 8 July 2012: (1) assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4(a); and (2) felonious assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b). N.C. Gen. Stat. § 14-32.4(a) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-32.4(a) (2013). Here, Defendant's conduct pertaining to his charge for and conviction of assault with a deadly weapon inflicting serious injury was covered by the provisions of N.C. Gen. Stat. § 14-32(b), which permits a greater punishment than N.C. Gen. Stat. § 14-32.4(a). *See* N.C. Gen. Stat. § 14-32(b) (2013).

Contrary to the statutory mandate, the trial court entered a consolidated judgment for both assault convictions. Therefore, we arrest judgment on Defendant's conviction of inflicting serious bodily injury and remand for resentencing on Defendant's conviction of felonious assault with a deadly weapon inflicting serious injury. *See State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 871 (2005), *disc. review denied*, __ N.C. __, 628 S.E.2d 8 (2006).

V. Conclusion

For the reasons set forth above, we conclude that the trial court did not err by instructing the jury on two different theories of malicious maiming. However, we conclude that the trial court erred by entering judgment and sentencing Defendant on both assault convictions. Therefore, judgment against Defendant on the charge of assault inflicting serious bodily injury is arrested and remanded to the trial court for resentencing. Judgment on Defendant's malicious maiming conviction remains undisturbed.

NO ERROR in part, JUDGMENT ARRESTED AND REMANDED in part.

Judges GEER and STROUD concur.

STATE v. HINNANT

[238 N.C. App. 493 (2014)]

STATE OF NORTH CAROLINA
v.
BURNICE ANTWON HINNANT, JR.

No. COA14-599

Filed 31 December 2014

1. Criminal Law—failure to give jury instruction—self-defense

In a murder prosecution, the trial court did not err by refusing to instruct the jury on self-defense. Defendant was not entitled to the instruction because he testified that he did not intend to shoot anyone but rather intended to fire a warning shot.

2. Homicide—jury instruction—intent to kill—voluntary manslaughter

In a murder prosecution, the trial court did not err by refusing to instruct the jury on voluntary manslaughter based on adequate provocation. One of the elements of voluntary manslaughter based on adequate provocation is the intent to kill, but defendant testified that he did not intend to kill anyone.

3. Homicide—jury instruction—involuntary manslaughter

In a murder prosecution, the trial court did not err by refusing to instruct the jury on involuntary manslaughter. Even though defendant testified that he did not intend to shoot anyone, his firing of the gun was intentional and occurred under circumstances naturally dangerous to human life.

4. Evidence—improper witness testimony—curative instruction not required

In a murder prosecution, the trial court did not commit plain error by failing to give a curative instruction not requested by defendant, where a witness gave his own opinion as to what "made reasonable sense." The trial court sustained trial counsel's objections to the testimony and granted his motion to strike. Even assuming the trial court erred, any error did not have a probable impact on the jury's verdict.

Appeal by Defendant from judgments entered 17 October 2013 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 21 October 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Brenda Menard, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for the Defendant.

DILLON, Judge.

Burnice Antwon Hinnant, Jr., ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of assault with a deadly weapon and second degree murder.

I. Background

The evidence tended to show the following: In the early morning hours of 2 September 2012, Defendant was involved in an altercation with his cousin C.J. Hinnant[1] at a party. During the altercation, Defendant shot Jayquan Tabron with a .38 caliber revolver. Defendant testified in his own defense, stating that C.J. was reaching for what he believed to be a gun and that he intended to fire warning shots in the direction of C.J. but did not intend to hit him. One of these warning shots, however, hit Mr. Tabron in the chest, killing him. Mr. Tabron had been standing in a crowd next to C.J.

One of the State's witnesses testified that C.J. reached for his waistband before Defendant drew his weapon, and further, that it was C.J., not Defendant, who started the fight.

On 29 October 2012, a Nash County grand jury indicted Defendant with carrying a concealed handgun, assault with a deadly weapon with intent to kill, and first degree murder.[2] Defendant pleaded guilty to carrying a concealed handgun. The remaining charges in the matter came on for trial in Nash County Superior Court.

The jury found Defendant guilty of assault with a deadly weapon and second degree murder. The trial court sentenced Defendant to prison for 180 to 228 months for second degree murder and 75 days for assault with a deadly weapon, consolidating the concealed weapon charge with

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1. Because Defendant and C.J. Hinnant are cousins and share the same last name, C.J. Hinnant is referred to herein as "C.J."

2. Defendant's liability for the murder is based on the doctrine of transferred intent, which provides that where "one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary." *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

the assault charge and ordering that the sentences run consecutively. Defendant filed notice of appeal in open court.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Self-Defense and Voluntary Manslaughter Instructions

[1] Defendant first contends that the trial court erred in refusing to instruct the jury on self-defense and in omitting an instruction on voluntary manslaughter. We disagree.

A defendant is only entitled to an instruction on self-defense if evidence exists that (1) he "in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm" *and* (2) that such a belief was reasonable. *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). In this case, Defendant's argument fails because there was no evidence to support the first element of self-defense - that he "in fact" formed a belief that it was necessary to kill C.J. – in that he testified that he was only firing warning shots. Specifically, our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter "while still insisting . . . that he did not intend to shoot anyone[.]" *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996).

On the witness stand, Defendant testified that he did not intend to shoot C.J. or anyone else when he fired his weapon, but rather his intent was to fire warning shots, because he believed C.J. was reaching for a weapon:

> I wasn't trying to harm C.J. or [Mr. Tabron], you know, I was just trying to get C.J. to back off of me. And I felt like if I pulled my gun out at the time, that would get him to back off of me. And that's what he did, he backed off of me.
>
> . . .
>
> If I had reached my arm out and pointed my gun directly in front of me, I mean, I would have shot C.J. But like I said, *I was just trying to get C.J. to back off of me.* That's why I had pulled my gun out. *And if C.J. had have pulled his gun out, yes, I would then have shot C.J.*, ***but that wasn't my intent. My intent was just to get him to back off of me.***

(Emphasis added).

The facts of this case are almost identical to that faced by our Supreme Court in *Williams*. In *Williams*, the defendant testified that he felt threatened during an altercation when he believed that one of his adversaries was reaching for a gun and testified that he fired warning shots in the air to make his adversaries back off, one of which struck and killed the victim:

> The defendant testified that he felt threatened because [an adversary] reached at his belt as if he were reaching for a pistol. Defendant testified that he then pointed his pistol in the air and fired three shots to scare [his adversaries] and make them back off.

Id. at 872, 467 S.E.2d at 393. In holding that the defendant was not entitled to an instruction on self-defense, our Supreme Court stated as follows:

> The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.

Id. at 873, 467 S.E.2d at 394.

Defendant argues that, notwithstanding his own testimony about his intent, he was nonetheless entitled to jury instructions on self-defense and voluntary manslaughter because there was other evidence presented at trial to support a finding by the jury that he acted in self-defense. We agree that the testimony of other witnesses may have been sufficient for the jurors to conclude that it was reasonable for Defendant to use deadly force during his encounter with C.J.; however, such evidence only satisfies the second element of self-defense. Our Supreme Court has held that such evidence is irrelevant where the defendant's testimony about his own belief demonstrates that the first element was not present. *State v. Nicholson*, 355 N.C. 1, 30-31, 558 S.E.2d 109, 130-31 (2002). Specifically, in *Nicholson*, the Supreme Court held that the testimony of a witness stating that it was reasonable for the defendant to believe deadly force was necessary was irrelevant where the defendant himself testified that he did not intend to shoot anyone when he fired his weapon. *Id.* at 31, 558 S.E.2d at 131.

Here, Defendant's own testimony was that he did not intend to shoot anyone when he fired his weapon. Therefore, based on *Williams*, *Nicholson*, and other decisions by our appellate courts, we hold that Defendant was not entitled to an instruction on self-defense. *See*, *e.g.*, *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 779 (1995) ("[F]rom defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot anyone," but rather intended to shoot at the top of a door); *State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789-90 (1994) (defendant cannot claim self-defense while also asserting that he did not aim his gun at the victim); *State v. Gaston*, ___ N.C. App. ___, ___, 748 S.E.2d 21, 26-27 (2013) (defendant was not entitled to instruction on self-defense or voluntary manslaughter where he testified that the gun fired accidentally).

[2] Defendant devotes the final two paragraphs of his first argument to the alternate contention that the trial court erred in refusing to instruct the jury on voluntary manslaughter based on a theory of adequate provocation. We disagree for the same reasons expressed above concerning his argument regarding self-defense. Voluntary manslaughter committed in the heat of passion and with adequate provocation requires that the defendant perpetrate the killing with the intent to kill. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). Again, Defendant testified that he did not intend to kill or injure anyone when he fired the gun. As in *Lyons*, where the defendant fires warning shots not intending to kill anyone, "the evidence . . . does not tend to indicate that the defendant in fact formed a belief that it was necessary to kill," and the defendant is not entitled to a jury instruction on voluntary manslaughter based on a theory of adequate provocation. 340 N.C. at 663, 459 S.E.2d at 779. Accordingly, this final portion of Defendant's first argument is overruled.[3]

B. Involuntary Manslaughter Instruction

[3] Defendant next argues that the trial court erred in refusing to instruct the jury on involuntary manslaughter. We disagree.

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3. We note that in his reply brief Defendant relies heavily on. *State v. Owens*, 60 N.C. App. 434, 299 S.E.2d 258 (1983). In that case, this Court held that an instruction on voluntary manslaughter was required despite the defendant's testimony that he pulled his gun out of fear of the victim, stating that "the jury could have concluded that [the] defendant intentionally fired the gun in self-defense but used excessive force." *Id.* at 436, 299 S.E.2d at 259. However, more recently, we recognized that *Owens* and other decisions in that line of cases were implicitly overruled by the Supreme Court's more recent decisions in *Williams* and *Nicholson*. *Gaston*, ___ N.C. App. at ___, 748 S.E.2d at 26. Therefore, Defendant's reliance on *Owens* is misplaced.

Involuntary manslaughter is an unintentional killing committed *without malice* that "proximately result[s] from the commission of an unlawful act not amounting to a felony or [] from some [other] act done in an unlawful or culpably negligent manner[.]" *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986). Our Supreme Court has held that where an unintentional killing results from the unintentional – yet reckless or culpably negligent – use of a firearm "in the absence of intent to discharge the weapon," a jury instruction on involuntary manslaughter is appropriate. *State v. Wallace*, 309 N.C. 141, 146, 305 S.E.2d 548, 551-52 (1983). Where death results from the intentional use of a firearm or other deadly weapon as such, malice is presumed. *State v. Gordon*, 241 N.C. 356, 358-59, 85 S.E.2d 322, 323-24 (1955).

We believe that our resolution of this issue is controlled by our decision in *State v. Martin*, 52 N.C. App. 373, 278 S.E.2d 305, *disc. review denied*, 303 N.C. 549, 281 S.E.2d 399 (1981), which involved facts very similar to those in the present case. In *Martin*, the defendant testified that she intended to fire a gun in the direction of her husband but that she was intending only to fire warning shots to "keep him back," and was not trying to hit him:

> I intentionally pulled the trigger. I did not intentionally shoot my husband. I intentionally pulled the trigger, thinking at the time that it would warn him back, not realizing that it was in the position to actually hit him.

Id. at 374, 278 S.E.2d at 307. We held that where the defendant testified that she intentionally fired the weapon and that the weapon did not discharge accidentally, the intentional discharge was "under circumstances naturally dangerous to human life" and that "[t]his could not be involuntary manslaughter[,]" even if the defendant did not intend to wound anyone with the shot. *Id.* at 375, 278 S.E.2d at 307. Accordingly, we held that it was error to instruct the jury on involuntary manslaughter.

Like in *Martin*, Defendant here admitted that he intentionally fired the gun, but that he did not intend to wound C.J. or anyone else. However, since he intentionally fired the gun under circumstances naturally dangerous to human life, we hold that the trial court did not err in not giving an instruction on involuntary manslaughter. The cases cited by Defendant, *State v. Buck*, 310 N.C. 602, 313 S.E.2d 550 (1984), and *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011), are easily distinguishable. Neither involved the intentional discharge of a firearm. *Buck* involved a stabbing, 310 N.C. at 605, 313 S.E.2d at 552, and *Debiase* involved an attack with a

beer bottle, 211 N.C. App. at 508-09, 711 S.E.2d at 443-44. In the present case, the uncontradicted evidence showed that Defendant drew a loaded .38 caliber revolver and intentionally fired it twice in rapid succession in the direction of C.J. and the surrounding crowd. As in *Martin*, "all the evidence, including [D]efendant's testimony, shows that the deceased was fatally wounded when [D]efendant intentionally discharged [his] gun under circumstances naturally dangerous to human life. There was no evidence of an accidental discharge of the weapon." 52 N.C. App. at 375, 278 S.E.2d at 307. Accordingly, this argument is overruled.

C. Absence of a Curative Instruction

[4] In his final argument, Defendant contends that the trial court committed plain error by failing to instruct the jury to disregard certain testimony by a deputy investigating the case, after granting his motion to strike that testimony. The following colloquy transpired on direct examination of the deputy:

> [DEPUTY]: [W]hy would you in the middle of a conflict with someone who . . . is pulling out a firearm on you, why would you choose to shoot up in the air over them. That doesn't make reasonable sense. That's not something that a reasonable person would do. If I believe someone is going to pull a weapon out on me, it's my intention to get my weapon out as quick as I can to discharge my weapon.
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> [DEFENSE COUNSEL]: Objection, Your Honor.
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> THE COURT: Sustained.
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> [DEPUTY]: -- to defend myself.
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> THE COURT: Sustained.
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> [DEFENSE COUNSEL]: Motion to strike.
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> THE COURT: Motion is allowed.
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> [DEPUTY]: So, it didn't make sense to me why he was doing what he was doing and saying what he was saying. . . . You look down, believing that this person is pulling out a gun and then you come up and shoot your gun up in the air. That doesn't make sense.
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> [DEFENSE COUNSEL]: Objection.
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> THE COURT: Sustained.

Defendant thus contends that the trial court's omission of an unrequested curative instruction constituted plain error where the court sustained his counsel's objections to the deputy's testimony as to what "made reasonable sense" twice, did so once more on its own motion, and granted his motion to strike that portion of the testimony. We disagree.

A trial court does not err in failing to provide an unrequested curative instruction unless the error or impropriety is extreme. *Smith v. Hamrick*, 159 N.C. App. 696, 699, 583 S.E.2d 676, 679, *disc. review denied*, 357 N.C. 507, 587 S.E.2d 674 (2003). Assuming, *arguendo*, that the trial court's failure to provide this instruction was error, we do not believe this failure had any *probable* impact on the jury's final determination. Accordingly, this argument is overruled.

III. Conclusion

We believe that Defendant received a fair trial free from reversible error, and therefore uphold the challenged convictions.

NO ERROR.

Judge HUNTER, Robert C. and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANTHONY CHRIS JOHNSON

NO. COA14-566

Filed 31 December 2014

1. Witnesses—subpoena—continuing obligation—compulsory attendance—initial session of court required

The trial court erred in ordering, under threat of contempt, that defense counsel's legal assistant, Martinez, appear as a witness for the State. Martinez was subpoenaed to appear on specific weeks in November and December 2013, and January 2014. However, the trial did not occur until a week after the first date listed in the subpoena. Although the State argued that Martinez was required to appear on the first date, and then from session to session until released by the court, there must first be a session of court at which a particular case is scheduled to be heard to trigger compulsory attendance.

2. Constitutional Law—right to counsel—defense counsel legal assistant—compelled to appear by State

There was prejudice in a methamphetamine precursor prosecution where the trial court compelled defense counsel's legal assistant to appear for the State to authenticate a written statement in which defendant took full responsibility for possession of the chemicals. But for the written confession, there was a reasonable possibility that the jury might have believed that one or both of the other people in the car were responsible for possession of the precursors.

3. Constitutional Law—effective assistance of counsel—testimony by defense counsel legal assistant—conflict of interest hearing required

Given the likelihood that an effective assistance of counsel issue would arise on remand of a prosecution for possession of methamphetamine precursor chemicals, the Court of Appeals held that a conflict of interest hearing should be held if defense counsel's legal assistant testified, even if the State's only purpose in admitting the testimony was the verification of a document signed by defendant. The privileged communications issue should be addressed even if defendant obtained new counsel.

Appeal by defendant from judgment entered on or about 20 November 2013 by Judge Reuben F. Young in Superior Court, Johnston County. Heard in the Court of Appeals 23 October 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General Brian D. Rabinovitz, for the State.

Reece & Reece by Michael J. Reece, for defendant-appellant.

STROUD, Judge.

Anthony Chris Johnson ("defendant") appeals from a conviction for possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. *See* N.C. Gen. Stat. § 90-95(d1)(2) (2013). Defendant contends that (1) the trial court erred in ordering defendant's counsel's legal assistant to appear to testify at trial; and (2) his trial counsel did not provide effective assistance of counsel due to a conflict of interest. Finding prejudicial error, we hold that defendant is entitled to a new trial.

I. Background

The State's evidence showed that on the morning of 3 April 2013, defendant called James Best and asked him to purchase a box of Sudafed for him. That afternoon, defendant drove Best to a Walmart store. Defendant's wife, Tina Lynn, rode in the front passenger seat. Best entered the Walmart and bought a box of Sudafed. Best returned to the car and gave the box of Sudafed to defendant. Defendant then drove Lynn and Best to a Walgreens store. Defendant entered the Walgreens, leaving Lynn and Best in the car.

After receiving a report of possible drug activity, Officer Sean Cook arrived in the Walgreens parking lot. Officer Cook approached defendant as he was exiting the Walgreens and walking toward the car in which Lynn and Best were waiting. Officer Cook asked defendant if he could search his person, and defendant consented. Officer Cook found a pill in a clear container and car keys in defendant's pockets. Officer Cook asked defendant if he could search the car, and defendant consented. After Officer Cook directed Lynn and Best to leave the car, Officer Cook conducted a search of the car and found three boxes of Walgreens instant cold packs, three cans of starter fluid, a four-pack of Energizer Ultimate lithium batteries, a 26-ounce can of table salt, and a box of pseudoephredine hydrochloride tablets. Officer Cook arrested defendant for possession of methamphetamine precursors.

On or about 5 August 2013, a grand jury indicted defendant for possession of an immediate precursor chemical, pseudoephredine, knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. *See* N.C. Gen. Stat. § 90-95(d1)(2). Defendant pled not guilty. At trial, the State proffered expert testimony that all of the items found by Officer Cook are necessary to manufacture methamphetamine. The State also used testimony by Margarita Martinez, defendant's counsel's legal assistant, to authenticate defendant's written confession of "full responsibility" for the charge against him. On or about 20 November 2013, a jury found defendant guilty of possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine. On or about 20 November 2013, the trial court sentenced defendant to 16 to 29 months' imprisonment. Defendant gave notice of appeal in open court.

II. Order to Appear

A. Standard of Review

We review questions of law *de novo*. *State v. Harris*, 198 N.C. App. 371, 377, 679 S.E.2d 464, 468, *disc. rev. denied*, 363 N.C. 585, 683 S.E.2d 211 (2009).

B. Analysis

[1] Defendant challenges the trial court's order, under threat of contempt, that Martinez, his own counsel's legal assistant, appear as a witness for the State. On or about 8 November 2013, the State served Martinez a subpoena directing her to appear to testify in this case at 10:00 a.m. on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014.[1] The trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Defendant contends that Martinez was not required to appear on Tuesday, November 19, 2013, because the subpoena did not include the week of Monday, November 18, 2013. The State counters that Martinez was required to appear on Friday, November 8, 2013 and then to continue to appear "from session to session" until released by the trial court. *See* N.C. Gen. Stat. § 8-63 (2013) ("Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and . . . continue to attend from session to session until discharged[.]"). The use of "term" refers to the typical six-month assignment of a superior court judge, whereas "session" refers to the typical one-week assignment within a term. *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 154 n.1., 446 S.E.2d 289, 291 n.1 (1994).

But the trial court did not hold a session for this case on Friday, November 8; rather, the session and the trial began over a week later, on Monday, November 18.[2] Defendant's counsel also pointed out to the trial court that the Johnston County Superior Court did not hold a session for any case on Friday, November 8. Because Martinez was directed to appear specifically for this case for specific dates and the trial court did

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1. The subpoena incorrectly lists the last date as January 13, 2013, instead of January 13, 2014.

2. We also note that the State apparently contemplated that the case may possibly be reached at one of several sessions of court, as three were specified on the subpoena. If the State truly believed that the subpoena for November 8, 2013 would remain continuously in force from November 8 until the case was actually reached, there would have been no reason to list the two later dates on the subpoena.

not hold a session of court at which this case was calendared on Friday, November 8, Martinez was not required to appear on Friday, November 8. We interpret "from session to session" to mean that first there must be a "session" of court at which a particular case is scheduled to be heard to trigger compulsory attendance for that case. *See* N.C. Gen. Stat. § 8-63. From that point onward, a properly subpoenaed witness is required to appear "from session to session" for that case until discharged. *See id.* Given that Martinez was not required to appear on Friday, November 8, we hold that Martinez was not required by the State's subpoena to appear on Tuesday, November 19.

The trial court strongly expressed its displeasure with defendant's counsel because it believed that counsel "knew that [the] subpoena did not have the accurate date on it." But defendant had no duty to ensure that State's witnesses were properly subpoenaed. *See State v. Love*, 131 N.C. App. 350, 358, 507 S.E.2d 577, 583 (1998) ("[T]he State had no burden to see to it that [defendant] procured the attendance of the witnesses he desired to have present."), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382, *cert. denied*, 528 U.S. 944, 145 L.Ed. 2d 280 (1999). Because Martinez had not been properly subpoenaed to appear on Tuesday, November 19, we hold that the trial court erred in ordering, under threat of contempt, that Martinez appear on that day as a witness for the State.

C. Prejudice

[2] "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2013). The State used Martinez's testimony to authenticate defendant's written confession of "full responsibility" for the charge against him. The prosecutor also elicited testimony that Martinez worked for defendant's counsel. Apart from defendant's confession, the only evidence linking defendant to the methamphetamine precursors is Officer Cook's testimony that he discovered the methamphetamine precursors in the car in which defendant and two other passengers were riding and Best's testimony that defendant had asked him to buy a box of Sudafed and had accepted the box from him. But for the written confession, there is a reasonable possibility that the jury may have believed that one or both of the other people in the car were responsible for possession of the precursors. Accordingly, we hold that, had Martinez not appeared at trial, there is a "reasonable possibility" that defendant would not have been convicted of possession of an immediate precursor chemical knowing, or having reasonable cause to believe, that it will be used to manufacture methamphetamine. *See id.*

Because the trial court committed prejudicial error, we hold that defendant is entitled to a new trial.[3]

III. Conflict of Interest

[3] Defendant next contends that his trial counsel did not provide effective assistance of counsel due to a conflict of interest arising from Martinez testifying as a prosecution witness. Given the likelihood that Martinez will testify again on remand, we address this issue.

A criminal defendant has the right to effective assistance of counsel under both the federal and state constitutions. *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed. 2d 674, 692 (1984); *State v. Braswel*l, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

> The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest.
>
> When a defendant raises a claim of ineffective assistance of counsel, in most instances he or she must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. However, when the claim of ineffective assistance is based upon an actual, as opposed to a potential, conflict of interest arising out of an attorney's multiple representation, a defendant may not be required to demonstrate prejudice under *Strickland* to obtain relief.

State v. Choudhry, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011) (citations and quotation marks omitted). Although the conflict of interest here does not arise from an attorney's representation of a prosecution witness, we analogize this case to that line of cases, because here defendant's counsel employed Martinez, a prosecution witness. *See*, *e.g.*, *id.*, 717 S.E.2d 348; *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993).

> When the court becomes aware of a potential conflict of interest with regard to a defendant's retained counsel, especially when the person with the potentially compelling interest is known to be a prosecution witness[,] the [trial] judge shall conduct a hearing to determine whether

3. Defendant also contends that his constitutional right to be present was violated, because he was not present during the trial court's conference with the lawyers regarding the State's subpoena of Martinez. Because we hold that defendant is entitled to a new trial, we do not reach this issue.

> there exists a conflict of interest. In addition, the trial judge should see that the defendant is fully advised of the facts underlying the potential conflict and is given the opportunity to express his or her views.

James, 111 N.C. App. at 791, 433 S.E.2d at 758-59; *see also State v. Ballard*, 180 N.C. App. 637, 643, 638 S.E.2d 474, 479 (2006), *disc. rev. denied and dismissed*, 361 N.C. 358, 646 S.E.2d 119 (2007). A defendant can waive his right to conflict-free representation, if done knowingly, intelligently, and voluntarily. *James*, 111 N.C. App. at 791-92, 433 S.E.2d at 759. Defendant here had no opportunity to knowingly, intelligently, and voluntarily waive any conflict that may have existed. *See id.*, 433 S.E.2d at 759.

In *State v. James*, the defendant's counsel represented a prosecution witness in another matter. *Id.* at 788, 433 S.E.2d at 757. Here, although the nature of the relationship between defendant's counsel and the prosecution witness was employer and employee, the same types of concerns exist.

> We believe representation of the defendant as well as a prosecution witness (albeit in another matter) creates several avenues of possible conflict for an attorney. Confidential communications from either or both of a revealing nature which might otherwise prove to be quite helpful in the preparation of a case might be suppressed. Extensive cross-examination, particularly of an impeaching nature, may be held in check. Duties of loyalty and care might be compromised if the attorney tries to perform a balancing act between two adverse interests.

Id. at 790, 433 S.E.2d at 758. Here, the trial court was fully aware that Martinez was employed by defendant's counsel and, perhaps for that reason, just prior to her testimony, had ordered her to appear despite the lack of a valid subpoena.

The record does not reveal the circumstances under which Martinez came to notarize an incriminating statement for her own employer's client, and it would seem quite likely that this information may implicate privileged attorney-client communications. As an employee of counsel, Martinez was potentially aware of communications and information that would be protected by the attorney-client privilege. *See Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 822 (1992) ("[C]onfidential communications made to an attorney in his professional capacity by his

client are privileged, and the attorney cannot be compelled to testify to them unless his client consents."), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994). This privilege applies to Martinez, as an employee of defense counsel. *See State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 948 (Ohio 2012) (per curiam) ("[T]he attorney-client privilege applies to agents working on behalf of legal counsel[.]"); *Augustine v. Allstate Ins. Co.*, 807 N.W.2d 77, 85 (Mich. Ct. App. 2011) ("The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents."). Placing defendant's counsel in the position that he may need to extensively cross-examine Martinez but cannot because this may require disclosure of privileged communications between Martinez or defendant's counsel and defendant raises a potentially severe conflict of interest. *See State v. Gonzelez*, 234 P.3d 1, 13-14 (Kan. 2010) (holding that, "[i]n view of the role and importance of a trustworthy and confidential attorney-client relationship, particularly in [an adversarial] system of criminal justice, and of the potential for damage to that system if the relationship is too cavalierly invaded or compromised," a prosecutor who wishes to subpoena a criminal defense counsel to testify about a current or former client's confidential information must establish, among other elements, that the information sought is not protected by the attorney-client privilege).

The State argues that the only purpose for Martinez's testimony was to provide the foundation for admission of the defendant's statement, since she notarized it. The State's argument implies that Martinez had no relevant knowledge of the case other than the fact that defendant signed the statement. This assumption may be true, but the record does not demonstrate it since no inquiry was made into the conflict of interest. And if this assumption were the case, the State had no reason to ask Martinez about her employment as defense counsel's legal assistant—other than to let the jury know that defendant had essentially confessed to his own attorney.

The trial court did not conduct a *James* hearing to determine whether an actual conflict of interest existed. *See James*, 111 N.C. App. at 791, 433 S.E.2d at 758-59. Accordingly, we hold that, should Martinez testify again for the State on remand, the trial court must conduct a hearing to determine whether an actual conflict of interest exists. *See id.* at 791, 433 S.E.2d at 758-59; *Ballard*, 180 N.C. App. at 643, 638 S.E.2d at 479. We also note that even if defendant has new trial counsel on remand, the issue of privileged communications between defendant and his prior counsel still exists and should be addressed.

IV. Conclusion

Because the trial court committed prejudicial error in ordering Martinez to appear, we hold that the defendant is entitled to a new trial.

NEW TRIAL.

Judges GEER and BELL concur.

STATE OF NORTH CAROLINA
v.
JOSEPH ORTIZ

No. COA14-782

Filed 31 December 2014

1. Sentencing—nonstatutory aggravating factor—insufficient notice

The trial court erred by allowing the State to proceed on an aggravating factor that was not alleged in the indictment. Simply providing notice in compliance with N.C.G.S. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor that defendant committed the sexual offense against the victim knowing that he was HIV positive and could transmit the AIDS virus.

2. Sentencing—robbery with dangerous weapon—assault with deadly weapon—separate acts sufficient for separate convictions

The trial court did not err by entering judgment and imposing sentences for both robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. There was sufficient evidence for the jury to find that the acts necessary to convict defendant of robbery with a dangerous weapon concluded before defendant committed the acts which constituted the offense of assault with a deadly weapon. Thus, separate convictions and sentences for the two offenses were appropriate.

Appeal by defendant from judgments entered 20 September 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 3 November 2014.

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

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.

BELL, Judge.

Defendant Joseph Ortiz appeals from a judgment sentencing him to life imprisonment for his conviction of first degree sexual offense and a consolidated judgment sentencing him to a consecutive term of 146 to 185 months imprisonment for convictions of robbery with a dangerous weapon, felony breaking and entering, assault with a deadly weapon, and attaining habitual felon status. On appeal, Defendant raises three issues. First, Defendant contends that the trial court erred in allowing the State to proceed on an aggravating factor that was not alleged in the indictment. Second, Defendant contends that, should this Court determine that the State was not required to include the aggravating factor in the indictment, the trial court erred in denying Defendant's motion to dismiss the aggravating factor for insufficient evidence. Third, Defendant argues that the trial court erred in entering judgment and imposing sentence for both Defendant's conviction of robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. In that we find error and remand Defendant's first degree sexual offense judgment for resentencing, we will not address Defendant's second argument.

I. Factual Background

A. State's Evidence

In July 2009, Stacey moved from Indianapolis, where she was getting her PhD in clinical psychology, to a downtown apartment in Asheville, North Carolina.[1] Defendant was a neighbor of Stacey's, and had made Stacey uncomfortable when they encountered each other in the common areas of the apartment complex. For example, when Stacey returned from being out of town over the Thanksgiving holiday, Defendant asked her where her car had been for the number of days Stacey had been gone. Stacey thought it odd that Defendant would have paid attention to her car and had noted how long it had not been parked in the parking area.

1. Stacey is a pseudonym created by this Court to protect the victim's identity.

On Friday, 21 May 2010, Stacey came home from work and took a nap prior to meeting friends for dinner. She woke up around 6:00 p.m. and went to the bathroom. While in the bathroom, Stacey heard a loud pounding at her door. When she opened the door, Defendant, wearing a ski mask and brandishing a knife, forced himself into the apartment, at which point Stacey began screaming.

Defendant told Stacey to "shut up," forced her to lay on the floor, put duct-tape over her eyes and tied her hands and feet together. Defendant then asked Stacey for her ATM card. Stacey told Defendant that she did not have a card but had cash in her wallet. Defendant then began making sexual comments towards Stacey. As Defendant began to pull down Stacey's pants, she told Defendant, falsely, that if he was going to have sex with her, he should use a condom because she was HIV positive. At that point, police officers, responding to a domestic disturbance call, knocked on Stacey's apartment door and identified themselves. Defendant forced Stacey into her bathroom where he held the knife to Stacey's throat and threatened to kill her if she said anything. After hearing no response from inside the apartment, the officers left.

Defendant then put a pillowcase over Stacey's face, cut off her clothing and, over the course of three hours sexually assaulted her by performing cunnilingus on her, rubbing vodka on her body and sucking her breasts. Defendant drank approximately three-fourths of the bottle of vodka, and eventually became so intoxicated that he passed out. After Defendant passed out, Stacey ran from her apartment, got in her car, called 911, and drove to the police station. Upon arriving at the police station, Stacey gave her keys to officers, who returned to her home to find Defendant passed out, face down, on her living room floor. Defendant awoke after handcuffs were placed on him. As a result of the sexual assault by Defendant, Stacey had to report to a hospital to receive prophylactic HIV treatment for a total of thirty days.

B. Defendant's Evidence

Defendant, who was age 53 at the time of his trial, moved into the same apartment complex as Stacey in 2009. According to Defendant, he and Stacey developed a sexual relationship. Defendant would go to Stacey's apartment and the two would role-play and then perform oral sex on each other. They devised a "signal," consisting of Stacey parking in front of Defendant's apartment, by which Defendant would know Stacey was interested in a sexual encounter.

Defendant received the "signal" on the day of the incident and went to Stacey's apartment as, he contends, he and Stacey had agreed. While

in Stacey's apartment, Defendant drank vodka, which after interacting with certain medications he was taking, caused him to pass out. When Defendant awoke, he was surprised to find himself in handcuffs and explained to police officers that the encounter between he and Stacey was consensual.

B. Procedural Facts

Warrants for Defendant's arrest were issued on 22 May 2010. On 12 July 2010, the Buncombe County grand jury returned bills of indictment charging Defendant with felonious breaking and entering, robbery with a dangerous weapon, assault with a deadly weapon, first degree kidnapping, first degree sexual offense, and attaining habitual felon status. Superseding indictments were entered on 2 August 2010 on Defendant's first degree kidnapping and first degree sexual offense charges, adding a sentencing enhancement under N.C. Gen. Stat § 15A-1340.16(d) based upon the allegation that defendant committed these acts by using, displaying or threatening a knife as a deadly weapon.

On 15 August 2011, the State filed a motion requesting that the trial court allow it to file a notice of a non-statutory aggravating factor under seal due to a potential conflict between N.C. Gen. Stat. § 15A-1340.16(a6), requiring the State to provide a defendant with written notice of its intent to prove an aggravating factor, and N.C. Gen. Stat. § 130A-143, which prohibits the public disclosure of the identity of persons with certain communicable diseases that are subject to the reporting requirements of N.C. Gen. Stat. § 130A-143. The parties appeared before the trial court on 17 August 2011 to address the State's motion, as well as other issues. The trial court closed the proceedings at the request of the State and with the consent of Defendant. The trial court then heard the State's motion to file notice of an aggravating factor under seal. The State sought to assert as a non-statutory aggravating factor the fact that Defendant committed the sexual offense against Stacey knowing that he was HIV positive and could transmit the AIDS virus to Stacey, causing serious bodily injury or death. According to the State, it could not file the statutorily required written notice due to the provisions of N.C. Gen. Stat. § 130A-143, which prohibit the disclosure of the identity of persons with certain communicable diseases, including HIV/AIDS. The defense objected to the State's request to submit the aggravating factor on the basis that the 30-day notice requirement had expired. The court opined that it did not "necessarily" see a conflict between the statute requiring notice of aggravating factors to be filed and the statute prohibiting the disclosure of certain medical information given the exception provided in N.C. Gen. Stat. § 130A-143(6) allowing for the information to be disclosed by court order.

However, the court granted the State's motion to file the notice under seal and noted Defendant's objection.

Although the case was set to be tried on 29 August 2011, the State moved to continue the case due to potential discovery issues. During a pre-trial hearing on 10 September 2013, Defendant waived his right to have the trial proceedings closed. Defendant's case came on for trial during the 16 September 2013 Criminal Session of Buncombe County Superior Court. The jury returned guilty verdicts on all charges. The State then sought to proceed on the non-statutory aggravating factor and Defendant objected. The trial court overruled Defendant's objections and allowed the State to present evidence of the aggravating factor to the jury. The jury returned a unanimous verdict against Defendant with respect to the aggravating factor. The jury also found Defendant guilty of attaining habitual felon status. On 20 September 2013, the trial court entered judgments against Defendant sentencing him in the aggravated range to life imprisonment without parole for his conviction of first degree sexual offense[2]; to a consecutive term of 146 to 185 months imprisonment for his conviction of first degree kidnapping; and a second consecutive term of 146 to 185 months imprisonment for his convictions of robbery with a dangerous weapon, breaking and entering, assault with a deadly weapon, and attaining habitual felon status. Defendant gave notice of appeal to this Court.

II. Legal Analysis

A. Non-Statutory Aggravating Factor

[1] It his first argument on appeal, Defendant contends that the trial court erred in allowing the State to proceed on a non-statutory aggravating factor when it was not alleged in the indictment, as required by N.C. Gen. Stat. § 15A-1340.16(a4). The State concedes that it was required by N.C. Gen. Stat. § 15A-1340.16(a4) to include the non-statutory aggravating factor in the indictment. However, the State contends that the trial court did not err in allowing the State to proceed on the aggravating factor, as the State was statutorily prohibited by the provisions of N.C. Gen. Stat. § 130A-143 from complying with N.C. Gen. Stat. § 15A-1340.16(a4). Although we commend the State's attempt to protect Defendant's privacy and comply with its understanding of the requirements of N.C. Gen. Stat. § 130A-143, we do not agree with its methodology.

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2. We note that the judgment entered by the trial court indicates that the court made no written findings because the sentence was in the presumptive range. However, the court sentenced Defendant to life imprisonment without the possibility of parole on the conviction of first degree sexual offense, a B1 felony. Pursuant to the applicable sentencing chart, this sentence is only available if the court is sentencing in the aggravated range.

The legislature enumerated twenty-eight specific aggravating factors that could, if proven beyond a reasonable doubt, allow a court to sentence a defendant in the aggravated range. N.C. Gen. Stat. §§ 15A-1340.16(a) & (d). Additionally, N.C. Gen. Stat. § 15A-1340.16 includes a catchall provision for "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20). Pursuant to N.C. Gen. Stat. § 15A-1340.16(a4), aggravating factors under subdivision (d) "need not be included in an indictment or other charging instrument"; however, any non-statutory "aggravating factor alleged under subdivision (d)(20) . . . shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924." In *State v. Ross*, 216 N.C. App. 337, 350-51, 720 S.E.2d 403, 411-12 (2011), *disc. review denied*, 366 N.C. 400, 735 S.E.2d 174 (2012), this Court reversed the defendant's judgment and remanded it for resentencing when the State "simply served [the] defendant with notice of its intent to prove the existence of" non-statutory aggravating factors but did not include them in an indictment. Although N.C. Gen. Stat. § 15A-1340.16(a4) and this Court's holding in *Ross* make it clear that the failure to include a non-statutory aggravating factor renders it unavailable for sentencing purposes, the State contends that its noncompliance with this statutory mandate should be excused because conflicting statutory provisions prevented it from following proper procedure.

The statute upon which the State relies provides, in pertinent part, that "information and records, whether publicly or privately maintained, that identify a person who has AIDS virus infection or who has or may have a disease or condition required to be reported pursuant to the provisions of this Article shall be strictly confidential" and "shall not be released or made public." N.C. Gen. Stat. § 130A-143. According to the State, alleging in an indictment that Defendant has a reportable communicable disease would violate the provisions of N.C. Gen. Stat. § 130A-143. We disagree.

This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records, N.C. Gen. Stat. § 132-1.4(k); *see also State v. West*, 293 N.C. 18, 32, 235 S.E.2d 150, 158 (1977), and as such, may generally be made available upon request by a citizen. N.C. Gen. Stat. § 132-1(b). However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State

could have sought to seal the indictment. N.C. Gen. Stat. § 132-1.4(k) (providing that an indictment is a "public records and may be withheld only when sealed by court order"). It is perplexing to this Court that the State obtained permission from the trial court to file notice of its intent to pursue an aggravating factor under seal but did not attempt to do so for the indictment.

This Court could speculate as to methods by which the State could have unequivocally complied with both statutes but that is not our role. The plain language of N.C. Gen. Stat. § 15A-1340.16(a4) requires the non-statutory aggravating factor to be included in the indictment and the State's failure to do so rendered it unusable by the State in its prosecution. Considering the plain language of N.C. Gen. Stat. § 15A-1340.16(a4), this Court's holding in *Ross*, and in the absence of authority to the contrary, we conclude that simply providing notice in compliance with N.C. Gen. Stat. § 15A-1340.16(a6) was insufficient to allow the State to proceed on the non-statutory aggravating factor and it was error for the trial court to so allow.

B. Sentencing for Armed Robbery and Assault with a Deadly Weapon

[2] Defendant next argues that the trial court erred when it entered judgment and sentenced Defendant for both robbery with a dangerous weapon and the lesser-included offense of assault with a deadly weapon. The State contends that Defendant has not properly preserved this issue for appeal. This Court has recently noted:

> As a general rule, "constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (citations, internal quotation marks, and brackets omitted) (declining to review the defendant's double jeopardy argument because he failed to raise it at trial). Furthermore, our appellate rules require a party to make "a timely request, objection, or motion [at trial], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C.R. App. P. 10(a)(1).

State v. Mulder, __ N.C. App. __, __, 755 S.E.2d 98, 101 (2014) (alterations in original). The defendant in *Mulder* argued that judgment should have been arrested on one of his charges because it was a lesser-included offense of another crime for which he was convicted. *Id.* at __, 755 S.E.2d at 100. The State argued that the defendant should be denied appellate review because the issue was being raised for the first time on

appeal. *Id.* at __, 755 S.E.2d at 101. Relying on Supreme Court precedent, the defendant contended that the issue was reviewable as it related to a fatal error appearing on the face of the record. *Id.* This Court, however, held that the defendant's "double jeopardy argument cannot be raised for the first time on appeal on a motion for arrest of judgment because a double jeopardy problem does not constitute a fatal defect on the face of the record." *Id.* The issue was nonetheless reviewed by this Court pursuant to Rule 2 of our Rules of Appellate Procedure.

Defendant here has not requested that this Court exercise our discretion under Rule 2 to review this issue. However, we elect to do so on our on motion. *See id.* (noting that "[t]he decision to review an unpreserved argument relating to double jeopardy is entirely discretionary"). We do not think it is of significance that Defendant did not couch his argument specifically as being based on his right against double jeopardy. We recognize that "[t]he argument advanced by [D]efendant has been presented under various titles: double jeopardy, lesser-included offense, an element of the offense, multiple punishment for the same offense, merged offenses, etc.," and "choose to avoid any lengthy discussion of the appropriate title, as it is the principle of law rather than the characterization of the issue that is important." *State v. Gardner*, 315 N.C. 444, 451 340 S.E.2d 701, 707 (1986).

In the present case, Defendant was convicted and sentenced for both robbery with a dangerous weapon and assault with a deadly weapon. While Defendant argues that these convictions arose out of the same conduct, a careful review of the record supports a contrary conclusion. Stacey testified that Defendant threatened her with a knife and took her money. He then began to make sexual comments to her and started to remove her clothing. His acts were interrupted when the police knocked on the apartment door. Defendant then forced Stacey into the bathroom and held a knife to her throat and threatened to kill her. Thus, we find that there was sufficient evidence for the jury to find that the acts necessary to convict Defendant of robbery with a dangerous weapon, as charged in the indictment, concluded before Defendant committed the acts which constituted the offense of assault with a deadly weapon, as alleged in a separate indictment and therefore support separate convictions and sentences for the two offenses. Accordingly, we find no error in the trial court's judgment.

III. Conclusion

For the reasons set forth above, this Court concludes that the trial court erred in submitting the aggravating factor to the jury and applying it

in sentencing Defendant on his conviction of first degree sexual offense. We therefore must reverse and remand for resentencing.

REVERSED AND REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge Robert C. HUNTER concur.

STATE OF NORTH CAROLINA
v.
SHAWN ADRIAN PENDERGRAFT

No. COA14-39

Filed 31 December 2014

1. Indictment and Information—facial invalidity—raised first on appeal—statutory language

Although defendant never challenged the sufficiency of a false pretenses indictment before the trial court, an indictment may be challenged on facial invalidity grounds for the first time on appeal and will be reviewed de novo. An indictment that fails to allege every element of an offense is facially invalid and does not suffice to confer jurisdiction upon a trial court, but an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute.

2. False Pretenses—indictment—sufficiency of allegation—real estate—false representation of right to occupy

Defendant's contention in a false pretenses case that the indictment failed to allege a specific false representation lacked merit. The indictment sufficiently alleged that defendant obtained real property by falsely representing that he was lawfully entitled to occupy it, thus alleging more than mere entry into a building.

3. False Pretenses—indictment—sufficiency of allegation—false representation and causation

A false pretenses indictment sufficiently alleged the existence of a causal connection between any false representation by defendant and the attempt to obtain real property. The facts alleged in the indictment were sufficient to imply causation, since they were obviously calculated to produce the result sought to be achieved.

4. False Pretenses—sufficiency of evidence—real property—adverse possession

The trial court did not err by denying defendant's motion to dismiss a false pretenses charge involving real property for insufficient evidence. Defendant contended that the undisputed evidence showed that he honestly but mistakenly believed that he could obtain title to the property by adverse possession; however, the mere fact that defendant attempted to adversely possess the property does not insulate him from criminal liability if the evidence otherwise shows his guilt of obtaining property by false pretenses. Defendant made multiple representations intended to further his plan to occupy and obtain title to the property, and the knowing falsity of these representations shows that Defendant made them with an intent to deceive.

5. Appeal and Error—appealability—criminal judgment vacated—no explanation—not double jeopardy—not reviewed on merits

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a felonious breaking or entering charge arising from defendant's attempt to obtain vacant property by adverse possession. The trial court arrested judgment; given that the trial court did not explain its decision to arrest judgment and that judgment does not appear to have been arrested to avoid double jeopardy, the trial court's decision effectively vacated defendant's felonious breaking or entering conviction and deprived the Court of Appeals of the ability to review defendant's challenge to conviction on the merits.

6. False Pretenses—instruction—adverse possession—intent—ignorance of law

In a prosecution for obtaining real property by false pretenses, the trial court did not err by instructing the jury that ignorance or mistake of law would not serve to obviate defendant's guilt or by not instructing the jury that the State was required to prove that defendant did not intend to adversely possess property. The law of adverse possession does not have any bearing on the issue of defendant's guilt of obtaining property by false pretenses.

7. False Pretenses—instructions—burden of proof

The trial court instructed the jury on obtaining real property by false pretenses in a manner consistent with North Carolina Supreme Court precedent and the North Carolina Pattern Jury Instructions,

and placed upon the State the burden of proving that defendant acted with the necessary intent to deceive upon the State.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 19 July 2013 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 11 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

W. Michael Spivey for Defendant.

ERVIN, Judge.

Defendant Shawn A. Pendergraft appeals from a judgment entered based upon his conviction for obtaining property by false pretenses and from his conviction of felonious breaking or entering in a case in which the trial court arrested judgment. On appeal, Defendant argues that the trial court lacked jurisdiction to enter judgment against him based upon his conviction for obtaining property by false pretenses, that the trial court erroneously denied his motions to dismiss the felonious breaking or entering and obtaining property by false pretenses charges for insufficiency of the evidence, and that the trial court erroneously refused to instruct the jury that the State was required to prove beyond a reasonable doubt that Defendant did not attempt to obtain ownership of the property in question by adverse possession, erroneously instructed the jury that ignorance of the law and a mistake of law did not preclude a finding of guilt, and erroneously instructed the jury in such a manner as to place the burden of proof on the intent issue upon Defendant rather than upon the State. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On or about 27 January 2011, DLJ Mortgage Capital, Inc., acquired title to a tract of property located at 1208 Graedon Drive in Raleigh through foreclosure. On 5 July 2011, Defendant filed a deed purporting to convey the same tract of property from ONCE International Land

Trust to ONCE International Land Trust. In addition, Defendant filed a "Common Law Lien" that purported to place a $1,200,000 lien upon the property and asserted that the lien could not be removed unless the party seeking to do so came into court with "clean hands" and proved ownership of the property. Finally, Defendant filed a "Notice" asserting that the property was the "private property of ONCE International Land Trust." Defendant signed each of these documents in the capacity as Trustee for ONCE.

In early July 2011, Lee St. Peter, a real estate broker who served as DLJ's property manager and as listing agent for the Graedon Drive property, was informed by another real estate agent that someone was occupying another house that Mr. St. Peter had listed for sale in a different part of Raleigh. When he checked the real estate records maintained by the Wake County Register of Deeds for information concerning the house about which he had received the tip, Mr. St. Peter discovered the documents that Defendant had filed with respect to the Graedon Drive property.

Upon making this discovery, Mr. St. Peter went to the Graedon Drive property and found that the house was unoccupied and in good condition. On 10 July 2011, Mr. St. Peter wrote a note to Mike Sanders of Select Portfolio Servicing, an asset management company that managed the Graedon Drive property for DLJ, for the purpose of informing Mr. Sanders that he believed that someone was pretending to own the Graedon Drive property for the purpose of selling or leasing it without having the authority to do so.

On 7 August 2011, Defendant moved into the house located on the Graedon Drive property. At the time that he entered the house, Defendant removed the doorknob and the Realtor's lockbox.[1] On the following day, Mr. St. Peter stopped by the property to confirm that a recent roof repair had been done correctly and that no leaks were occurring. Upon arriving at the property, Mr. St. Peter observed that a U-Haul van was parked in the driveway and observed, after walking up to the front of the house, that the Realtor's lockbox had been removed and that the front door knob had been changed.

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1. A "Realtor's lockbox" is a container that is placed on the front door of the relevant structure and contains a key that can be used to enter the premises. In the event that a real estate agent wishes to show a particular piece of property, he or she contacts a call center, identifies himself or herself as a real estate agent, and provides an identification code. After confirming the agent's status, the call center provides the agent with the combination to the lockbox, thereby enabling the agent to obtain access to the property that he or she wishes to show.

After walking around the house to investigate, Mr. St. Peter returned to the front of the house, where he encountered Defendant on the sidewalk. When Mr. St. Peter asked Defendant what he was doing on the property, Defendant replied that he had "bought [the property] directly from the bank through an investment company" and that his ownership of the property was evidenced by some documents that he had in his hand. Mr. St. Peter declined to look at the papers that Defendant offered to show him and told Defendant that he was calling the Sheriff's Office.

After speaking with someone at the Sheriff's Office, Mr. St. Peter contacted Mr. Sanders for the purpose of informing him that someone was now occupying the property and inquiring of him as to whether anything had transpired that would have given Defendant the right to be on the property. In response, Mr. Sanders stated that Defendant should not be on the property.

Deputy Kevin Moore of the Wake County Sheriff's Office responded to Mr. St. Peter's call. Upon Deputy Moore's arrival, Mr. St. Peter informed Deputy Moore that no one was supposed to be in the house and that the locks had been changed. At that point, Deputy Moore checked the real estate database maintained by the Wake County Revenue Department for the purpose of ascertaining the identity of the individual or entity listed as the owner of the property and spoke with Mr. Sanders for the purpose of confirming that the property was supposed to be unoccupied. After engaging in these investigative activities, Deputy Moore approached Defendant, who handed a deed and other documents to Deputy Moore and explained to Deputy Moore that Defendant was named as the grantee on the deed and had the right to be there on the basis of the doctrine of adverse possession. At that point, Deputy Moore and Mr. St. Peter agreed to give Defendant 24 hours within which to vacate the property.

On the following day, Deputy Moore returned to the property. At that time, Defendant continued to occupy the house and refused to unlock the door. Although Deputy Moore left the property after failing to gain access to it, he returned with a locksmith and additional deputies. After gaining entry using an unlocked side door, Deputy Moore came into the house and placed Defendant under arrest.

B. Procedural History

On 9 August 2011, a warrant for arrest was issued charging Defendant with felonious breaking or entering, obtaining property worth more than $100,000 by false pretenses, and second degree trespass. On 11 October

2011, the Wake County grand jury returned a bill of indictment charging Defendant with felonious breaking or entering, obtaining property worth more than $100,000 by false pretenses, and second degree trespass. The charges against Defendant came on for trial before the trial court and a jury at the 15 July 2013 criminal session of the Wake County Superior Court. At the close of all of the evidence, the State voluntarily dismissed the second degree trespass charge. On 18 July 2013, the jury returned verdicts convicting Defendant of felonious breaking or entering and obtaining property worth more than $100,000 by false pretenses. The trial court arrested judgment with respect to Defendant's conviction for felonious breaking or entering and entered a judgment sentencing Defendant to a term of 44 to 62 months imprisonment based upon his conviction for obtaining property worth more than $100,000 by false pretenses. Defendant noted an appeal to this Court from the trial court's judgments.

II. Substantive Legal Analysis

A. Jurisdictional Claim

In his first challenge to the trial court's judgments, Defendant contends that the trial court lacked jurisdiction over the false pretenses charge because the indictment charging him with the commission of that offense was fatally defective. More specifically, Defendant contends that the indictment purporting to charge him with obtaining property worth more than $100,000 by false pretenses failed to allege either that Defendant had made a false representation or that there was a causal connection between any false representation that Defendant might have made and Defendant's ability to obtain the property in question. Defendant's contentions lack merit.

1. Standard of Review

[1] Although Defendant never challenged the sufficiency of the false pretenses indictment before the trial court, an indictment may be challenged on facial invalidity grounds for the first time on appeal. *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 122 S. Ct. 628, 151 L. Ed. 2d 548 (2001). This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (quotation marks and citations omitted).

2. Applicable Legal Principles

An indictment that fails to allege every element of an offense is facially invalid and does not suffice to confer jurisdiction upon a trial court. *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008). In light of that general principle, "an indictment for a statutory offense is sufficient when the offense is charged in the words of the statute." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980).

N.C. Gen. Stat. § 14-100 provides, in pertinent part, that:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any . . . property . . . with intent to cheat or defraud any person of such . . . property . . . such person shall be guilty of a felony: . . . Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such . . . property . . . by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the . . . property . . . and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

As a result, the elements of the crime of obtaining property by false pretenses are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286.

3. Validity of Indictment

a. False Representation

[2] In his first challenge to the validity of the false pretenses indictment, Defendant contends that the indictment failed to allege that Defendant made a false representation. We disagree.

"[T]o sustain a charge of obtaining property by false pretenses, the indictment must state the alleged false representation." *State v. Braswell*, __ N.C. App. __, __, 738 S.E.2d 229, 233 (2013) (citing *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983)). The false representation may consist of an action or conduct rather than necessarily being made by spoken words. *State v. Ledwell*, 171 N.C. App. 314, 319, 614 S.E.2d 562, 566 (2005), *cert. denied*, __ N.C. __, 699 S.E.2d 639 (2010).

The indictment returned against Defendant in this case for the purpose of charging him with obtaining property by false pretenses alleges, in pertinent part, that:

> on or about July 5, 2011 through August 9, 2011, in Wake County the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain a house located at 1208 Graedon Drive, Raleigh, NC, having a value of $836,918.00 from DLJ Mortgage Capital Inc., by means of a false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: The defendant moved into the house located at 1208 Graedon Drive, Raleigh, NC with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent. This act was done in violation of [N.C. Gen. Stat. § 14-100].

As Defendant notes, the false pretenses indictment does not explicitly charge Defendant with having made any particular false representation.

This Court has previously upheld the sufficiency of an indictment charging the defendant with obtaining property by false pretenses which, while failing to explicitly state the false representation that the defendant allegedly made, did sufficiently apprise the defendant about the nature of the false representation that he allegedly made.[2] In *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007), the indictment alleged, in part, that "THIS PROPERTY WAS OBTAINED BY MEANS

2. Although our dissenting colleague emphasizes the allegations concerning Defendant's acts contained in the indictment, the actual requirement set forth in our prior decisions is that "the indictment must state the alleged false representation." *Braswell*, __ N.C. App. at __, 738 S.E.2d at 233. Thus, we believe that the important portion of our decision in *Perkins* is the holding that a sufficient allegation that the defendant in a false pretenses case made the required false representation can be inferred from the language of the indictment even if it is not directly stated.

OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM." *Id.* at 215, 638 S.E.2d at 595. In upholding the sufficiency of this allegation, we stated that, "[b]y alleging that defendant used a card that was issued in the name of another person, that was wrongfully obtained, and that she had no permission to use, the indictment sufficiently apprised defendant that she was accused of falsely representing herself as an authorized user of the cards." *Id.*

A careful study of the record reveals that the false pretenses indictment returned against Defendant in this case sufficiently apprised Defendant that he had been accused of falsely representing that he owned the Graedon Drive property as part of an attempt to fraudulently obtain ownership or possession **of** it.[3] More specifically, the false pretenses indictment returned against Defendant alleges that he wrongfully obtained the Graedon Drive property by "mov[ing] into the house . . . with the intent to fraudulently convert the property to his own." The act of moving into a residence or occupying a particular tract of property is, under ordinary circumstances, tantamount to an assertion that the person owns or is lawfully entitled to occupy the premises. However, that implied assertion becomes fraudulent in nature in the event that the person who moves into the home or occupies the property while taking steps to falsely effectuate his claim of ownership or possession knows that he is not lawfully entitled to do so.[4] As a result, since the indictment sufficiently alleges that Defendant obtained the Gradeon Drive

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3. According to the record, Defendant made this representation in a number of ways, including his reliance upon false documents in his discussions with investigating officers.

4 According to our dissenting colleague, a decision to uphold the validity of the indictment at issue in this case would suffice to render anyone committing a theft or trespass guilty of obtaining property by false pretenses. The difference between a theft or trespass and a false pretense is, however, that the latter, but not the former, involves a false representation. *State v. Hines*, 36 N.C. App. 33, 42, 243 S.E.2d 782, 787 (stating that "the essence of the crime is the intentional false pretense") (citation omitted), *disc. review denied*, 295 N.C. 262, 245 S.E.2d 779 (1978); *State v. Cummings*, 346 N.C. 291, 326, 488 S.E.2d 550, 571 (1997) (stating that a larceny conviction requires "'proof that defendant (a) took the property of another; (b) carried it away; (c) without the owner's consent; and (d) with the intent to deprive the owner of his property permanently'") (quoting *State v. White*, 332 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)), *cert. denied*, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998)); *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (stating that "[i]t is 'elementary that trespass is a wrongful invasion of the possession of another'") (quoting *State ex rel. Bruton v. Flying "W" Enterprises, Inc.*, 273 N.C. 399, 415, 160 S.E.2d 482, 493 (1968)). Although we might agree with our dissenting colleague's argument, assuming that the taking of property like

property by falsely representing that he was lawfully entitled to occupy it, the indictment alleges more than mere entry into a building, so that Defendant's contention that the indictment fails to allege that he made a specific false representation lacks merit.

b. Causal Connection

[3] In addition, Defendant argues that the false pretenses indictment that was returned against him failed to allege the existence of a causal connection between any false representation by Defendant and the attempt to obtain property. Once again, we do not find Defendant's challenge to the validity of the false pretenses indictment persuasive.

As Defendant asserts, a valid false pretenses indictment must allege sufficient facts to show the existence of a causal connection between the false representation and the defendant's ability to obtain or the defendant's attempt to obtain property from another. *Cronin*, 299 N.C. at 236, 262 S.E.2d at 282 (1980). On the other hand, "it [is] not necessary to allege specifically that the victim was in fact deceived by the false pretense when the facts alleged in the bill of indictment are sufficient to suggest that the surrender of something of value was the natural and probable result of the false pretense." *Id.* at 237, 262 S.E.2d at 282 (citing *State v. Hinson*, 17 N.C. App. 25, 27, 193 S.E.2d 415, 416 (1972)), *cert. denied*, 282 N.C. 583, 194 S.E.2d 151, *cert. denied*, 412 U.S. 931, 93 S. Ct. 2762, 37 L. Ed. 2d 159 (1973)). In addition, this Court has stated that "no particular form of allegation is required; an allegation that the money or property was obtained 'by means of a false pretense' is sufficient to allege the causal connection where the facts alleged are adequate to make clear that the delivery of the property was the result of the false representation." *State v. Childers*, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763 (quoting *State v. Dale*, 218 N.C. 625, 12 S.E.2d 556 (1940)), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986).

In this case, the false pretenses indictment alleged that the Defendant "did knowingly and designedly with the intent to cheat and defraud, obtain [the Graedon Drive property] . . . by means of a false pretense which was calculated to deceive and did deceive." The facts alleged in

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that at issue here could support a larceny conviction, *State v. Wilfong*, 101 N.C. App. 221, 222, 398 S.E.2d 668, 669 (1990) (noting that "[t]here must be a taking and carrying away of the personal property of another to complete the crime of larceny") (citation omitted), in the event that the indictment simply alleged the taking of or entry onto the property of another, the present indictment alleges both a taking or entry and the existence of an intent to defraud of the type commonly characteristic of the crime of obtaining property by false pretense. As a result, the indictment at issue here does more than allege a mere taking of or entry onto the property of another.

the indictment are "sufficient to imply causation, since they are obviously calculated to produce the result" sought to be achieved, *Hinson*, 17 N.C. App. at 27, 193 S.E.2d at 416, given that Defendant's conduct in moving into the Graedon Drive home and falsely representing to own or be entitled to possess the property made it likely that Defendant would be allowed to occupy and, possibly, even obtain title to the property. As a result, neither of Defendant's challenges to the false pretenses indictment have merit.

B. Sufficiency of the Evidence of False Pretenses

[4] Secondly, Defendant contends that the trial court erred by denying his motion to dismiss the false pretenses charge for insufficiency of the evidence. More specifically, Defendant contends that the undisputed evidence shows that he honestly, albeit mistakenly, believed that he could obtain title to the Graedon Drive property by adverse possession and that such a showing precluded the jury from convicting him of obtaining property by false pretenses. We do not find Defendant's contention persuasive.

An appeal from the denial of a motion to dismiss based upon the insufficiency of the evidence presents a question of law concerning whether the record contains substantial evidence of each essential element of the offense charged, or a lesser included offense, and of defendant's being the perpetrator of the offense, *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982), with "substantial evidence" being "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (citing *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In examining the sufficiency of the record to support a conviction, the evidence must be viewed in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 652. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (quotation marks and citations omitted).

As Defendant appears to acknowledge, adverse possession has not been recognized as an affirmative defense to a criminal charge in this jurisdiction. Although a person who is able to establish the elements of adverse possession does, in fact, become the owner of the relevant tract of property, nothing of which we are aware in any way insulates the person attempting to adversely possess a tract of property from the consequences of his otherwise unlawful conduct, including criminal

prosecution for obtaining property by false pretenses. The ultimate thrust of Defendant's challenge to the sufficiency of the evidence to support his false pretenses conviction is, purely and simply, an assertion that anyone who attempts to adversely possess a tract of property does not possess the intent necessary for a finding of guilt, a position that is tantamount to making an intention to adversely possess a tract of property an affirmative defense to a false pretenses charge. As a result of the fact that no such defense has previously been recognized in this jurisdiction and the fact that recognizing such a defense would have significant public policy implications,[5] we believe that any decision to recognize an attempt to adversely possess a tract of property as a defense to a false pretenses charge should be made by the General Assembly rather than by this Court. As a result, we conclude, contrary to Defendant's contention, that the mere fact that Defendant attempted to adversely possess the Graedon Drive property does not insulate him from criminal liability in the event that the evidence otherwise shows his guilt of obtaining property by false pretenses.

A careful examination of the record provides ample justification for the jury's decision to convict Defendant of obtaining property by false pretenses. Defendant clearly intended to occupy and, eventually, own the Gradeon Drive property. In order to achieve that end, Defendant moved into and occupied the Graedon Drive property which, as we have already noted, constituted an implicit false representation to the effect that Defendant had a valid claim to the property. In addition, the record shows that Defendant falsely stated to Mr. St. Peter that he had "bought [the property] directly from the bank through an investment company" and that his right to possess the property was evidenced by certain documents that he tendered to Mr. St. Peter. Furthermore, Defendant filed a fraudulent deed in the Wake County registry purporting to transfer title to the Gradeon Drive property to ONCE. In addition to showing that Defendant made multiple representations intended to further his plan to occupy and obtain title to the Gradeon Drive property, the knowing falsity of these representations shows that Defendant made them with an intent to deceive. Finally, given that the evidence suffices to demonstrate that the victim relied on the false representation in the event that the victim suspected that the representation was false,

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5. In denying Defendant's dismissal motion, the trial court stated, among other things, that "what you're suggesting is and what you have suggested through the evidence is using adverse possession, a criminal Defendant can go downstairs to the Register of Deeds, file some phony document, go to my house, walk through the front door, camp out, set up shop, do whatever

see State v. Simpson, 159 N.C. App. 435, 439, 583 S.E.2d 714, 716-17, *aff'd*, 357 N.C. 652, 588 S.E.2d 466 (2003) (holding that when the victim, a pawn shop owner, testified that he was suspicious that certain cameras brought into the pawn shop by the defendant had been stolen, the jury could reasonably conclude that the victim had, in fact, been deceived), the fact that Mr. St. Peter called Mr. Sanders to see if Defendant did, in fact, have the right to occupy the Graedon Drive property on the theory that, "[h]ypothetically, it could have occurred," sufficed to demonstrate that Mr. St. Peter was, in fact, deceived by Defendant's representations. As a result, the record contained ample support for the jury's decision to convict Defendant of obtaining property by false pretenses.

C. Sufficiency of the Evidence of Breaking or Entering

[5] Thirdly, Defendant argues that the trial court erred by denying his motion to dismiss the felonious breaking or entering charge for insufficiency of the evidence. More specifically, Defendant argues that the undisputed record evidence failed to show that he intended to commit a felony or any larceny at the time that he entered the Graedon Drive residence. Defendant is not entitled to any relief on appeal based upon this argument.

As we have already noted, the trial court arrested judgment in the case in which Defendant was convicted of felonious breaking or entering. A decision to arrest judgment can have one of two effects, with the first being to vacate the underlying judgment and the second being to withhold the entry of judgment based on a valid jury verdict. *State v. Reeves*, 218 N.C. App. 570, 575, 721 S.E.2d 317, 321 (2012) (citing *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990)). Judgment is arrested in the first of these two instances "because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment," with the effect of a decision to arrest judgment in this instance being to vacate the defendant's conviction and preclude the entry of a final judgment which is subject to review on appeal. *Id.* at 575-76, 721 S.E.2d at 321-22 (citations omitted). On the other hand, judgment is arrested in the second of these two instances for the purpose of addressing double jeopardy or other concerns, such as a situation in which the defendant has been convicted of committing a predicate felony in a case in which he or she has also been convicted of first degree murder on the basis of the felony murder rule, *see Pakulski*, 326 N.C. at 441, 390 S.E.2d at 133 (stating that the trial court properly arrested judgment with respect to "the offenses of armed robbery and felonious breaking or entering, as these offenses formed the offenses upon which the convictions of felony murder were predicated") (quotation marks

and citation omitted), or convicted of a charge used to enhance punishment for a related offense. *See Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322 (finding that "the additional conviction of reckless driving was arrested because it was used to enhance the DWI") (internal quotation marks omitted). In the second of these two situations, the underlying guilty verdict remains intact so that judgment can be entered based on that verdict in the event that (1) the conviction for the murder or related charge is overturned in subsequent proceedings and (2) the verdict with respect to which judgment has been arrested is not disturbed on appeal. *Pakulski*, 326 N.C. at 439-40, 390 S.E.2d at 132 (stating that "the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal, and the convictions on the predicate felonies are not disturbed on appeal"). In the event that the trial court arrests judgment for the first of these two reasons, we lack the authority to review any challenge that Defendant might seek to lodge against the underlying conviction on appeal given that the underlying conviction has been vacated. *Reeves*, 218 N.C. App. at 576, 721 S.E.2d at 322 (stating that a trial court's decision to arrest judgment based on a defective indictment or fatal defect on the face of the record, which has the effect of vacating the defendant's conviction on that charge, does not result in the entry of final judgment that is subject to appellate review). As a result, our initial task in reviewing Defendant's challenge to his conviction for felonious breaking or entering is to determine the basis for the trial court's decision to arrest judgment in that case.

A careful examination of the record developed at Defendant's trial indicates that the trial court did not explain the reasoning underlying its decision to arrest judgment in the breaking or entering case. In such circumstances, this Court and the Supreme Court have provided us with guidance in determining into which of the two categories delineated above a particular decision to arrest judgment should be placed. Although "[t]he legal effect of arrest of judgment is to vacate the verdict and judgment," *State v. Morrow*, 31 N.C. App. 592, 593, 230 S.E.2d 182, 183 (1976) (citing *State v. Covington*, 267 N.C. 292, 296, 148 S.E.2d 138, 142 (1966)); *see also State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983) (stating that "[t]he legal effect of arresting judgment is to vacate the verdict and sentence," so that "[t]he State may proceed against the defendant if it so desires, upon new and sufficient bills of indictment") (citing *State v. Benton*, 275 N.C. 378, 382, 167 S.E.2d 775, 778 (1969)), a limited exception to this general rule precludes the State from obtaining and proceeding upon a new charge in the event that the trial court arrests judgment with respect to a particular conviction

based upon double jeopardy-related concerns. *See State v. Pagon*, 64 N.C. App. 295, 299, 307 S.E.2d 381, 384 (1983) (stating the principle that, "[i]n cases in which a defendant is convicted of two offenses in violation of the double jeopardy bar, judgment must be arrested upon one of the convictions"), *overruled on other grounds in State v. Hurst*, 320 N.C. 589, 591, 359 S.E.2d 776, 777 (1987), *overruled on other grounds in State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988); *Pakulski*, 326 N.C. at 439-40, 390 S.E.2d at 132 (noting the general rule that an arrest of judgment vacates the verdict while recognizing the exception for arrests of judgment necessary "to avoid a double jeopardy problem"). In the event that a trial court arrests judgment without stating an express purpose for having done so, the arrested judgment will operate to vacate the defendant's conviction with respect to that charge. *See State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980) (stating that, "[g]enerally, a judgment is arrested because of insufficiency in the indictment or some fatal defect appearing on the face of the record" and assuming that judgment was arrested on those grounds given that "no reason for the arrest of judgment appear[ed] in the record on appeal").[6] As a result, in the absence of some indication that the trial court's decision to arrest judgment stemmed from double jeopardy-related concerns, the effect of the decision to arrest judgment is to vacate the underlying conviction and preclude subsequent appellate review.

After carefully reviewing the record, we see no indication that the trial court's decision to vacate the judgment in the felonious breaking or entering case rested upon double jeopardy-related considerations. The felonious breaking or entering for which Defendant was convicted was simply not a predicate or basis for Defendant's false pretenses conviction. Thus, given that the trial court did not explain its decision to arrest judgment in the case in which Defendant was convicted of felonious breaking or entering and given that judgment does not appear to have been arrested in that case to avoid double jeopardy-related concerns, the trial court's decision to arrest judgment has the effect of vacating Defendant's felonious breaking or entering conviction and deprives us

6. Similarly, in *State v. Casey*, 195 N.C. App. 460, 673 S.E.2d 168, 2009 N.C. App. LEXIS 144 (unpublished), *disc. review denied*, 363 N.C. 584, 682 S.E.2d 704 (2009), we treated the trial court's decision to arrest judgment as resulting from a flaw appearing on the face of the record given that the trial court provided no explanation for its decision. *Casey*, 2009 N.C. App. LEXIS 144 at *14. Although *Casey*, as an unpublished decision, is not binding on this Court, the result reached in that decision is consistent with the analysis that we have utilized in addressing Defendant's challenge to this felonious breaking or entering conviction.

of the ability to review Defendant's challenge to his felonious breaking or entering conviction on the merits. As a result, Defendant is not entitled to any relief from his felonious breaking or entering conviction on the basis of the argument advanced in his brief.

D. Jury Instructions

Finally, Defendant contends that the trial court erred by refusing to instruct the jury in accordance with his written request for instructions, by instructing the jury that ignorance of the law or mistake of law were not defenses to the crime of obtaining property by false pretenses, and by instructing the jury concerning the issue of his guilt of obtaining property by false pretenses in such a way as to shift the burden of proof with respect to the issue away from the State and onto himself. Defendant is not entitled to relief from the trial court's judgment based upon these instruction-related arguments.

1. Adverse Possession and Mistake of Law

[6] In his first challenge to the trial court's instructions, Defendant contends that the trial court erred by refusing to instruct the jury that the State was required to prove beyond a reasonable doubt that Defendant did not intend to gain ownership of property by adverse possession and by instructing the jury, instead, about the elements of adverse possession accompanied by an instruction that ignorance or a mistake of law did not operate to excuse unlawful conduct. More specifically, Defendant argues that, in the event that the jury concluded that he intended to adversely possess the Graedon Drive property, then he lacked the intent to deceive necessary for guilt of obtaining property by false pretenses and that the trial court erred by failing to instruct the jury to that effect. We do not find Defendant's argument persuasive.

At trial, Defendant requested the trial court to instruct the jury that the State bore the burden of proving beyond a reasonable doubt that he was not seeking to adversely possess the Graedon Drive property.[7] Although the trial court declined to instruct the jury in accordance with Defendant's request, it did discuss the law of adverse possession while coupling this instruction with the statement that "[i]gnorance or mistake of law will not excuse an act in violation of the criminal laws."

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7. In his request, Defendant asked the trial court to instruct the jury that, "[w]hen evidence has been offered that tends to show that the alleged offenses were in an attempt to adversely possess property and you find that the defendant was in fact attempting to adversely possess property, the defendant would not be guilty of any crime," with "[t]he burden [being] on the [S]tate to prove its case beyond a reasonable doubt and in so doing disprove the defendant's assertion of attempting to adversely possess the property."

A trial court's jury instructions are sufficient if they present the law of the case in such a manner as to leave no reasonable cause for believing that the jury was misled or misinformed. *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005). "A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (citations omitted), *cert. denied*, 519 U.S. 875, 117 S. Ct. 196, 126 L. Ed. 2d 133 (1996). "[W]hen a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995), *cert. denied*, 516 U.S. 1129, 116 S. Ct. 948, 133 L. Ed. 2d 872 (1996). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A] trial court's failure to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby." *State v. Muhammad*, 186 N.C. App. 355, 361, 651 S.E.2d 569, 574 (2007), *appeal dismissed*, 362 N.C. 242, 660 S.E.2d 537 (2008).

As we have previously determined, an intent to adversely possess a tract of property is not a recognized defense to a criminal act in North Carolina. For that reason, the law of adverse possession does not, contrary to Defendant's contention, have any bearing on the issue of Defendant's guilt of obtaining property by false pretenses. For that reason, the trial court did not err by failing to instruct the jury that the State was required to prove that Defendant did not intend to adversely possess the Graedon Drive property beyond a reasonable doubt in order to return a verdict of guilty or by instructing the jury that ignorance of the law or a mistake of law would not serve to obviate Defendant's guilt of that offense. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of this contention.

2. Intent-Related Burden of Proof

[7] Secondly, Defendant contends that the trial court impermissibly shifted the burden of proving that he lacked the intent necessary for guilt of the offense of obtaining property by false pretenses from the State to himself. Once again, we do not find Defendant's argument persuasive.

The trial court instructed the jury with respect to the issue of Defendant's guilt of obtaining property by false pretenses in a manner consistent with the Supreme Court's decision in *Cronin* and the North Carolina Pattern Jury Instructions as follows:

The Defendant has been charged with obtaining property worth -- obtaining property worth more than $100,000 by -- or more by false pretenses. For you to find the Defendant guilty of this offense, the State must prove six things beyond a reasonable doubt.

First, that the Defendant made a representation to another.

Second, that this representation was false.

Third, that the representation was calculated and intended to deceive.

Fourth, that the victim was, in fact, deceived by this representation.

Fifth, that the Defendant thereby obtained or attempted to obtain property from the victim.

And, sixth, that the property was worth $100,000 or more.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the Defendant made a representation and that this representation was false, that this representation -- representation was calculated and intended to deceive, that the victim was, in fact, deceived by it, that the defendant thereby attempted or -- excuse me -- the – the defendant thereby obtained or attempted to obtain property from the victim and that the property was worth $100,000 or more, it would be your duty to return a verdict of guilty of obtaining property worth $100,000 or more by false pretenses.

If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of obtaining property worth $100,000 or more by false pretenses, but you must determine whether he is guilty of obtaining property by false pretenses.

Obtaining property by false pretenses differs from obtaining property worth $100,000 or more by false pretenses in that the value of the property need not be worth $100,000 or more.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date that the defendant made a representation, that this representation was false, that this

> representation was calculated and intended to deceive, that the victim was, in fact, deceived by it, and the defendant thereby obtained or attempted to obtain property from the victim, it would be your duty to return a verdict of guilty of obtaining property by false pretenses.
>
> If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

See N.C.P.I.-Crim. 219.10A; *Cronin*, 299 N.C. at 242, 262 S.E.2d at 286. As we understand them, the trial court's instructions clearly placed the burden of proving that Defendant acted with the necessary intent to deceive upon the State. Although Defendant asserts that the trial court's decision to instruct the jury that ignorance and mistake of law did not excuse otherwise criminal conduct had the effect of shifting the burden of proof with respect to the intent issue, a decision to accept that argument would require us to also accept Defendant's contention that an intent to adversely possess property operates to preclude a conviction for obtaining property by false pretenses, a step that we have declined to take. With that exception, Defendant has failed to identify any language in the trial court's jury instructions that had the effect of shifting the burden of proof with respect to the intent issue from the State to Defendant, and nothing that has that effect is apparent to us based on our review of the trial court's instructions. As a result, Defendant is not entitled to relief from the trial court's judgment on the basis of this argument.

III. Conclusion

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

AFFIRMED.

Judge McCULLOUGH concurs.

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

I concur with the majority's holding with respect to Defendant's challenge to the felonious breaking or entering judgment. However, I respectfully dissent from the holding finding no error in Defendant's conviction for obtaining property by false pretenses. Specifically, I believe that the indictment is fatally defective because it fails to allege

any false representation, an essential element of that crime.[1] *State v. Braswell*, ___ N.C. App. ___, ___, 738 S.E.2d 229, 233 (2013) (holding that "the indictment must state the alleged false representation").

The only action by Defendant alleged in the indictment is that he "moved into the house[.]" Otherwise, the indictment alleges his *intent* "to fraudulently convert the property to his own[,]" this intent being a separate element which also must be alleged. *State v. Moore*, 38 N.C. App. 239, 241, 247 S.E.2d 670, 672, *disc. review denied*, 295 N.C. 736, 248 S.E.2d 866 (1978) (holding an indictment to be fatally defective which fails to allege that the defendant acted with "the intent to defraud"). However, the only action alleged in the indictment — that Defendant moved into the house — is essentially just another way of stating that he "obtained" the property. The allegation does not identify "the false representation" *used* to obtain the property. If obtaining property were equivalent to obtaining that property by means of a false pretense, *every* larceny would constitute obtaining property by false pretenses.[2]

The majority cites *State v. Perkins*, 181 N.C. App. 209, 638 S.E.2d 591 (2007), for the proposition that the required false representation can be inferred from the *actions* alleged in an indictment. I agree with this general proposition. However, the action alleged in the present indictment falls far short of the language approved by this Court in *Perkins*.

The indictment in *Perkins* alleged that the defendant's actions consisted of obtaining "beer and cigarettes" *by purchasing them with a stolen credit card. Id.* at 215, 638 S.E.2d at 595. On appeal, we held that though the indictment did not allege that the defendant made an explicit statement, it "adequately described [her] actions" to "apprise[] [her] that she was [being] accused of falsely representing herself as an authorized user of the [stolen] cards." *Id.* at 215, 638 S.E.2d at 595-96. In reaching this conclusion, we cited our Supreme Court's holding in *State v. Parker*,

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1. As described by our Supreme Court, "[t]he gist of obtaining property by false pretenses is the false representation of a subsisting fact [or future event] intended to and which does deceive one from whom the property is obtained." *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983).

2. Though "trespass" is typically a word used to describe the unlawful possession of real property, our Supreme Court has described larceny - the unlawful taking of personal property - as a type of "trespass." *State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968). In *Bowers*, the Court stated that this type of trespass can be either "actual" or "constructive." *Id.* "Actual" trespass occurs where the taking does not involve "some trick or artifice," whereas "constructive" trespass occurs where the taking involves deceit. *Id.* In the present case, the indictment only alleges actions akin to an "actual" trespass – Defendant moved into and physically possessed the house – and no deceit or falsehood.

354 N.C. 268, 553 S.E.2d 885 (2001), that a "false pretense need not come through spoken words, but instead may be by act or conduct." *Id.* at 215, 638 S.E.2d at 595.

Unlike the actions alleged in *Perkins*, no intent that Defendant obtained possession of the house by means of a false representation is readily inferable from the action alleged here – that Defendant "moved into the house." I do not believe the General Assembly intended that a defendant who unlawfully obtains property *by whatever means* would be criminally liable under G.S. 14-100 for *ob*taining that property by false pretenses simply based on an allegation that he took or *re*tained possession of it, which is what was alleged here. Neither party nor the majority cite — nor has my research uncovered — any case where G.S. 14-100 has been applied to a defendant who merely continues to trespass on land or continues to possess and use stolen property, where the property was not otherwise obtained by means of a false pretense. *Perkins*, on the other hand, involved a somewhat routine application of G.S. 14-100, clearly intended by the General Assembly, whereby a defendant *ob*tained the possession of property (beer and cigarettes) *from someone else* by deceit. The present case would be more analogous to *Perkins* if there had been an allegation in the indictment that Defendant obtained possession of the house through some deceit rather than by simply moving in or if Defendant had obtained *some other property*, such as *rent money* from a prospective tenant, by falsely representing himself as the owner of the house.

The State advanced an alternate theory at trial that — rather than the property being *the house itself* which Defendant "obtained" by moving in, as alleged in the indictment — the property involved was *the continued possession of* or *the clear title to the house* that Defendant was "attempting to obtain." However, even based on this alternate theory, the mere allegation in the indictment that he moved into the house still fails to identify any false representation by which he attempted to obtain this property.

In any event, I do not believe that the General Assembly intended that a defendant becomes criminally liable under G.S. 14-100 based on the mere continuing trespass to property that he wrongfully obtained by whatever means, even where his intent was — to use the words of the indictment – "to convert the property to his own," whether temporarily or permanently, based on an adverse possession/statute of limitations defense. *See*, *e.g.*, N.C. Gen. Stat. § 1-52(4) (2013) (three-year statute of limitation to bring an action to recover property wrongfully converted). To be sure, the intent of many who criminally trespass on

real property or steal personal property is to convert the property to their own, even if only for a short time. However, having this intent does not elevate the mere trespass to a crime of obtaining property by false pretenses. Otherwise, everyone who trespassed on land, for no matter how long, would be criminally liable for violating G.S. 14-100. Similarly, a defendant caught driving a stolen car would also be subject to criminal liability under the statute based on an indictment which alleged that the defendant "drove the car with the fraudulent intent of converting the car to his own use," based on a theory that "the property" was *not* the car itself but *rather* the temporary or permanent continued use of the car, and "the false representation" was that the defendant claimed ownership to the car, which could be inferred merely from his act of driving it. Thus, while Defendant's actions alleged in the indictment are sufficient to allege a criminal act, I do not believe they allege the crime of obtaining property by false pretenses.

STATE OF NORTH CAROLINA
v.
MAT DALLAS PIERCE

No. COA14-613

Filed 31 December 2014

1. Evidence—expert testimony—lack of physical evidence consistent with claims of sexual abuse

In a prosecution for sexual offenses committed by defendant against his two daughters, the trial court did not commit plain error by allowing the nurse who performed the forensic physical exam of one of the girls to state her opinion that the lack of physical evidence of sexual abuse was consistent with the girl's assertion that she had been sexually abused. While the nurse's opinion regarding the victim's credibility would have been impermissible, her opinion that her findings were consistent with, not contradictory to, the victim's account was permissible.

2. Evidence—prior crimes or bad acts—sexual abuse—sufficiently similar—time lapse explained by incarceration

In a prosecution for sexual offenses committed by defendant against his daughters, the trial court did not err by admitting testimony from several witnesses regarding previous instances of sexual

abuse by defendant. The prior instances of sexual abuse, which occurred between ten and twenty years before the trial, were sufficiently similar to the present offenses, and lapses in time between instances could be explained by defendant's incarceration and lack of access to a victim. The strong evidence of a common plan outweighed any danger of unfair prejudice.

3. Indecent Liberties—multiple sexual acts in same encounter—multiple counts

The trial court did not err by denying defendant's motion to dismiss one count of indecent liberties with a child. The State presented evidence that defendant had sex with his girlfriend in the presence of his daughter, performed oral sex on his daughter, and watched as his girlfriend performed oral sex on his daughter. Even though these actions occurred during a single encounter, they constituted more than one sexual act and therefore supported defendant's conviction for more than one count of indecent liberties with a child.

4. Sexual Offenses—with a child—motion to dismiss—insufficient evidence as to elements, locations, and time—conviction vacated

The trial court erred by denying defendant's motion to dismiss one count of sexual offense with a child. Defendant was charged with numerous sexual offenses of varying elements, locations, and time periods. Although the victim testified that defendant sexually assaulted her more than ten times and that he performed a sexual act on her in Caldwell County, there was no evidence as to each element of the offense occurring at the time and place alleged in the indictment. The Court of Appeals vacated the conviction, which had been consolidated for judgment with other convictions, and remanded for resentencing.

Appeal by defendant from judgments entered 18 October 2013 by Judge C. Thomas Edwards in Burke County Superior Court. Heard in the Court of Appeals 9 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant Mat Dallas Pierce appeals his Burke County convictions of indecent liberties with a child, rape of a child, and sexual offense with a child by an adult. Defendant also appeals his Caldwell County convictions of first degree sexual offense and two counts of indecent liberties with a child. The victim of the Burke County indecent liberties offense is defendant's daughter "Maggie." The victim of the remaining offenses is defendant's daughter "Melissa."[1]

On appeal, defendant primarily argues that the trial court erred in denying his motion to dismiss two of the charges involving Melissa: one count of indecent liberties occurring in Caldwell County and one count of sexual offense with a child occurring in Burke County. With respect to the Caldwell County charges, the State presented evidence that defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. Defendant argues that this evidence only supports one count of indecent liberties with a child. We disagree. Pursuant to *State v. James*, 182 N.C. App. 698, 643 S.E.2d 34 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties. Accordingly, we hold that the evidence presented by the State is sufficient to support defendant's two convictions for indecent liberties.

With respect to the Burke County sexual offense charge, we agree with defendant that the State failed to present substantial evidence that a sexual act as defined by N.C. Gen. Stat. § 14-27.4A (2013) occurred between defendant and Melissa in Burke County. The only evidence presented by the State regarding a sexual act that occurred in Burke County -- testimony by Melissa that defendant placed his finger inside her vagina while alone in their kitchen in Burke County -- was not admitted as substantive evidence. The State presented specific evidence that defendant performed oral sex on Melissa -- a sexual act under the statute -- but that act occurred in Caldwell, not Burke, County. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of N.C. Gen. Stat. § 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. This evidence is insufficient to support the Burke County sexual offense conviction.

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1. For ease of reading and to protect the privacy of the minor children, we use pseudonyms throughout this opinion. We also use the pseudonyms "Laura," "Lisa," "Abby," "Nina," and "Cathy" to identify the 404(b) witnesses.

Accordingly, we hold that the trial court erred in denying defendant's motion to dismiss the Burke County sexual offense with a child charge and remand for resentencing on the Burke County offenses. Because we find defendant's remaining arguments unpersuasive, we hold that defendant received a trial free of prejudicial error on the remaining charges.

Facts

The State's evidence tended to show the following facts. Melissa and Maggie are twin daughters of defendant. In 2009, when the girls were 10 years old, they lived with defendant, their mother, and their brother in a yellow house in Burke County, North Carolina. In the fall of 2009, after school had started, but before Christmas, defendant took Melissa into the kitchen of the yellow house, pulled down her pants, and "put his penis on [her] vagina [and] started moving back and forth." On a different occasion, defendant had vaginal intercourse with Melissa while they were in the basement of the yellow house. Defendant had vaginal intercourse with Melissa more than five times.

Sometime in January or February of 2010, defendant, Melissa, and defendant's girlfriend, "Laura," spent the night at the house of defendant's nephew, Mikey, in Caldwell County. Melissa slept on a bed while defendant and Laura slept on a couch in the same room. During the night, Melissa was awakened by defendant and Laura having sex. Defendant asked Melissa to join them and told her to go over to the couch. Defendant took off Melissa's pants and started licking her vagina. He then asked Laura to perform oral sex on Melissa, and she complied.

When asked if defendant ever put anything other than his mouth or penis on her vagina Melissa testified "yes."[2] On redirect examination, Melissa responded affirmatively to the State's questions whether defendant "sexually assaulted" her more times than she had described to the jury, whether "it happen[ed] more than ten times" and whether "[o]nce it started, . . . it continue[d]." Defendant told Melissa not to tell anyone about the sexual conduct because if she did, he would go back to prison.

Maggie testified that when she was home sick from school and no one else was in the house, defendant touched her vagina with his hand

2. Melissa testified that one time when she was home alone with defendant in their kitchen, defendant put his hand down her pants and placed his finger on the outside of her vagina. On a different occasion, defendant was helping Melissa with her homework in the kitchen and he put his hand down her pants and his finger inside her vagina. However, this testimony was not admitted as substantive evidence because the State failed to disclose these specific incidents during discovery.

underneath her clothes. Defendant touched her vagina, both over and under her clothes, more than five times. On one occasion, defendant was helping Maggie with her homework in the kitchen and he touched her inside her pants.

With respect to Maggie, defendant was indicted in Burke County for indecent liberties with a child. With respect to Melissa, defendant was indicted in Burke County for rape of a child by an adult and sexual offense with a child by an adult, and in Caldwell County, for rape of a child by an adult, sexual offense with a child, and two counts of taking indecent liberties with a child. The Caldwell County cases were transferred to Burke County for trial.

The cases came on for trial on 15 October 2013. At the conclusion of the evidence, the trial court dismissed the Caldwell County rape charge. The jury found defendant guilty of the remaining charges. The trial court consolidated the Burke County charges for judgment and sentenced defendant to a presumptive-range term of 350 to 429 months imprisonment. The trial court consolidated the Caldwell County charges for judgment and sentenced defendant to a presumptive-range term of 386 to 473 months imprisonment. The sentences were to run concurrently.[3] Defendant timely appealed the judgments to this Court.

I

[1] Defendant first argues that the trial court erred in permitting Elizabeth Osbahr, the nurse who performed a forensic physical examination of Melissa, to state her opinion that her medical findings were consistent with Melissa's assertion that she had been sexually abused. Because defendant did not object to the testimony at trial, we review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

3. Although it appears from the transcript that the trial judge may have intended for the sentences to run consecutively, neither judgment specified that the sentence was to run at the expiration of the other sentence.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

In a prosecution for a sexual offense involving a child victim, absent physical evidence of sexual abuse, expert opinion that sexual abuse has in fact occurred constitutes an impermissible opinion regarding the victim's credibility and is inadmissible. *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789.

In this case, Nurse Osbahr was tendered without objection as an expert in her field as a pediatric nurse practitioner. She testified that she performed a physical examination of Melissa after observing a social worker's interview of Melissa. She walked through the steps that she takes in conducting a physical examination and explained that in girls that were going through puberty, it was very rare to discover findings of sexual penetration. She testified that "the research, and, . . . this is thousands of studies, indicates that it's five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse." With respect to Melissa, Nurse Osbahr testified that her genital findings were normal and that such findings "would be still consistent with the possibility of sexual abuse." The prosecutor then asked:

> Q Now, you watched her interview there at the Children's Advocacy Center. Were your medical findings consistent with her disclosure in the interview?
>
> A They were.

Defendant contends that Nurse Osbahr's "second opinion -- i.e., that her medical findings with respect to [Melissa] were 'consistent with her *disclosure*' (emphasis added) -- vouched for [Melissa's] credibility." However, our Supreme Court has addressed similar testimony and found it to be admissible. In *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) ("*Aguallo II*"),[4] a pediatrician testified that the results of the victim's physical examination were consistent with the victim's pre-examination statement that she had been sexually abused. On appeal, the Supreme Court rejected the defendant's argument that the pediatrician's testimony was a comment on the victim's truthfulness or the guilt or innocence of the defendant, explaining:

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4. *Aguallo II* is the defendant's appeal from his second trial after having been granted a new trial in *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986) ("*Aguallo I*").

> Essentially, the doctor testified that the physical trauma revealed by her examination of the child was consistent with the abuse the child alleged had been inflicted upon her. We find this vastly different from an expert stating on examination that the victim is "believable" or "is not lying." The latter scenario suggests that the complete account which allegedly occurred is true, that is, that this defendant vaginally penetrated this child. The actual statement of the doctor merely suggested that the physical examination was consistent with some type of penetration having occurred. The important difference in the two statements is that the latter implicates the accused as the perpetrator of the crime by affirming the victim's account of the facts. The former does not.

Id.

Likewise, here, Nurse Osbahr did not testify as to whether Melissa's account of what happened to her was true. Rather, she merely testified that the lack of physical findings was consistent with, and did not contradict, Melissa's account. Nurse Osbahr gave this testimony after laying a proper foundation by explaining her credentials, including her experience and knowledge of the profiles of sexually abused children, and by explaining the examination procedure she used with Melissa. Her testimony amounted to an opinion that the lack of physical findings of sexual abuse was consistent with the profiles of other similarly developed children who had been sexually abused. Such testimony is admissible under both *Stancil* and *Aguallo II*. *See also State v. May*, ___ N.C. App. ___, ___, 749 S.E.2d 483, 492 (2013) (holding expert testimony that victim showed no signs of sexual assault was admissible where expert did not testify that sexual abuse had in fact occurred, and expert merely testified as to her examination procedures, her experience and knowledge of the profiles of sexually abused children, and whether the victim's symptoms were consistent with sexual abuse), *disc. review allowed*, 367 N.C. 293, 753 S.E.2d 663 (2014); *State v. Kennedy*, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366 (1987) (finding no error in admission of physician's opinion that victim's symptoms were consistent with sexual abuse).

Defendant, however, cites *Aguallo I*, *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and *State v. Driver*, 162 N.C. App. 360, 590 S.E.2d 477, 2004 WL 77831, 2004 N.C. App. LEXIS 131 (2004) (unpublished), in support of his argument that Nurse Osbahr's testimony is inadmissible. The testimony of the experts in these cases, however, is materially different from Nurse Osbahr's testimony. In *Aguallo I*, the examining

physician testified that the child victim was "believable." 318 N.C. at 599, 350 S.E.2d at 81. In *Trent*, the examining physician testified that he believed that the victim had in fact been sexually abused. 320 N.C. at 613, 359 S.E.2d at 465. Similarly, in *Driver*, the examining physician testified that "[her] opinion at the completion of our evaluation was that with reasonable medical certainty the patient had experienced and received the medical diagnosis of sexual abuse." 2004 WL 77831 at *1, 2004 N.C. App. LEXIS 131 at *3. Although the physician in *Driver* testified that the exam was consistent with the victim's disclosure, she further asserted that "[d]ue to [the victim's] highly detailed and consistent disclosure, we believe that sexual abuse is probable." *Id.* Thus, the testimony in each of these cases, unlike the testimony of Nurse Osbahr, amounted to an opinion regarding the truthfulness of the victim and the guilt of the defendant. Accordingly, we hold that defendant has failed to demonstrate that the trial court committed plain error in admitting the testimony of Nurse Osbahr.

II

[2] Defendant next argues that the trial court erred in admitting testimony from several witnesses concerning previous instances of sexual abuse by defendant under Rules 404(b) and 403 of the Rules of Evidence. This Court "review[s] de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

The State contends, citing *State v. Ray*, 364 N.C. 272, 277-78, 697 S.E.2d 319, 322 (2010), that plain error review applies because defendant failed to preserve this issue by not objecting to the 404(b) witnesses in the presence of the jury. Defendant concedes that objections were not made in the presence of the jury, but argues that pursuant to *State v. Hazelwood*, 187 N.C. App. 94, 98, 652 S.E.2d 63, 66 (2007), the objections were sufficiently contemporaneous to preserve this issue for appellate review. We need not determine whether plain error review applies because even assuming, without deciding, that defendant's objections were sufficient, we hold that the testimony was admissible.

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This Rule is a "general rule of *inclusion* of relevant evidence

of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

"Though it is a rule of inclusion, Rule 404(b) is still 'constrained by the requirements of similarity and temporal proximity.' " *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (quoting *State v. Al–Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002)). "Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them," but the similarities need not "rise to the level of the unique and bizarre." *Id.* (internal quotation marks omitted).

In this case, the testimony of "Cathy" constituted the earliest evidence of sexual abuse by defendant. Cathy testified regarding numerous instances of sexual abuse by defendant from approximately 1988 until 1994, when Cathy was between the ages of eight and 15. During that time, defendant was married to Cathy's aunt. When Cathy was eight years old, defendant touched her vagina while she was staying at defendant's home and sleeping with her cousins in their bedroom. Defendant first had sexual intercourse with Cathy when she was 11 years old, and had anal intercourse with her when she was in sixth grade. She estimated that defendant had sex with her over 30 times. One time, defendant and Cathy's aunt took her to a motel where defendant had sex with Cathy and her aunt in one another's presence. Charges were filed against defendant in 1994 for his conduct with Cathy, and he was convicted of indecent liberties with a child in 1996.

"Lisa" was the next Rule 404(b) witness. In 1999, defendant was released from prison and began dating and living with Lisa's mother, "Abby." Defendant lived with Lisa and Abby from 1999 until 2003 or 2004, when Lisa was between the ages of three and eight years old. Lisa testified that defendant had her sleep in the living room, even though she had a bedroom. One night, Lisa was sleeping in the living room and woke up as defendant was licking her vagina. Defendant also put his finger in her vagina and tried to get Lisa to perform oral sex. Lisa estimated that this happened more than 10 times and did not stop until defendant went to prison on drug charges around 2004. Lisa did not tell her mother about the abuse because defendant threatened to kill her family if she did.

Abby's testimony corroborated the accounts of Cathy and Lisa. Abby testified that she began dating defendant in 1999 after he was released

from prison and that he told her that he went to prison for sleeping with Cathy when she was 15 years old. In 2004, Abby learned that defendant had molested Lisa. While in prison, defendant telephoned Abby as a part of a 12-step program and admitted that he started touching Lisa when she was four years old and that he touched her vaginal area while she sat in his lap, and he rubbed his penis between her legs. When defendant was released from prison in 2009, he visited Abby and Lisa at a family Easter gathering and apologized to them for what he had done.

Nina, defendant's oldest daughter, also corroborated the testimony of Cathy and Lisa. She testified that defendant went to jail the first time for having sex with Cathy when she was 15 years old and that Cathy was sold to defendant for drugs or money. She stated that in 2003, while defendant was in prison, he admitted to her that he rubbed Lisa's vagina as she sat on his lap. Defendant later admitted to Nina that he rubbed his penis on Lisa's vagina, ejaculated on her belly, and put his penis in her face and on her lips.

Finally, Laura, defendant's girlfriend after he was released from prison in 2009, testified as to events occurring between defendant and Melissa in 2009 and 2010. Laura testified regarding the night in Caldwell County when defendant forced Laura to perform oral sex on Melissa while he watched. She also testified that one time when they were staying at a friend's house in Burke County, defendant refused to let Melissa sleep in the living room on the couch and made her sleep in the bed with him and Laura. That night, Laura witnessed defendant rub his penis between Melissa's legs -- an act defendant referred to as "slip-legging."

Defendant argues that the testimony regarding what happened to Cathy and Lisa is too remote in time to fall within Rule 404(b). We disagree. With respect to temporal proximity of other acts of sexual abuse, our Supreme Court has explained:

> While a lapse of time between instances of sexual misconduct slowly erodes the commonality between acts and makes the probability of an ongoing plan more tenuous, the continuous execution of similar acts throughout a period of time has the opposite effect. When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.

State v. Shamsid-Deen, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (internal citation omitted). Moreover, "[t]emporal proximity is not eroded when the remoteness in time can be reasonably explained" such

as by lack of access to a victim or by the defendant's incarceration. *State v. Barnett*, ___ N.C. App. ___, ___, 734 S.E.2d 130, 134 (2012), *disc. review denied*, 366 N.C. 587, 739 S.E.2d 844 (2013).

Although the sexual abuse of Cathy and Lisa occurred between 10 and 20 years prior to trial, the lapses of time between the instances of sexual misconduct involving Cathy, Lisa, Melissa, and Maggie can be explained by defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to Cathy and Lisa and what happened to Melissa and Maggie. At the time of the sexual misconduct, each victim was a minor female who was either the daughter or the niece of defendant's spouse or live-in girlfriend. The abuse frequently occurred at defendant's residence, at night, and while others slept nearby. Defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that defendant engaged in a pattern of conduct of sexual abuse over a long period of time.

Accordingly, we hold that the evidence of past instances of sexual abuse of Cathy and Lisa meets Rule 404(b)'s requirements of similarity and temporal proximity. *See State v. Register*, 206 N.C. App. 629, 641, 698 S.E.2d 464, 473 (2010) (holding that evidence that defendant had sexually abused other children 14, 21, and 27 years prior to the start of defendant's alleged sexual abuse of victim was evidence of a common plan and thus was admissible as other bad acts evidence, despite the remoteness in time of the first incident; evidence indicated that defendant was married to victims' mothers or aunt, that the sexual abuse occurred when the children were prepubescent, that, at the time of the abuse, defendant's wife was away at work while he was home looking after the children, and that the abuse involved fondling, fellatio, or cunnilingus, in most instances taking place in defendant's wife's bed).

Defendant makes no specific argument as to why Laura's testimony is inadmissible other than to note that she "testified about her own sexual conduct with [Melissa] and some other (uncharged) conduct of defendant with [Melissa]." Laura's sexual conduct with Melissa was at the behest of defendant and in his presence, and it corroborated Melissa's testimony regarding what occurred that night in Caldwell County. Further, the uncharged conduct of defendant, which he called "slip-legging," is the same act that Melissa testified defendant did to her in the yellow house in Burke County. Thus, Laura's testimony involved substantially similar acts by defendant against the same victim and within the same time period. Accordingly, we hold that Laura's testimony also falls under Rule 404(b).

Having determined that the evidence is admissible under Rule 404(b), we now review the trial court's Rule 403 determination for abuse of discretion. Here, the trial judge first heard the testimony of the 404(b) witnesses outside the presence of the jury and then heard arguments before ruling on admissibility of each witness. As to Nina, defendant's daughter, the trial court excluded testimony regarding an incident when Nina was 18 years old and defendant bought her ecstasy and another incident when defendant asked Nina to "show him her monkey" because it was not sufficiently similar to the charged crimes. The trial court also excluded testimony of Laura regarding Cathy and Cathy's mother because Laura's testimony did not disclose enough information for the court to determine at that time if those events were temporally related. The trial judge's exclusion of this evidence indicates that he carefully weighed the evidence in making his rulings. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 161 (noting that "[t]he judge excluded testimony about one incident that did not share sufficient similarity to the charged actions, thus indicating his careful consideration of the evidence").

Furthermore, " 'a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury.' " *Id.*, 726 S.E.2d at 160 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998)). The trial court instructed the jury to only consider the testimony for the purpose of showing defendant's motive, knowledge, intent, plan, or scheme, and not as substantive evidence of the crimes charged. This limiting instruction diminished the danger of unfair prejudice to defendant.

Given the similarities in the accounts of the 404(b) witnesses to those of Melissa and Maggie and the persistence of defendant's conduct with similar victims over a long period of time, we hold that the trial court could reasonably conclude that the testimony of the 404(b) witnesses provided strong evidence of a common plan that outweighed any unfair prejudice to defendant. *See Register*, 206 N.C. App. at 641, 698 S.E.2d at 473 (holding that trial court did not abuse its discretion in concluding that testimony showing pattern of sexually abusive behavior by defendant over period of 31 years constituted strong evidence of common plan that outweighed any unfair prejudice to defendant).

III

[3] Finally, defendant argues that the trial court erred in denying his motion to dismiss two of the offenses involving Melissa: one count of indecent liberties with a child in Caldwell County and the Burke County

charge of sexual offense with a child by an adult. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). " 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation omitted) (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919).

With respect to the Caldwell County charges, defendant concedes that the evidence that defendant performed oral sex on Melissa at Mikey's house in Caldwell County supports a conviction for sexual offense and indecent liberties, but he argues that a second indecent liberties conviction is not supported by the evidence. We disagree.

"A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1(a)(1) (2013). "[I]t is not necessary that there be a touching of the child by the defendant in order to constitute an indecent

liberty within the meaning of N.C.G.S. 14–202.1." *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981).

For example, in *State v. Ainsworth*, 109 N.C. App. 136, 147, 426 S.E.2d 410, 417 (1993), this Court held that there was sufficient evidence to support a conviction of indecent liberties where the defendant had sex with another woman in the presence of her child and then watched her son have sex with the woman. Additionally, "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties." *James*, 182 N.C. App. at 705, 643 S.E.2d at 38 (upholding defendant's convictions of three counts of indecent liberties for touching and sucking victim's breasts, performing oral sex on her, and having sexual intercourse with her).

In this case, the State presented evidence that defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then watched as his girlfriend performed oral sex on Melissa. Although these actions occurred during a single encounter, they constitute more than one sexual act and, under *James*, support defendant's conviction of more than one count of indecent liberties.

[4] Defendant next argues that there is insufficient evidence of a sexual offense occurring in Burke County. We agree. "A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.4A(a). A "'[s]exual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1(4) (2013).

Here, Melissa testified as to two specific incidents where a sexual act occurred between defendant and Melissa: (1) defendant placed his fingers inside her vagina while they were alone in the kitchen in her house in Burke County, and (2) defendant performed oral sex on Melissa at Mikey's house in Caldwell County. Neither of these incidents constitutes substantial evidence that would support the Burke County sexual offense. The evidence regarding the kitchen incident was not admitted as substantive evidence because the State had failed to disclose it in discovery. Therefore, consistent with the trial court's limiting instruction, this evidence may only be considered for the limited purpose of establishing defendant's motive, knowledge, or common plan for the crimes charged. While the evidence of oral sex occurring in Caldwell County

was admitted as substantive evidence, it does not support a conviction for a sexual offense occurring in Burke County.

The State, however, points to Melissa's testimony that defendant "sexually assaulted" her more than 10 times and that once it began, it continued. The State argues, citing *State v. Bullock*, 178 N.C. App. 460, 472, 631 S.E.2d 868, 876 (2006), that this testimony, when considered with Melissa's testimony that defendant performed a sexual act on her in Caldwell County, is substantial evidence that a sexual act occurred in Burke County.

In *Bullock*, this Court addressed the issue "whether the State is required to present evidence of specific and unique details of each charge to the jury, or whether a count can be submitted to the jury based upon the victim's testimony that repeated incidents occurred over a period of time." *Id.* There, defendant was convicted of 11 counts of rape. *Id.* at 464, 631 S.E.2d at 872. The victim gave specific testimony regarding the first act of sexual intercourse, and then testified that defendant had sex with her "'more than two times a week'" during an 11-month period of time. *Id.* at 463, 631 S.E.2d at 871. In holding that this generic testimony was sufficient to support the defendant's convictions of 10 additional counts of rape, the Court explained:

> While the first instance of abuse may stand out starkly in the mind of the victim, each succeeding act, no matter how vile and perverted, becomes more routine, with the latter acts blurring together and eventually becoming indistinguishable. It thus becomes difficult if not impossible to present specific evidence of each event.

Id. at 473, 631 S.E.2d at 877.

Here, unlike in *Bullock*, defendant was charged with various offenses that required proof of different elements, locations, and time periods. Instead of testifying specifically which act occurred more than one time, Melissa testified generally that defendant "sexually assaulted" her more than 10 times. It is unclear from the testimony whether this statement referred to acts amounting to vaginal intercourse, sexual acts within the meaning of the statute, or indecent liberties with a child.

We decline to extend *Bullock* to cases where, as here, there was no substantive evidence admitted as to each element of the offense occurring at the time and location alleged in the indictment, and it is unclear from the transcript whether the generic testimony that the victim was "sexually assaulted" multiple times encompasses the specific

offense at issue. *Compare State v. Khouri*, 214 N.C. App. 389, 391, 716 S.E.2d 1, 4 (2011) (holding that State submitted substantial evidence to support charges of sexual offense where State presented evidence that defendant initiated acts of touching and oral sex with victim and "[victim] continued performing oral sex on defendant a few times a week"), *disc. review denied*, 356 N.C. 546, 742 S.E.2d 176 (2012). Therefore, we hold that defendant's Burke County sexual offense conviction must be vacated.

We note that this conviction was consolidated with the Burke County offenses of rape of a child and indecent liberties. Even though both the rape and the sexual offense crimes are B1 felonies, our Supreme Court has held that "[s]ince it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated." *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). Accordingly, we remand for entry of judgment and resentencing on the Burke County offenses.

No error in part; vacated and remanded in part.

Judges STROUD and BELL concur.

STATE OF NORTH CAROLINA
v.
JIMMY SCOTT SISK

No. COA14-738

Filed 31 December 2014

Motor Vehicles—habitual impaired driving—results of blood test volunteered—right to be readvised of implied consent rights not triggered

The trial court did not err in a habitual impaired driving case by admitting the results of defendant's blood test into evidence. Defendant, without any prompting, volunteered to submit to a blood test. Thus, defendant's statutory right to be readvised of his implied consent rights was not triggered.

Appeal by defendant from judgment entered 22 November 2013 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 5 November 2014.

Roy Cooper, *Attorney General*, *by Neil Dalton*, *Special Deputy Attorney General*, *for the State.*

Leslie C. Rawls for defendant-appellant.

DAVIS, Judge.

Jimmy Scott Sisk ("Defendant") appeals from his convictions for habitual impaired driving and attaining the status of an habitual felon. On appeal, he contends that the trial court erred by admitting the results of his blood test into evidence. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State's evidence at trial tended to establish the following facts: At approximately 5:10 p.m. on 20 October 2012, Trooper Ben Sanders ("Trooper Sanders") of the North Carolina Highway Patrol was on duty driving his marked patrol vehicle southbound on N.C. Highway 10 in Cleveland County. Defendant was driving a motor home in the opposite direction. Trooper Sanders observed Defendant's vehicle veer into Trooper Sanders' lane and then swerve back into Defendant's original

lane. Trooper Sanders turned his patrol car around in pursuit and activated his blue lights and siren.

Trooper Sanders drove for some distance before he caught up with Defendant's vehicle. Defendant then abruptly turned into a convenience store parking lot and drove through a carwash stall, causing minor damage to both the stall and the motor home. Trooper Sanders followed Defendant and then exited his patrol car. As Trooper Sanders approached Defendant's vehicle, Defendant exited the driver's side door and then stumbled back against the motor home. Trooper Sanders noticed that Defendant smelled strongly of alcohol, his speech was slurred, and he was unsteady on his feet. Trooper Sanders also observed several open beer cans on the front floorboard of the motor home. Defendant was arrested for driving while impaired.

Defendant was then transported to the intoxilyzer room of the Cleveland County Law Enforcement Center where Trooper Sanders read and gave Defendant a copy of his implied consent rights. Defendant acknowledged his awareness of his rights and "stated that he would not take a breath test, but that he would give a blood test[.]" Approximately 23 minutes later, Trooper Sanders asked Defendant to give a breath sample, and Defendant refused. Trooper Sanders then told Defendant that he would be transported to the hospital for a blood test, and Defendant said "[o]kay."

At the Cleveland County Hospital emergency room, Defendant was placed in a waiting room, where he laid down on a gurney and fell asleep. When the technician came in, Defendant was awakened and informed that his blood was about to be drawn. Defendant made no comment or objection but "offered his arm out, and [the technician] took a blood sample from his left arm." The test results showed that Defendant's blood alcohol level was .16.

On 13 November 2012, Defendant was indicted for habitual impaired driving and attaining the status of an habitual felon. On 15 November 2013, Defendant filed a pretrial motion to suppress the results of his blood test. The trial court denied Defendant's motion.

A jury trial was held in Cleveland County Superior Court on 19 November 2013. At trial, the blood test results were admitted over Defendant's objection. The jury convicted Defendant of both charges. The trial court sentenced Defendant to 117 to 153 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court erred in admitting his blood test results into evidence. Specifically, Defendant contends that Trooper Sanders' failure to readvise him of his implied consent rights before the blood draw violated both N.C. Gen. Stat. § 20-16.2 and N.C. Gen. Stat. § 20-139.1(b5). We disagree.

Because Defendant objected to the introduction of the evidence at trial, this issue is preserved for appellate review. *See* N.C.R. App. P. 10(a)(1) ("[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). "The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008) (citation omitted), *appeal dismissed and disc. review denie*d, 363 N.C. 131, 675 S.E.2d 660, *cert. denied*, 558 U.S. 865, 175 L.E.2d 111 (2009).

N.C. Gen. Stat. § 20-16.2(a) states, in pertinent part, as follows:

> (a) Basis for Officer to Require Chemical Analysis; Notification of Rights. — Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your driver[']s license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> . . . .

> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
>
> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.

N.C. Gen. Stat. § 20-16.2(a) (2013).

N.C. Gen. Stat. § 20-139.1(b5) states, in pertinent part, that

> [a] person may be requested . . . to submit to a chemical analysis of the person's blood . . . in addition to or in lieu of a chemical analysis of the breath, in the discretion of a law enforcement officer. . . . If a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).

N.C. Gen. Stat. § 20-139.1(b5) (2013).

On appeal, Defendant does not dispute the fact that he told Trooper Sanders in the intoxilizer room that he was willing to submit to a blood test. Nor does he claim that he objected to the blood draw at the hospital. Instead, he argues that Trooper Sanders was required under N.C. Gen. Stat. § 20-139.1(b5) to readvise him of his implied consent rights prior to the blood draw. In making this argument, Defendant relies on our decision in *State v. Williams*, __ N.C. App. __, 759 S.E.2d 350, *disc. review denied*, __ N.C. __, 762 S.E.2d 201 (2014). We believe his reliance on *Williams* is misplaced.

In *Williams*, the defendant was arrested and charged with driving while impaired. He was taken to the sheriff's office where he was read and given a copy of his implied consent rights, which he acknowledged and signed. *Id.* at __, 759 S.E.2d at 351. An officer subsequently asked the defendant to submit to a breath test, which he refused. The officer then requested that a blood testing kit be brought in for the defendant. The officer gave the defendant a consent form for the blood test — which the defendant signed — but failed to readvise the defendant of his implied consent rights with respect to the blood test. A paramedic then proceeded to draw the defendant's blood. *Id.*

The defendant filed a motion to suppress the results of his blood test, which was granted by the trial court. *Id.* On appeal, this Court affirmed, holding that the blood test results were inadmissible because

of the officer's failure to readvise the defendant of his rights prior to the blood draw. *Id.* at __, 759 S.E.2d at 354. In reaching this conclusion, we noted that "[w]here a defendant refuses to take a breath test . . . the State may then seek to administer a different type of chemical analysis such as a blood test pursuant to [N.C. Gen. Stat. § 20-139.1(b5).]" *Id.* at __, 759 S.E.2d at 353. However, we concluded that "the State was required, pursuant to the mandates of [N.C. Gen. Stat.] § 20–16.2(a) and as reiterated by [N.C. Gen. Stat.] § 20-139.1(b5), to re-advise defendant of his implied consent rights before requesting he take a blood test." *Id.* at __, 759 S.E.2d at 354.

We believe that *Williams* is distinguishable from the present case. Here, unlike in *Williams*, Defendant — without any prompting — *volunteered* to submit to a blood test. Because the prospect of Defendant submitting to a blood test originated with Defendant — as opposed to originating with Trooper Sanders — we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered. *See* N.C. Gen. Stat. § 20-139.1(b5) ("If a subsequent chemical analysis is *requested* pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a)." (emphasis added)). Therefore, we conclude that the trial court did not err in admitting evidence of the results of Defendant's blood test. Accordingly, Defendant's argument is overruled.

Conclusion

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

NO ERROR.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
CRYSTAL SITOSKY

No. COA14-639

Filed 31 December 2014

1. Appeal and Error—appellate jurisdiction—notice of appeal—writ of certiorari

The trial court dismissed defendant's writ of certiorari requesting appellate review because her notice of appeal was deemed insufficient to confer jurisdiction. Defendant's notice of appeal listed the file numbers of the judgments she sought to appeal, the Court of Appeals was the only court with jurisdiction to hear defendant's appeal, and the State did not suggest that it was misled by either of the errors in the notice of appeal.

2. Probation and Parole—erroneous revocation of probation and activation of suspended sentence—gap in statutory provision

The trial court erred by revoking defendant's probation and activating her suspended sentence in file number 07 CRS 60072-74. Defendant, who committed the offenses prior to 1 December 2009 but had her revocation hearing after 1 December 2009, was not covered by either statutory provision N.C.G.S. § 15A-1344(d) or § 15A-1344(g) authorizing the tolling of probation periods for pending criminal charges.

3. Probation and Parole—erroneous revocation of probation and activation of suspended sentence—based on violations neither admitted nor proven

The trial court erred by revoking defendant's probation and activating her suspended sentence in file number 10 CRS 53201-03 based, in part, on probation violations that were neither admitted by defendant nor proven by the State at the probation hearing. The case was remanded for further proceedings.

Appeal by defendant from judgments entered 5 March 2014 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 21 October 2014.

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

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

DAVIS, Judge.

Crystal Sitosky ("Defendant") appeals from the trial court's judgments revoking her probation and activating her suspended sentences in file numbers 07 CRS 60072-74 and 10 CRS 53201-03. On appeal, she argues that the trial court (1) lacked jurisdiction to revoke her probation in file numbers 07 CRS 60072-74; and (2) erred in revoking her probation in file numbers 10 CRS 53201-03. After careful review, we vacate the trial court's judgments and remand for further proceedings.

Factual Background

On 10 July 2008, Defendant pled guilty to three counts of obtaining a controlled substance by fraud or forgery. The trial court sentenced Defendant to three consecutive sentences of 5 to 6 months imprisonment, suspended the sentences, and placed Defendant on supervised probation for a period of 36 months. On 22 September 2011, Defendant pled guilty to one count of attempted trafficking in heroin and three counts of obtaining a controlled substance by fraud or forgery. The trial court sentenced Defendant to three consecutive sentences of 6 to 8 months imprisonment for the obtaining a controlled substance by fraud or forgery offenses and 90 to 117 months imprisonment following the expiration of the above sentences for the attempted trafficking in heroin offense. The trial court then suspended these sentences and placed Defendant on supervised probation for 36 months.

Defendant's probation officer filed violation reports on 3 May 2013, 18 June 2013, 26 November 2013, and 10 January 2014, alleging that Defendant had violated various conditions of her probation. The 3 May 2013 violation reports alleged that Defendant had been charged with driving while license revoked, simple possession of a Schedule II controlled substance, simple possession of a Schedule IV controlled substance, and maintaining a vehicle or dwelling place for the purpose of keeping or selling a controlled substance. The 18 June 2013 violation reports alleged that Defendant had violated a condition of her probation by testing positive for opiates on 7 June 2013. The 26 November 2013 violation reports alleged that Defendant had violated a condition of her probation by testing positive for opiates on 21 November 2013. Finally, the 10 January 2014 violation reports alleged that Defendant had been charged with multiple counts of (1) driving with expired registration and

expired inspection; (2) driving while license revoked; (3) misdemeanor larceny; and (4) obtaining property by false pretenses.

A hearing on the alleged probation violations was held in New Hanover County Superior Court on 5 March 2014. At the hearing, Defendant admitted to three of the alleged probation violations: (1) testing positive for opiates on 7 June 2013; (2) testing positive for opiates on 21 November 2013; and (3) being charged with and convicted on 27 February 2014 of one count of driving while license revoked. Defendant did not admit to any of the other violations alleged in the violation reports, and the State presented no evidence regarding these remaining alleged violations. The trial court revoked Defendant's probation and activated her suspended sentences. Defendant appealed to this Court.

Analysis

I. Appellate Jurisdiction

[1] Defendant has filed a petition for writ of certiorari requesting appellate review in the event that her notice of appeal is deemed insufficient to confer jurisdiction upon this Court. The record shows that Defendant filed a handwritten letter indicating her intent to appeal but failed to serve a copy of the letter on the State as required by Rule 4(a) of the North Carolina Rules of Appellate Procedure. Defendant's trial counsel also filed a notice of appeal on Defendant's behalf, which was served on the State. This notice of appeal, however, failed to designate the court to which the appeal was being taken and listed the incorrect date for the judgments being appealed. We do not believe that either of these errors are fatal to Defendant's appeal.

We have previously held that a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled by the defendant's flawed notice of appeal. *State v. Ragland*, ___ N.C. App. ___, ___, 739 S.E.2d 616, 620 ("Here, defendant's intent to appeal is plain, and since this Court is the only court with jurisdiction to hear defendant's appeal, it can be fairly inferred defendant intended to appeal to this Court. The State does not suggest that it was in any way misled by the notice of appeal. Accordingly, defendant's . . . mistake in failing to name this Court in his notice of appeal do[es] not warrant dismissal."), *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013).

We have also deemed a defendant's notice of appeal sufficient to confer jurisdiction upon this Court when, despite an error in designating

the judgment, the notice of appeal as a whole indicates the defendant's intent to appeal from a specific judgment. *See State v. Rouse*, ___ N.C. App. ___, ___ , 757 S.E.2d 690, 692 (2014) ("A mistake in designating the judgment should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." (citation, quotation marks, brackets, ellipses, and emphasis omitted)).

Here, because (1) Defendant's notice of appeal lists the file numbers of the judgments she seeks to appeal; (2) this Court is the only court with jurisdiction to hear Defendant's appeal; and (3) the State has not suggested that it was misled by either of the errors in her notice of appeal, we conclude that a dismissal of Defendant's appeal is not warranted. We therefore dismiss Defendant's petition for writ of certiorari and proceed to address the merits of the appeal.

II. Revocation of Probation

A. File Numbers 07 CRS 60072-74

[2] Defendant first alleges that the trial court lacked jurisdiction to revoke her probation and activate her suspended sentences in file numbers 07 CRS 60072-74. We agree.

In file numbers 07 CRS 60072-74, Defendant was placed on 36 months of supervised probation on 10 July 2008 for offenses she committed in June and July of 2007. The State contends that Defendant remained on probation for these offenses at the time of the 5 March 2014 revocation hearing because her probationary period was tolled each time she acquired new criminal charges until those new charges were resolved.

It is true that the tolling provision of N.C. Gen. Stat. § 15A-1344(d) — which provided that "[t]he probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation" — previously applied to Defendant's probation in file numbers 07 CRS 60072-74. However, in 2009, the General Assembly repealed this provision for "hearings held on or after December 1, 2009." 2009 N.C. Sess. Laws 667, 679, ch. 372, § 20. While an amended tolling provision was then added to subsection (g)[1] of N.C. Gen. Stat. § 15A-1344, the

1. While not relevant to our decision in this case, we note that N.C. Gen. Stat. § 15A-1344(g) was later repealed by the General Assembly in 2011. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3.

State concedes, as it must, that the amended provision does not apply to Defendant because N.C. Gen. Stat. § 15A-1344(g) took effect on "1 December 2009 and applies to offenses committed on or after that date." *See id.* at 675, 679, ch. 372, §§ 11(b), 20. Consequently, because Defendant's underlying offenses were committed in June and July of 2007, N.C. Gen. Stat. § 15A-1344(g) is clearly inapplicable to her.

The State does assert, however, that Defendant's probationary period in file numbers 07 CRS 60072-74 was covered by the tolling provision of N.C. Gen. Stat. § 15A-1344(d) despite the fact that the effective date for the repeal of that provision was for hearings held on or after 1 December 2009 and Defendant's revocation hearing was held on 5 March 2014 — approximately four and a half years after this effective date. In making this argument, the State essentially relies not on the text of the session law repealing the tolling provision of N.C. Gen. Stat. § 15A-1344(d) but rather upon its belief that the General Assembly "did not intend to eliminate the tolling provision for defendants who committed offenses before 1 December 2009." However, it is well established that in determining the intent of the General Assembly, we must first examine the plain language of the statutory provisions at issue. *See State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) ("The primary indicator of legislative intent is statutory language . . . ."). "When interpreting a statute, we ascertain the intent of the legislature, first by applying the statute's language and, if necessary, considering its legislative history and the circumstances of its enactment." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (citation and quotation marks omitted). If the language is clear, we must give the provision its plain meaning. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.").

Here, the session law at issue — Chapter 372 of the 2009 North Carolina Session Laws — plainly states that Section 11(a), the section of the session law that repeals the tolling provision in N.C. Gen. Stat. § 15A-1344(d), "applies to *hearings held* on or after December 1, 2009." 2009 N.C. Sess. Laws 667, 679, ch. 372, § 20 (emphasis added). It then goes on to state that "[t]he remainder of this act [which included the newly enacted subpart (g) of N.C. Gen. Stat. § 15A-1344] becomes effective December 1, 2009, and applies to *offenses committed* on or after that date." *Id.* (emphasis added). As such, the General Assembly specifically articulated a clear effective date for the section of the session law removing the tolling provision from N.C. Gen. Stat. § 15A-1344(d), and

we are obligated to give effect to this unambiguously stated effective date. *See Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) ("[W]hen the language of a statute is clear and unambiguous, it must be given effect . . . ." (citation and quotation marks omitted)).

In urging us to reach a contrary result, the State is, in essence, asking this Court to rewrite the effective date set out in the session law in order to accomplish what it contends must have been the desire of the General Assembly in enacting these statutory amendments. This we are not at liberty to do. *See id.* (explaining that our appellate courts have "no power to amend an Act of the General Assembly" and "will not engage in judicial construction merely to assume a legislative role and rectify what [a party] argue[s] is an absurd result" (citation and quotation marks omitted)).[2]

Indeed, we note that on at least one other occasion this Court has identified a gap in coverage arising out of the designated effective dates of statutory provisions affecting probation. In *State v. Nolen*, ___ N.C. App. ___, ___, 743 S.E.2d 729 (2013), we explained that the recent enactment of the Justice Reinvestment Act ("the Act") had significantly reduced the trial court's authority to revoke probation for probation violations by limiting revocation-eligible violations to three types of conduct, one of which was absconding supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a), a newly added statutory condition of probation. *Id.* at ___, 743 S.E.2d at 730. According to the effective dates of the Act, the recently limited revocation authority of trial courts took effect on 1 December 2011 and applied to all probation violations occurring on or after that date, but the provision of the Act actually establishing absconding as a statutory probation violation applied only to probationers who had committed the underlying offenses resulting in their probation on or after 1 December 2011. *See id.* at ___, 743 S.E.2d at 731.

As a result, we held that a gap was created by the Act such that a subset of the persons on probation in North Carolina — including the defendant in *Nolen* — was subject to the Act's new limitations on the power of trial courts to revoke probation (based on the date of their alleged probation violations) yet could not have their probation revoked

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2. While we recognize that in construing and interpreting statutes, our courts endeavor to "adopt an interpretation which will avoid . . . bizarre consequences," *State v. Jones*, 359 N.C. 832, 837, 616 S.E.2d 496, 499 (2005), we do so only where the statute at issue is susceptible to more than one permissible interpretation. Here, however, this session law lends itself to only one rational interpretation as it clearly articulates a specific effective date and, as such, leaves no room for judicial construction.

for absconding because they were not subject to the prohibition against absconding as a condition of their probation (based on their offense date). *Id.* at ___, 743 S.E.2d at 731.

Likewise, in the present case, based on the plain language of Chapter 372 of the 2009 North Carolina Session Laws, we conclude that Defendant, who committed her offenses in file numbers 07 CRS 60072-74 *prior to 1 December 2009* but had her revocation hearing *after 1 December 2009*, was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges. As a result, we have no choice but to conclude that the trial court lacked jurisdiction to revoke her probation and activate her suspended sentences in file numbers 07 CRS 60072-74.

B. File Numbers 10 CRS 53201-03

[3] Defendant next argues that the trial court erred in revoking her probation in file numbers 10 CRS 53201-03 because it based the revocation, in part, on probation violations that were neither admitted by Defendant nor proven by the State at the probation hearing. We agree.

In file numbers 10 CRS 53201-03, Defendant was placed on 36 months of supervised probation on 22 September 2011 for offenses she committed in February and March of 2010. At the 5 March 2014 revocation hearing, Defendant admitted to three violations of the conditions of her probation: (1) testing positive for opiates on 7 June 2013 as alleged in paragraph 1 of the violation reports filed on 18 June 2013; (2) testing positive for opiates on 21 November 2013 as alleged in paragraph 1 of the violation reports filed on 26 November 2013; and (3) committing the crime of driving while license revoked in file number 13 CRS 7669 as alleged in paragraph 1 of the violation reports filed on 10 January 2014.

Our review of the transcript of the revocation hearing reveals that Defendant did not admit to — and no evidence was offered by the State regarding — the remaining alleged probation violations. Nevertheless, the trial court's judgments revoking Defendant's probation incorrectly state that she admitted to *all* of the violations alleged in paragraphs 1 and 2 of the 13 May 2013 violation reports, paragraph 1 of the 18 June 2013 violation reports, paragraph 1 of the 26 November 2013 violation reports, and paragraphs 1 and 2 of the 10 January 2014 violation reports.

We recognize that Defendant's admission to driving while license revoked, standing alone, could have served as a sufficient basis for the trial court to revoke her probation in file numbers 10 CRS 53201-03.

Although driving while license revoked is currently a Class 3 misdemeanor, it was classified as a Class 1 misdemeanor at the time she committed this offense on 6 August 2013. *See* N.C. Gen. Stat. § 20-28 (2011); 2013 Sess. Laws 995, 1305, ch. 360, § 18B.14(f) (amending N.C. Gen. Stat. § 20-28(a), effective 1 December 2013, to classify driving while license revoked as Class 3 misdemeanor instead of Class 1 misdemeanor "unless the person's license was originally revoked for an impaired driving offense, in which case the person is guilty of a Class 1 misdemeanor").

Thus, the trial court could have properly revoked Defendant's probation in file numbers 10 CRS 53201-03 on the basis that she committed a new crime[3] in violation of the conditions of her probation. *See* N.C. Gen. Stat. § 15A-1344(a),(d) (authorizing trial court to revoke probation if probationer commits new crime in any jurisdiction so long as probation is not revoked "solely for conviction of a Class 3 misdemeanor").

However, the judgments in this case do not provide us with a basis to determine whether the trial court would have decided to revoke Defendant's probation on the basis of her admission to committing the new crime of driving while license revoked in the absence of the other alleged violations that it mistakenly found that Defendant had admitted. We note that the trial court did not mark the box on the judgment forms specifying that each violation "in and of itself" would be a sufficient basis for revocation. Thus, we must remand for further proceedings so that the trial court can determine whether the revocation of Defendant's probation is appropriate in file numbers 10 CRS 53201-03.

Conclusion

For the reasons stated above, we vacate the trial court's judgments revoking Defendant's probation in file numbers 07 CRS 60072-74 and 10 CRS 53201-03 and remand for further proceedings consistent with this opinion in file numbers 10 CRS 53201-03.

VACATED AND REMANDED.

Judges HUNTER, Robert C., and DILLON concur.

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3. While testing positive for illegal drugs is a violation of a condition of probation, we have held that a positive drug test does not constitute sufficient evidence, standing alone, to support a possessory offense. *State v. Harris*, 178 N.C. App. 723, 632 S.E.2d 534 (2006), *aff'd*, 361 N.C. 400, 646 S.E.2d 526 (2007). Thus, driving while license revoked would constitute the commission of a "new crime" while on probation but testing positive for narcotics, without more, would not.

STEELE v. BOWDEN

[238 N.C. App. 566 (2014)]

ANTONIO STEELE, PLAINTIFF
v.
TAMMY BOWDEN, ALAMANCE TOWING & RECOVERY, JOHN DOE I, D/B/A ALAMANCE TOWING & RECOVERY, AND JOHN DOE II, DEFENDANTS

No. COA14-573

Filed 31 December 2014

1. Estoppel—collateral estoppel—previous order not a final judgment or entered in a separate action

The trial court did not violate the principle of collateral estoppel by granting plaintiff's motion for summary judgment with respect to his conversion and trespass to personal property claims where another judge had previously denied plaintiff's motion for judgment on the pleadings. Because the order denying the motion for judgment on the pleadings neither constituted a final judgment nor was entered in a separate action, there was no error.

2. Pleadings—summary judgment—granted after motion for judgment on pleadings denied—not improper overruling of another judge

The trial court did not improperly overrule another judge by granting plaintiff's motion for summary judgment with respect to his conversion and trespass to personal property claims where another judge had previously denied plaintiff's motion for judgment on the pleadings. A denial of a motion for judgment on the pleadings does not preclude summary judgment, which considers matters outside the pleadings. While both parties referenced facts outside the pleadings at the hearing for the motion on the pleadings, the trial court did not review any evidentiary materials when considering the motion. For this reason, the motion on the pleadings was not converted to a motion for summary judgment.

3. Conversion—summary judgment—defendant towed vehicle from co-owner without consent

The trial court did not err by granting summary judgment on plaintiff's claim for conversion where defendant, the co-owner of a vehicle with plaintiff, "repossessed" the vehicle from plaintiff by towing it away without his consent. There was no genuine issue of material fact regarding whether defendant was entitled to "repossess" the vehicle because the forecasted evidence tended to show that defendant forcibly took possession without plaintiff's consent. These actions did not fall near the "shadowy line" limiting how far

a tenant in common may go in exercising control without creating a claim for conversion.

4. Trespass—personal property—summary judgment—defendant towed vehicle from co-owner without consent—sold vehicle to satisfy lien

The trial court did not err by granting summary judgment on plaintiff's claim for trespass to personal property where defendant, the co-owner of a vehicle with plaintiff, "repossessed" the vehicle from plaintiff by towing it away without his consent. Defendant forcibly took the vehicle from plaintiff without his consent and allowed it to be sold to satisfy a lien, thereby preventing plaintiff from recovering the vehicle. Even assuming defendant would have been entitled to take the vehicle based upon a prior agreement with plaintiff, summary judgment nonetheless was proper because defendant failed to forecast any evidence of such an agreement at the hearing.

5. Pleadings—summary judgment hearing—defendant not permitted to give oral testimony—defendant offered no other evidentiary materials

The trial court did not abuse its discretion by declining to allow plaintiff to give sworn oral testimony at a summary judgment hearing or by declining to consider her unsworn oral statements. Because defendant did not present any affidavits, depositions, or other evidentiary materials at the hearing, her oral testimony would have impermissibly constituted more than "supplementary" evidence to serve as a "small link" between other evidence.

6. Unjust Enrichment—failure to submit jury instructions—reimbursement for payments on loaned vehicle

In an action concerning the "repossession" by defendant of a vehicle co-owned by plaintiff and defendant, the trial court erred by failing to instruct the jury to consider defendant's counterclaim seeking reimbursement for payments she made on the loan for the vehicle. Even though defendant's answer did not specifically designate a counterclaim, her answer nonetheless properly pled a counterclaim for unjust enrichment by alleging that she as co-signer had paid the balance of the automobile loan and that plaintiff now owed her reimbursement for the amount paid. The Court of Appeals vacated the judgment as to this issue and remanded for a trial on the counterclaim.

7. Appeal and Error—failure to preserve issues—failure to object—failure to cite authority—failure to introduce evidence

In an action concerning the "repossession" by defendant of a vehicle co-owned by plaintiff and defendant, several of defendant's arguments before the Court of Appeals were not properly preserved for appeal. Defendant's challenges concerning the jury instructions and special interrogatories submitted to the jury were not properly before the Court of Appeals because defendant failed to object at trial. In addition, defendant's argument regarding damages was viewed as abandoned because defendant failed to cite any authority in support of her argument. Last, defendant's argument regarding the trial court's decision on a motion in limine was not preserved because the plaintiff did not attempt to introduce the evidence at trial.

Judge ELMORE dissenting, in part, concurring, in part.

Appeal by defendant from order entered 29 October 2013 and judgment entered 12 November 2013 by Judge James T. Bryan in Orange County District Court. Heard in the Court of Appeals 22 October 2014.

Barry Nakell for Plaintiff.

Perry, Perry & Perry, P.A., by Maria T. Singleton, for Defendant.

ERVIN, Judge.

Defendant Tammy Bowden appeals from an order granting partial summary judgment in favor of Plaintiff Antonio Steele with respect to the conversion and trespass to personal property claims that he asserted against Defendant and from a judgment awarding Plaintiff a total of $10,570 in compensatory and punitive damages. On appeal, Defendant argues that the trial court erred by granting partial summary judgment in Plaintiff's favor with respect to his conversion and trespass to personal property claims on various procedural and substantive grounds, depriving her of the right to give sworn oral testimony at the summary judgment hearing, refusing to accept the oral statements that she made in open court in opposition to Plaintiff's summary judgment motion as evidence, refusing to submit the issues raised by her counterclaim to the jury, impermissibly presenting the jury with an "alternative verdict" form, incorrectly instructing the jury concerning the law applicable to

conversion and trespass to personal property claims, submitting the issue of punitive damages to the jury absent evidence that Defendant had acted maliciously, allowing the jury to award damages to Plaintiff despite the absence of sufficient evidence of the value of the vehicle in question, and granting Plaintiff's motion *in limine* seeking the exclusion of documents that should have been admitted into evidence. After carefully considering Defendant's challenges to the trial court's order and judgment in light of the record and the applicable law, we conclude that the trial court's order and judgment should be affirmed in part, that the trial court's judgment should be reversed in part, and that this case should be remanded to the Orange County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

Plaintiff and Defendant were married in 2004 and divorced in 2009. In January 2005, the two of them purchased a 2002 Ford Expedition that was financed using a loan that had been obtained from Santander Consumer USA. Defendant co-signed the loan with Plaintiff and the vehicle obtained as a result of the making of the loan was titled to both parties.

In the course of the process by which they parted company, the parties' entered an oral agreement under which Plaintiff would retain the vehicle, make timely payment as required by the loan agreement, and have Defendant's name removed from both the title to the vehicle and the loan agreement. Pursuant to this agreement, Plaintiff retained possession of the vehicle and made all of the remaining loan payments except for the final one. However, Plaintiff did not obtain the removal of Defendant's name from the title and the loan agreement or make all of the payments under the loan in a timely manner. As a result, an unpaid balance of $1,989.23 existed at the time that the loan should have been paid off.

Plaintiff continued to make payments against the outstanding balance under the loan after the date by which the full amount should have been paid in a total amount of $1,374.64, effectively leaving an outstanding balance of $694.62 due and owing under the loan agreement. Before Plaintiff completed the payment process, Defendant made the final payment by means of a check drawn on 28 March 2011 in the amount of $699.62. According to Defendant, Santander contacted her when Plaintiff failed to make timely payment under the loan and she eventually made the final payment herself in order to protect her access to credit.

After having made the final loan payment, Defendant attempted to "repossess" the vehicle from Plaintiff in March 2011 by hiring a towing company to remove the vehicle from Plaintiff's property. Plaintiff thwarted this attempted "repossession" by spotting the approaching tow truck and driving away at a high rate of speed. However, Plaintiff hit a curb and damaged the vehicle in the course of thwarting the "repossession." Defendant made a second attempt to "repossess" the vehicle in March or April 2011 and succeeded in obtaining possession of the vehicle on that occasion. Defendant claimed that she had made these efforts to "repossess" the vehicle in order to encourage Plaintiff to reimburse her for the amount of the final loan payment.

After obtaining possession of the vehicle, Defendant had an auto mechanic repair the damage that had occurred during the first "repossession" attempt. However, Defendant was unable to pay the mechanic for the required repairs. As a result, the vehicle was sold as part of the process of enforcing a repairman's lien.

B. Procedural History

On 11 July 2012, Plaintiff filed a complaint against Defendant, John Doe I doing business as Alamance Towing and Recovery, and John Doe II in which he asserted claims for conversion and assault and requested an award of compensatory and punitive damages. On 20 September 2012, Defendant filed an answer in which she denied the material allegations of Plaintiff's complaint, asserted that she had a legal right to take possession of the vehicle arising from Plaintiff's failure to make required loan payments, and requesting "reimbursement" for the amount of the loan balance.

On 16 November 2012, Plaintiff filed a motion seeking the entry of judgment on the pleadings. Judge Lunsford Long entered an order denying Plaintiff's motion for judgment on the pleadings on 9 January 2013. On 25 June 2013, Judge Beverly A. Scarlett entered an order allowing Plaintiff to amend his complaint to add a claim for trespass to real property. On 5 September 2013, Plaintiff filed a motion seeking the entry of partial summary judgment in his favor with respect to the issue of liability. On 29 October 2013, the trial court entered an order granting Plaintiff's motion with respect to the conversion and trespass to personal property claims and ordering that the amount of damages to which Defendant was entitled on the basis of his claims for conversion and trespass to personal property be determined by a jury. On the same

date, Plaintiff voluntarily dismissed his claims against Alamance Towing and Recovery and John Doe II.[1]

This case came on for trial before the trial court and a jury at the 29 October 2013 civil session of the Orange County District Court. At the beginning of the trial, the trial court recognized that Plaintiff had withdrawn his assault claim. On 30 October 2013, the jury returned a verdict awarding $10,320 in compensatory damages for Defendant's conversion of or trespass to the vehicle and $250 in punitive damages. The trial court entered a final judgment based on the jury's verdict on 12 November 2013. Defendant noted an appeal to this Court from the trial court's order and judgment.

II. Substantive Legal Analysis

A. Summary Judgment Order

In her brief, Defendant contends that the trial court erred by granting summary judgment in Plaintiff's favor with respect to his conversion and trespass to personal property claims. More specifically, Defendant contends that the granting of Plaintiff's summary judgment motion was precluded by Judge Long's refusal to enter judgment on the pleadings in Plaintiff's favor and that the record discloses the existence of genuine issues of material fact concerning the extent to which Defendant was entitled to forcibly take the vehicle from Plaintiff's possession sufficient to require a jury trial with respect to the issue of her liability for conversion and trespass to personal property. Defendant's contentions are without merit.

1. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "A 'genuine issue' is one that can be maintained by substantial evidence. The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted).

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1. As a result of the fact that Alamance Towing and Recovery was also named as John Doe I, the voluntary dismissal removed all of the defendants named in the complaint and amended complaint from this case except Defendant.

2. Defendant's Challenges to the Summary Judgment Order

a. Collateral Estoppel and Overruling Prior Order

[1] As an initial matter, Defendant contends that the trial court lacked the authority to grant summary judgment with respect to Plaintiff's claims on the grounds that those claims had previously been argued and adjudicated before a different trial judge in violation of the principle of collateral estoppel and the rule that one judge cannot overrule another judge of equal authority. In support of this contention, Defendant notes that Judge Long denied Plaintiff's motion for judgment on the pleadings with respect to Plaintiff's substantive claims by means of an order entered on 9 January 2013. Defendant's contention lacks merit.

"[A] claim cannot be barred by *res judicata* or collateral estoppel unless it was litigated to final judgment in a prior action." *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 601, 614 S.E.2d 268, 273 (2005). In view of the fact that Judge Long's order denying Plaintiff's motion for judgment on the pleadings was neither entered in a separate action or constituted a final judgment, that order does not have collateral estoppel effect.

[2] Defendant's claim that Judge Bryan improperly overruled Judge Long is devoid of merit as well. "It is well established that one [district] court judge may not ordinarily modify, overrule, or change the judgment or order of another [district] court judge previously entered in the same case." *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007). In considering a motion for judgment on the pleadings, the trial court is required to look to the face of the pleadings to determine whether the movant is entitled to judgment as a matter of law, with all of the factual allegations in the nonmovant's pleadings being deemed to have been admitted except to the extent that they are legally impossible or not admissible in evidence. *Governor's Club, Inc. v. Governors Club Ltd. Partnership*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003). "By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matters outside the pleadings." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991). Thus, "the denial of a motion [for judgment on the pleadings], which merely challenges the sufficiency of the [pleadings], does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint." *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 694, 179 S.E.2d 885, 887, *cert. denied*, 279 N.C.

348, 182 S.E.2d 580 (1971). As a result, Judge Bryan's decision to grant summary judgment in Plaintiff's favor did not constitute the overruling of Judge Long's order denying Plaintiff's motion for judgment on the pleadings.

In apparent recognition of this potential defect in her argument, Defendant contends that the argument that Plaintiff made in support of his judgment on the pleadings relied on information that was not contained in the pleadings, thereby converting Plaintiff's motion for judgment on the pleadings into one for summary judgment. *See Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007) (stating that "a motion [lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is converted to one for summary judgment if matters outside the pleading are presented to and not excluded by the court") (internal quotation marks omitted). "Ordinarily, if . . . the trial court considers matters outside the pleading[s], the motion shall be treated as one for summary judgment and disposed of as provided in [N.C. Gen. Stat. § 1A-1,] Rule 56." However, in the event that "the matters outside the pleading[s] considered by the trial court consist only of briefs and arguments of counsel, the trial court need not convert the [motion] into one for summary judgment." *Governor's Club*, 152 N.C. App. at 245-46, 567 S.E.2d at 785 (internal quotation marks and citations omitted).

At the hearing held for the purpose of considering Plaintiff's motion for judgment on the pleadings, both parties made reference to facts not contained in the pleadings or in their oral arguments. However, the trial court was not presented with, and did not review, any evidentiary materials such as affidavits, deposition transcripts, or documents, in the course of deciding whether to grant or deny Plaintiff's motion for judgment on the pleadings. For that reason, the trial court's ruling denying Plaintiff's motion for judgment on the pleadings did, in fact, represent a ruling made with respect to a motion for judgment on the pleadings rather than with respect to a motion for summary judgment. As a result, the trial court was not precluded from granting Plaintiff's summary judgment motion for either of the reasons stated in Defendant's brief.

b. Conversion Claim

[3] Secondly, Defendant contends that the trial court erred by granting summary judgment in Plaintiff's favor with respect to his conversion claim. More specifically, Defendant argues that the trial court erred by granting summary judgment in favor of Plaintiff with respect to his conversion claim on the grounds that the record disclosed the existence of

genuine issues of material fact concerning the extent to which Defendant had a lawful right to "repossess" the vehicle. Defendant's contention lacks merit.

"[C]onversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986). "[T]wo essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., Inc.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). In cases involving personal property owned jointly by multiple individuals as tenants in common, "where the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him and exercises a dominion over it, either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion." *Bullman v. Edney*, 232 N.C. 465, 468, 61 S.E.2d 338, 340 (1950).

A careful review of the record convinces us that Defendant has not forecast any evidence that, if accepted as true, would support a decision in her favor with respect to Plaintiff's conversion claim. Simply put, all of the evidence presented for the trial court's consideration at the summary judgment hearing tends to show that Defendant, who owned the vehicle in question jointly with Plaintiff as tenants in common, took forcible possession of that vehicle from Plaintiff without Plaintiff's consent. Although "it is difficult to draw or trace the shadowy line that marks the limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for conversion," *Waller v. Bowling*, 108 N.C. 289, 295, 12 S.E. 990, 992 (1891), Defendant has not identified the existence of any facts that would have authorized her to forcibly "repossess" the vehicle, and none are apparent on the face of the record. Simply put, while Defendant may have had a legal or equitable interest in the vehicle, Defendant has not cited any authority indicating that she had the right to forcibly take that vehicle from Plaintiff given his status as a co-owner. As a result, since the undisputed evidence contained in the record establishes that Defendant's conduct did not involve actions near the "shadowy line" referenced in *Waller*, the trial court did not err by granting summary judgment in Plaintiff's favor with respect to his conversion claim.

c. Trespass to Personal Property Claim

[4] Similarly, Defendant contends that the trial court erred by granting summary judgment in Plaintiff's favor with respect to his trespass to personal property claim. Once again, Defendant contends that the record reflects the existence of genuine issues of material fact concerning the extent to which she had a right to "repossess" the vehicle. Defendant's argument is unpersuasive.

"A successful action for trespass to chattels requires the party bringing the action to demonstrate that she had either actual or constructive possession of the personalty or goods in question at the time of the trespass, and that there was an unauthorized, unlawful interference or dispossession of the property." *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (internal citation omitted). "The key to assessing possession under a trespass to chattel claim is determining if there is a right to present possession whenever so desired or a right to immediate possession." *Id.* Moreover, "[i]n a trespass action a defendant may assert that the entry was lawful or under legal right as an affirmative defense." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 628, 588 S.E.2d 871, 874 (2003). As a result, given that Plaintiff had actual possession of the vehicle at the time that it was taken, the ultimate question raised by Plaintiff's trespass to personal property claim is whether "there was an unauthorized, unlawful interference or dispossession of the property." *Fordham*, 351 N.C. at 155, 521 S.E.2d at 704.

In her brief, Defendant argues that, as a co-owner of the vehicle, she had the authority to take possession of the vehicle from Plaintiff. As an initial matter we must note that, instead of pointing to the existence of a disputed factual issue, Defendant's argument is nothing more or less than a statement of what she believes the legal effect of the essentially undisputed facts to be. In light of that fact, the proper course for us to take in the event that we were to accept Defendant's argument as persuasive would be for us to reverse the trial court's judgment and remand this case for the entry of judgment in Defendant's favor rather than to order a new trial. Thus, the ultimate issue raised by Defendant's argument is one of law rather than one of fact.

As we have already noted, a claim for conversion is available in the event that "the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him and exercises a dominion over it." *Bullman*, 232 N.C. at 468, 61 S.E.2d at 340. Although the principle set forth in *Bullman* was enunciated in the context of a conversion claim, we are unable to see why a different rule should be

applicable in trespass to personal property cases. As the Supreme Court has stated in the landlord-tenant context, our laws, instead of permitting someone "to take the law into [her] own hands," require that a "remedy . . . be sought through those peaceful agencies which a civilized community provides to all its members." *Spinks v. Taylor*, 303 N.C. 256, 262, 278 S.E.2d 501, 505 (1981). In the event that we were to accept Defendant's implicit assertion that the principle enunciated in *Bullman* did not apply in trespass to personal property cases, "it must necessarily follow as a logical sequence, that so much [force] may be used as shall be necessary to overcome resistance, even to the taking of human life," *Spinks*, 303 N.C. at 263, 278 S.E.2d at 505, in the course of the private "repossession" of an item of personal property, resulting in an untenable situation in which the parties would be allowed to engage in an escalating cycle of violence during which each co-owner would be entitled to forcibly take the jointly owned property from the other co-owner in turn. As a result, instead of allowing one co-owner to forcibly seize property from another co-owner, we believe that a co-owner of jointly owned property "may not [take possession] against the will of the [other owner]," with "an objection by the [other owner being sufficient to] elevate[] the [retaking] to a forceful one," leaving "the [co-owner's] sole legal recourse [to be] to the courts." *Id.* at 263, 278 S.E.2d at 505.

The mere taking of an item of jointly held property, standing alone, is not sufficient to support the maintenance of an action for trespass to personal property. Instead, since "[o]ne tenant in common of a personal chattel has as much right to the possession of it as the other," "one tenant in common cannot maintain [an action for] trespass or trover against his cotenant without showing that the cotenant has destroyed the joint property." *Lucas v. Wasson*, 14 N.C. 398, 399 (1832); *see also Rice v. Bennington County Sav. Bank*, 93 Vt. 493, 503, 108 A. 708, 712 (1920) (stating that "[a] joint tenant of personal property has such title thereto that he may maintain an action against a co-tenant who sells or destroys the same.") (citing *Lucas*, 14 N.C. at 398). However, since Defendant allowed the vehicle to be sold for the purpose of satisfying a lien, "such a disposition of it [was] made as to prevent [Plaintiff] from recovering it." *Thompson v. Silverthorne*, 142 N.C. 12, 14, 54 S.E. 782, 782 (1906) (quoting *Grim v. Wicker*, 80 N.C. 343, 344 (1879))[2]. As a result, Plaintiff was

2. Aside from the fact that Defendant, rather than Plaintiff, sent the vehicle for repairs and incurred responsibility for paying the resulting bill, Defendant never argued in her brief that Plaintiff's ability to redeem the vehicle precluded the maintenance of a claim for trespass to personal property. *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

entitled to maintain a claim for trespass to personal property against Defendant despite Defendant's status as co-owner of the vehicle.

Although Defendant contends that she was entitled to "repossess" the vehicle based upon an agreement that she had reached with Plaintiff, her assertion to that effect does not justify a decision to overturn the trial court's award of summary judgment in Plaintiff's favor. Assuming, without in any way deciding, that such an oral agreement between the parties would be enforceable, Defendant's assertions relating to this alleged agreement do not suffice to preclude the entry of summary judgment in Plaintiff's favor with respect to the trespass to personal property claim given the absence of any evidence tending to show that such an agreement ever existed.

According to well-established North Carolina law, when a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C. App. 215, 217, 293 S.E.2d 215, 216-17 (1982), and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment. *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835; *see also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (providing that, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). A careful review of the record has persuaded us that Defendant adduced no facts at the summary judgment hearing tending to show the existence of an agreement of the sort upon which she seeks to rely in opposition to Plaintiff's motion. Instead, Defendant simply relied on her assertion that Plaintiff "defaulted on payments on the 2002 Ford Expedition and the finance company contacted her for the balance of the loan since Plaintiff . . . had defaulted." Thus, given the complete absence of any evidence tending to show the existence of an agreement like the one upon which Defendant has attempted to rely, the trial court did not err by granting Plaintiff's request for an award of summary judgment in his favor with respect to his trespass to personal property claim. As a result, Defendant is not entitled to relief from the trial court's summary judgment order on the basis of this contention.

B. Defendant's Other Claims

1. Oral Testimony at Summary Judgment Hearing

[5] In her brief, Defendant contends that the trial court erred by depriving her of the right to give sworn oral testimony at the summary judgment hearing and by refusing to accept the statements that she made in open court in opposition to Plaintiff's summary judgment motion as evidence. Defendant's argument is unpersuasive.

As a general proposition, evidence is presented at a hearing convened to address the merits of a summary judgment motion "through depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances." *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128, *disc. review denied*, 357 N.C. 169, 581 S.E.2d 447 (2003). Although "[o]ral testimony at a hearing on a motion for summary judgment may be offered," "the trial court is only to rely on such testimony in a supplementary capacity, to provide a 'small link' of required evidence, but not as the main evidentiary body of the hearing." *Id.* at 296, 577 S.E.2d at 129. In addition, the extent to which oral testimony is admitted at a summary judgment hearing is a matter within the trial court's discretion. *Pearce Young Angel Co. v. Don Becker Enterprises, Inc.*, 43 N.C. App. 690, 692, 260 S.E.2d 104, 105 (1979). "Generally, the test for abuse of discretion is whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Frost v. Mazda Motor of America, Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (internal quotation marks and citation omitted).

As the record clearly reflects, Defendant did not submit any affidavits, depositions, or other evidentiary materials in opposition to Plaintiff's request for the entry of summary judgment in his favor.[3] Had the trial court allowed Defendant to present oral testimony at the hearing, Defendant's testimony would not have constituted "supplementary" evidence for the purpose of "provid[ing] a 'small link' of required evidence." *Strickland*, 156 N.C. App. at 296, 577 S.E.2d at 129. Instead, Defendant's testimony would have constituted Defendant's entire showing in response to Plaintiff's summary judgment motion. In light of this set of circumstances, we are unable to say that the trial court abused its discretion by denying Defendant's request that she be allowed to

3. Plaintiff did, however, submit Defendant's deposition for the trial court's consideration at the summary judgment hearing.

offer oral testimony at the summary judgment hearing or by failing to consider Defendant's unsworn oral statements as evidence and do not believe that Defendant is entitled to relief from the trial court's summary judgment order on the basis of this contention.

2. Counterclaim

[6] Secondly, Defendant contends that the trial court erred by failing to instruct the jury to address the merits of her counterclaim, in which she sought reimbursement from Plaintiff for the payments that she had made on the vehicle-related loan. Defendant's contention has merit.[4]

> The trial court is required to submit to the jury those issues raised by the pleadings and supported by the evidence. An issue is supported by the evidence when there is substantial evidence, considered in the light most favorable to the non-movant, in support of that issue. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

In re Estate of Ferguson, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (internal quotation marks and citations omitted). A litigant is entitled to relief on appeal when the trial court's refusal to submit an issue for the jury's consideration results in the creation of a bar to the litigant's recovery. *See Brewer v. Harris*, 279 N.C. 288, 298, 182 S.E.2d 345, 351 (1971) (holding that the issue of whether the defendant's willful and wanton conduct was sufficient to preclude the rejection of the plaintiff's personal injury claim on contributory negligence grounds).

As an initial matter, we must determine whether Defendant properly pled a counterclaim seeking reimbursement for the payments that she made in connection with the vehicle-related loan in her responsive pleading. According to N.C. Gen. Stat. § 1A-1, Rule 8(a), a pleading that attempts to assert a counterclaim must contain (1) "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions

4. Although Plaintiff contends that the jury heard Defendant's contention that she was entitled to be reimbursed for the amount of the final loan payment and effectively considered this claim in the course of rendering its verdict for that reason, we are unable to accept this contention as valid given that careful scrutiny of the trial court's instructions reveals that the jury was never told that it could consider Defendant's reimbursement claim or adjust the amount of damages to be awarded to Plaintiff to reflect the fact that Defendant made the final payment. As a result, we are not persuaded by Plaintiff's argument that Defendant's reimbursement claim is adequately reflected in the jury's verdict.

or occurrences, intended to be proved showing that the pleader is entitled to relief" and (2) "[a] demand for judgment for the relief to which he deems himself entitled." N.C. Gen. Stat. § 1A-1, Rule 8(a). The fact that the defendant may have failed to explicitly indicate that he or she is asserting a counterclaim is irrelevant, since N.C. Gen. Stat. § 1A-1, Rule 8(c), provides that, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." *See also Hunt v. Hunt*, 117 N.C. App. 280, 283, 450 S.E.2d 558, 561 (1994).

A careful review of the record establishes that Defendant's answer asserted a counterclaim that complied with the provisions of N.C. Gen. Stat. § 1A-1, Rule 8(a), given that it alleged that "Defendant had to pay the balance of the loan as the co-signer in the amount of approximately $1,000 in which the Plaintiff now owes the Defendant" and requested "[r]eimbursement in the amount in excess of $5,000 for loan balance, harassment, mental anguish, malicious damages." Although Defendant did not specifically designate this set of statements as a counterclaim, we believe that considerations of simple "justice require[] that the trial court treat the defendant's pleadings as a[n attempt to assert a] counterclaim," *Hunt*, 117 N.C. App. at 283, 450 S.E.2d at 561, and that the trial court erred by apparently reaching a contrary conclusion.

In addition to having sufficiently pled the facts upon which she relied in support of her counterclaim and request for an award of relief, Defendant's allegations alleged a valid basis for the recovery of damages.

> Unjust enrichment is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. [A] person who has been unjustly enriched at the expense of another is required to make restitution to the other. A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law.

Hinson v. United Financial Services, Inc., 123 N.C. App. 469, 473, 473 S.E.2d 382, 385, *disc. review denied*, 344 N.C. 630, 477 S.E.2d 39 (1996) (internal quotation marks and citations omitted). The measure of damages for unjust enrichment is the reasonable value of the goods and services that the claimant provided to the other party. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). In view of the fact that Defendant has alleged that she paid off the balance of the loan relating to the vehicle and that Plaintiff had not reimbursed her for the

payments that she had made, Defendant has pled facts that, if believed, tend to show that Plaintiff had been "unjustly enriched at [Defendant's] expense," *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385, and that Defendant should be reimbursed for the $699.62 that she paid in connection with the vehicle-related loan.

Finally, Defendant adduced sufficient evidence at trial to support the submission of her unjust enrichment claim to the jury.[5] According to Plaintiff's Exhibit No. 5, Defendant wrote a check on 28 March 2011 in the amount of $699.62 to "Santander Consumer USA Inc.," and indicated on the memo line that this check "Paid" "Acct #1750283" "in Full." According to Plaintiff's Exhibit No. 6, which was the payment history associated with Account No. 1750283, a final payment in the amount of $699.62 was made to Santander by means of a check bearing the same number as that shown on Plaintiff's Exhibit No. 5. In view of the fact that these two exhibits, standing alone, tend to show that Defendant paid off the vehicle-related loan and the fact that the parties do not appear to dispute that, under the domestic settlement between the parties, Plaintiff had primary responsibility for paying off the vehicle-related loan, the trial court erred by refusing to submit Defendant's counterclaim for the jury's consideration. As a result, the lower court's judgment should be vacated to the extent that it constitutes a rejection of Defendant's counterclaim and this case should be remanded to the Orange County District Court for a trial on the issues raised by Defendant's counterclaim.

3. Other Issues

[7] Finally, Defendant has raised a number of other issues in her brief that merit passing attention. First, Defendant has challenged the form of the special interrogatories that were submitted to the jury and the manner in which the trial court instructed the jury concerning various issues. However, Defendant failed to object to either the verdict sheet or the jury instructions before the trial court. N.C. R. App. P. 10(a)(1) (stating that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context") and N.C. R. App. P. 10(a)(2) ("[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented

5. Defendant has not asserted in her brief that she presented sufficient evidence to support a claim for "harassment, mental anguish, and malicious damages" and we believe that her assessment of the state of the evidentiary record concerning that set of issues is correct.

on appeal unless the party objects thereto before the jury retires to consider its verdict"). In addition, although Defendant appears to be attempting to challenge the jury's compensatory and punitive damages award, she merely makes a passing reference to this set of issues in her brief without citing any authority in support of her position. N.C. R. App. P. 28(b)(6) (stating that any issue "in support of which no reason or argument is stated, will be taken as abandoned"). Finally, Defendant challenges the trial court's decision, in ruling on a motion *in limine*, to preclude the admission of documents arising from a bankruptcy petition filed by Plaintiff on 22 November 2011. However, Plaintiff did not attempt to introduce the documents at trial after the trial court granted Plaintiff's motion *in limine*. *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 620, 504 S.E.2d 102, 105 (1998) (stating that "[a] party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to . . . attempt to introduce the evidence at the trial") (quotation marks and citation omitted). As a result, since none of these arguments have been properly preserved for purposes of appellate review, they provide no basis for a decision to overturn the trial court's order or judgment.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, although the trial court erroneously refused to allow the jury to consider Defendant's counterclaim, it did not err by holding Defendant liable for conversion and trespass to personal property and awarding compensatory and punitive damages to Plaintiff based on those claims. As a result, we affirm the trial court's judgment in part, reverse the trial court's judgment in part, and remand this case to the Alamance County District Court for a trial on the issues raised by Defendant's counterclaim.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Judge BRYANT concurs.

Judge ELMORE dissents in part and concurs in part.

ELMORE, Judge, dissenting, in part, concurring, in part.

Because I believe the trial court erred in granting partial summary judgment in plaintiff's favor on grounds that the record does not disclose the existence of a genuine issue of material fact concerning the

extent, if any, to which defendant was authorized to repossess the 2002 Ford Expedition, I respectfully dissent.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

B. Defendant's Challenges to the Summary Judgment Order

I. Conversion Claim

Defendant argues that the trial court erred in entering the 29 October order granting defendant's motion for partial summary judgment on the claim of conversion. I agree, because the evidence suggests that a genuine issue of material fact concerning the extent to which defendant had a lawful right to repossess the vehicle is present in the record.

"The tort of conversion is well defined as an *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the . . . exclusion of an owner's rights." *Vaseleniuck Engine Dev., LLC v. Sabertooth Motorcycles, LLC*, ___ N.C. App. ___, ___, 727 S.E.2d 308, 310 (2012) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). In cases involving tenants in common of chattel "where the tenant in possession of personal chattels withholds the common property from his co-tenant, or wrests it from him, and exercises a dominion over it either in direct denial of or inconsistent with the rights of the latter, an action will lie for conversion." *Bullman v. Edney*, 232 N.C. 465, 468, 61 S.E.2d 338, 340 (1950). However, "it is difficult to draw or trace the shadowy line that marks the limit to which a tenant in common may go in the exercise of control over the common property without subjecting himself to liability for conversion." *Waller v. Bowling*, 108 N.C. 289, 295, 12 S.E. 990, 992 (1891).

The crux of defendant's argument is that the facts of the instant case give rise to a genuine issue of material fact as to whether defendant's possession of the vehicle was unauthorized. Again, I agree. Here, the

liability for plaintiff's claim of conversion hinges on whether defendant's possession of the vehicle was authorized or unauthorized under these particular circumstances.

The record discloses that pursuant to an alleged oral agreement between the parties, plaintiff was to retain possession of the vehicle, make timely loan payments, and remove defendant's name from the vehicle's title.[1] However, plaintiff did not comply with the terms of the parties' agreement because he neither removed plaintiff's name from the vehicle's title nor did he make all loan payments in a timely fashion. Defendant alleges that she often received calls from creditors regarding overdue payments on the car loan. Thus, it was plaintiff who purportedly elected to keep defendant's name on the vehicle's title and plaintiff who allegedly failed to make timely loan payments. There is evidence in the record to suggest that when defendant took possession of the vehicle, it was titled in her name and she had made the final loan payment. Based on this evidence, there exists in this case a question of whether defendant came into possession of the automobile rightfully despite the record evidence that plaintiff did not surrender the vehicle to defendant voluntarily.

It appears that the trial court determined on its own accord that defendant had no right to the possession of the vehicle. However, in ruling on plaintiff's motion for partial summary judgment, it was the trial court's duty to determine whether a genuine issue of material fact existed, not to determine the facts so that no issue existed. In the instant case, the trial court interpreted the facts as it saw fit.

Defendant has convinced me that a genuine issue of material fact existed regarding whether she had valid ownership of the vehicle such that her possession was authorized. Accordingly, I am of the opinion that the trial court erred in granting plaintiff's motion for summary judgment on the claim of conversion.

C. Trespass to Personal Property

Defendant argues that the trial court erred by granting summary judgment in plaintiff's favor with respect to his trespass to personal property claim. I agree with defendant that the record reflects the existence of a genuine issue of material fact concerning whether there was an unauthorized, unlawful interference or dispossession of the personal property.

1.. I do not hold that an oral agreement exists or that it is likewise enforceable. I merely recognize that defendant has alleged that such an agreement was entered by the parties.

A successful action for trespass to chattel requires the party bringing the action to demonstrate that "[(1)] he had either actual or constructive possession of the personalty or goods in question at the time of the trespass, and [(2)] that there was an unauthorized, unlawful interference or dispossession of the property." *Kirschbaum v. McLaurin Parking Co.*, 188 N.C. App. 782, 786-87, 656 S.E.2d 683, 686 (2008) (citation and quotation omitted). "The key to assessing possession under a trespass to chattel claim is determining if there is a right to present possession whenever so desired . . . or a right to immediate actual possession." *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (citation omitted).

The question before the trial court was whether "there was an unauthorized, unlawful interference or dispossession of the property." *Id.* I recognize that the mere taking of an item of jointly held property, standing alone, is insufficient to support an action for trespass to chattel. Instead, there must be a showing that a co-tenant who was in unlawful possession of the personal property also destroyed the joint property or placed it beyond recovery by means of legal process. *Doyle v. Bush*, 171 N.C. 10, 86 S.E. 165, 166 (1915) (citations omitted). On these facts, I do not believe that defendant's conduct of allowing the vehicle to be sold for the purposes of satisfying a mechanic's lien necessarily was sufficient to show that defendant destroyed the personal property for purposes of this claim. This is because, as discussed above, I am not convinced that defendant did not have an equal right of possession of the vehicle given her status as co-owner on these facts.

In addition, there is evidence in the record that plaintiff was afforded the opportunity to recover the vehicle from the auto mechanic after it had been repaired, but he elected not to do so. This raises a question of whether plaintiff was in fact dispossessed of the personal property. Moreover, in November 2011, plaintiff filed for bankruptcy and listed the vehicle as an item of joint personal property that was currently in defendant's possession. He claimed that the vehicle was valued at $3,940 and sought an exemption for half of that value. Given this, it appears that plaintiff likely did not consider the vehicle to be destroyed, but instead he considered it to be in defendant's lawful possession. I am of the opinion that there is a genuine issue of material fact as to whether there was an unauthorized, unlawful interference or dispossession of the personal property. Therefore, I conclude that the trial court erred in granting plaintiff's motion for summary judgment on plaintiff's trespass to personal property claim.

In sum, because I believe the trial court erred in granting summary judgment in favor of plaintiff with respect to his conversion and trespass to personal property claims, I respectfully dissent from the majority's decision to affirm the trial court's judgment in plaintiff's favor. I would reverse the trial court's order and remand for further proceedings. I concur in all other aspects of the majority's opinion.

TSG FINISHING, LLC, PLAINTIFF
v.
KEITH BOLLINGER, DEFENDANT

NO. COA14-623

Filed 31 December 2014

1. Appeal and Error—interlocutory orders—denial of preliminary injunction—violation of non-compete agreement—misappropriation of trade secrets

The merits of an appeal from the denial of a preliminary injunction were reached, even though the order was interlocutory, in an action involving a non-compete agreement and the potential misappropriation of trade secrets. Plaintiff was able to show that a substantial right could be lost without immediate appellate review.

2. Trade Secrets—misappropriation—likelihood of success on the merits

The trial court erred by concluding that plaintiff had not demonstrated a likelihood of success on the merits of plaintiff's claim for trade secret misappropriation. Although general processes are too vague to receive protection, plaintiff sought to protect specific knowledge of each discrete step in the process and presented sufficient evidence on its specific trade secrets to warrant protection. Additionally, plaintiff presented prima facie evidence of misappropriation.

3. Employer and Employee—non-compete agreement—preliminary injunction—likelihood of success on merits

The trial court erred when ruling on a motion for a preliminary injunction by concluding that plaintiff failed to present a likelihood of success on the merits of its claim for breach of a non-compete agreement governed by Pennsylvania law. The non-compete was

validly assigned to plaintiff through a bankruptcy reorganization, the agreement was reasonable to protect TSG's legitimate business interests, and the equities weighed in favor of enforcement under the facts.

4. Injunctions—preliminary—irreparable loss—likelihood demonstrated

In an action for violation of a non-compete agreement and misappropriation of trade secrets, plaintiff demonstrated that it was likely to suffer irreparable loss unless a preliminary injunction was issued where plaintiff was at risk of losing its long-held customers and whatever competitive advantage it may have had in the textile finishing industry.

Appeal by plaintiff from order entered 20 February 2014 by Judge Calvin E. Murphy in Catawba County Superior Court. Heard in the Court of Appeals 3 November 2014.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiff-appellant.

Patrick, Harper & Dixon, LLP, by Michael P. Thomas, for defendant-appellee.

HUNTER, Robert C., Judge.

TSG Finishing, LLC ("plaintiff" or "TSG") appeals from an order denying its motion for a preliminary injunction aimed at preventing its former employee, Keith Bollinger ("defendant"), from breaching a non-competition and confidentiality agreement ("the non-compete agreement") and misappropriating TSG's trade secrets. On appeal, plaintiff contends that the trial court erred by denying its motion for a preliminary injunction because: (1) it has demonstrated a likelihood of success on the merits of its claims for breach of contract and misappropriation of trade secrets; and (2) it would suffer irreparable harm without issuance of the preliminary injunction.

After careful review, we reverse the trial court's order and remand with instructions to issue the preliminary injunction.

Background

TSG is in the business of fabric finishing. It has three plants in Catawba County, North Carolina. Rather than manufacturing

fabrics, TSG applies chemical coatings to achieve whichever result is desired by the customer, such as coloring, stiffening, deodorizing, and abrasion resistance.

Defendant began working in the field of fabric finishing for Geltman Corporation after graduating from high school in 1982. He has no formal education beyond high school. TSG, Incorporated ("TSG, Inc.")[1] acquired Geltman in 1992, and defendant stayed on to work for TSG, Inc. By the late 1990's, defendant was promoted to Quality Control Manager.

Defendant was responsible for assessing a customer's finishing needs and developing a finishing protocol for that customer. Defendant also helped in the creation of a "style data card" for each customer. The style data cards contained information on each step of the finishing process, such as: (1) the chemical finish compound, 70 percent of which was proprietary to TSG; (2) "cup weight" density; (3) needle punch technique; (4) type of machine needed for the needle punch technique; (5) speed of needle punch; (6) types of needles used; (7) needle punch depths; (8) method of compound application; (9) speed of compound application; (10) blade size; (11) fabric tension; and (12) temperature and type of drying required.

Defendant testified during deposition that some of these factors required trial and error to achieve a customer's desired result. For example, on one of the style data cards used to explain defendant's work-related duties during the deposition, defendant had marked a number of changes to the various factors listed and signed his initials to the changes. He testified that he changed the data entered by the customer because subsequent testing revealed different and more efficient methods to achieve the result. He also testified that the results of the trials he conducted and the knowledge he gained regarding how to achieve these results were not known outside of TSG. Michael Goldman, the Director of Operations at TSG, filed an affidavit in which he asserted that some of the customer projects that defendant worked on required over a year's worth of trial and error to achieve a customer's desired result.

TSG expends great effort to keep its customer and finishing information confidential. Specifically, it uses a code system in its communications with customers that allows the customer to identify the type of finish it wants, but does not reveal the chemicals or processes involved in creating that finish. TSG has confidentiality agreements in place with many of its customers. Third parties must sign confidentiality agreements and

1. As will be discussed below, plaintiff is a wholly owned subsidiary of TSG, Inc.

receive a temporary identification badge when visiting TSG's facilities. TSG's computers are password protected, with additional passwords being required to access the company's production information.

In 2007, TSG, Inc. and defendant entered into a non-disclosure and non-compete agreement. In exchange for an annual increase in compensation of $1,300.00 and a $3,500.00 signing bonus, defendant agreed not to disclose TSG, Inc.'s confidential or proprietary trade secrets and further assented to employment restrictions after his tenure at the company ended.

TSG, Inc. filed for bankruptcy in 2009. By a plan approved by the United States Bankruptcy Court on 1 May 2011, TSG, Inc. transferred its interests to plaintiff, a wholly owned operating subsidy of TSG, Inc., which remained in operation. According to defendant, every aspect of his day-to-day job remained the same after bankruptcy reorganization.

In July 2013, defendant and a direct competitor of TSG, American Custom Finishing, LLC ("ACF"), began negotiations regarding defendant's potential to leave TSG and work for ACF. According to TSG, defendant resigned from his position on 21 November 2013 and announced that he was leaving to become plant manager for ACF at a plant five miles away from TSG. Defendant claims that he gave TSG two weeks' notice on 21 November 2013 but was terminated immediately and escorted off of the premises. Defendant began working for ACF the following Monday, on 25 November 2013. During his deposition, defendant testified that TSG and ACF shared certain customers, and that defendant is responsible for performing similar customer evaluations for ACF as he did at TSG.

TSG filed suit against defendant on 16 January 2014, alleging claims for breach of contract, misappropriation of trade secrets, and unfair and deceptive practices. TSG also moved for a preliminary injunction to prevent defendant from breaching the non-compete and misappropriating TSG's trade secrets. A confidential hearing was held on plaintiff's motion, and by order entered 20 February 2014, the trial court denied the motion for preliminary injunction. Plaintiff filed timely notice of appeal.

Grounds for Appellate Review

[1] We must first address the interlocutory nature of plaintiff's appeal. Orders granting or denying preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction deprives

the appellant of a substantial right which he would lose absent review prior to final determination." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004) (citations and internal quotation marks omitted).

> [W]here time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, [where a] case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). Citing the rule in *A.E.P. Indus., Inc.*, this Court has held that "the same reasoning applies to agreements between an employer and employee regarding protection of the employer's alleged trade secrets." *Horner Intern. Co. v. McKoy*, __ N.C. App. __, __, 754 S.E.2d 852, 855 (2014). Accordingly, because both a non-compete and the potential misappropriation of trade secrets are implicated by this case, we conclude that plaintiff has succeeded in demonstrating how a substantial right may be lost without immediate appellate review; thus, we will reach the merits of the appeal.

Discussion

I. Misappropriation of Trade Secrets

[2] Plaintiff first argues that the trial court erred by concluding that it has not demonstrated a likelihood of success on the merits of its claim for trade secret misappropriation. After careful review, we agree.

> As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P. Indus., Inc., 308 N.C. at 401, 302 S.E.2d at 759-60 (citations and internal quotation marks omitted). The standard of review from a denial

of a preliminary injunction is "essentially *de novo*," *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362, wherein this Court is not bound by the factual findings of the trial court, but may review and weigh the evidence and find facts for itself, *A.E.P. Indus., Inc.*, 308 N.C. at 402, 302 S.E.2d at 760. "Nevertheless[,] a trial court's ruling on a motion for preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *VisionAIR, Inc.*, 167 N.C. App. at 507, 606 S.E.2d at 362.

The Trade Secrets Protection Act ("TSPA") allows for a private cause of action where a plaintiff can prove the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. §§ 66-152(1), -153 (2013).

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2013). To determine what information should be treated as a trade secret for the purposes of protection under the TSPA, the Court should consider the following factors:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;
>
> (3) the extent of measures taken to guard secrecy of the information;
>
> (4) the value of the information to business and its competitors;

> (5) the amount of effort or money expended in developing the information; and
>
> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003).

"[A]ctual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation[.]" N.C. Gen. Stat. § 66-154(a) (2013).

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and
>
> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen. Stat. § 66-155 (2013).

Here, the trial court determined that plaintiff failed to demonstrate likelihood of success on the merits of its misappropriation of trade secrets claim for the following reasons: (1) plaintiff asserted that its finishing process "as a whole" was the trade secret for which it sought protection, and under the holding of *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003), general processes are too vague to receive TSPA protection; and (2) defendant's familiarity with customer preferences was "more akin to general knowledge and skill acquired on the job than any trade secret maintained by [p]laintiff." For the following reasons, we disagree with the trial court's conclusions.

First, contrary to the trial court's assessment of the preliminary injunction hearing, plaintiff did not "continually assert" that it was the "combination of [the] components," or the "process as a whole," for which it sought protection. Although TSG's Chief Executive Officer Jack Rosenstein ("Rosenstein") did say that the entire equation of processes was a trade secret in and of itself, he also testified that the particular steps in the process were also trade secrets. As an example, Rosenstein highlighted the needle punch technique on a style data card that defendant had worked on during his time at TSG. The customer initially requested that the fabric be put through the needle punch machine one

time at a specific setting. Through trial and error, defendant discovered that the customer's desired result could not be accomplished by running the needle punch machine one time at this setting, so he changed the process after experimenting with varying settings. Rosenstein testified the needle punch research for this client, in addition to the similar types of experimentation done to various processes throughout the finish equation, were trade secrets. Specifically, he testified as follows:

> [ROSENSTEIN]: That's all part of the trade secrets. That's all part of what [defendant], in his own mind when he's looking at a new fabric, needs to determine – which Latex should be used, what density needs to be used, whether it needs to be needle punched or not and then within that which – which needle punch, what depth of penetration – exactly what the parameters are. Then he needs to determine what range it needs to go on, what speed needs to be run, what the finish is. . . .
>
> Q: And so each one of those variables impacts the other variables in the equation?
>
> [ROSENSTEIN]: Yes.

Therefore, it was not just the process as a whole, but the specific knowledge defendant gained as to each discrete step in the process, that TSG sought to protect.

Based on *Analog Devices, Inc.*, the trial court concluded that plaintiff had failed to "put forward enough facts to support trade secret protection over the process as a whole or any particular component such that the [trial court] would be justified in granting the injunction sought." However, the *Analog Devices, Inc.* Court upheld the denial of a preliminary injunction in part because the differences between the defendant's former and new employers "render[ed] the alleged trade secrets largely non-transferable." *Analog Devices, Inc.*, 157 N.C. App. at 467, 579 S.E.2d at 453. Furthermore, the Court determined that the plaintiff did not carry its burden of producing evidence specifically identifying the trade secrets it sought to protect. *Id.* at 469, 579 S.E.2d at 454. The evidence before the Court showed that some of the plaintiff's production techniques were "easily and readily reverse engineered," while others were "either generally known in the industry, are process dependent so as to preclude misappropriation, or are readily ascertainable by reverse engineering." *Id.* at 470, 579 S.E.2d at 454. Finally, regarding the processes used by the plaintiff, the Court found that there was substantial differences between the products of the two companies that would "require

new experimentation and development of new ways to effectively identify efforts that will lead to successful development." *Id.* Thus, the Court affirmed the trial court's denial of the preliminary injunction. *Id.* at 472, 579 S.E.2d at 455.

The facts of this case are readily distinguishable from *Analog Devices, Inc.*, and they demonstrate that TSG would likely prevail on the merits of its claim for misappropriation of trade secrets. Using the factors enunciated by *Area Landscaping, L.L.C.*, 160 N.C. App. at 525, 586 S.E.2d at 511, TSG presented sufficient evidence on its specific trade secrets to warrant protection. First, Rosenstein testified that the company spends $500,000.00 per year on research and development in order to create unique finishes and applications for his customers. Defendant testified that the results of his experimentation at TSG regarding specific process refinements were not known outside of TSG. Rosenstein also testified that defendant's work was not something that anyone else in the industry would know without years of trial and error by experienced technicians. Security measures were in place such that only top-level employees were familiar with the proprietary information defendant was in charge of developing. The trial court acknowledged in its order that TSG "maintains significant security measures over its finishing process." Indeed, TSG made its employees, customers, and facility visitors sign confidentiality forms to protect this information. Additionally, Rosenstein testified that defendant's disclosure of the trade secrets would give ACF the opportunity to save "untold amounts of hours, days, weeks, and months to come up with these finishes and these applications." Rosenstein testified that defendant could help ACF achieve their customers' desired results, which they sometimes shared with TSG, without spending the money on research and development that TSG invested. Defendant admitted as much in his deposition when he testified that he performs many of the same duties for ACF for some of the same customers that he formerly served at TSG. Therefore, unlike in *Analog Devices, Inc.*, there was significant evidence showing that TSG's trade secrets were transferrable to ACF. Over the past two decades, TSG invested millions of dollars to develop and protect the information defendant compiled through his years of employment. The director of operations at TSG testified in deposition that defendant would sometimes work for more than a year on a process in order to achieve a desired result. There is no indication in the record that these process are able to be "reverse engineered" like those in *Analog Devices, Inc.*, and it is undisputed that they are not generally known throughout the industry.

In sum, each of the factors identified by the *Area Landscaping, L.L.C.* Court weigh in plaintiff's favor. Plaintiff specifically identified the

production factors for which it claims trade secret protection. Defendant acknowledged during his deposition that he performed research and development for these factors during his time at TSG and was responsible for keeping customer- and fabric-specific proprietary information regarding these processes on the style data cards. Therefore, we conclude that plaintiff has carried its burden of presenting evidence sufficient to identify the specific trade secrets protected by the TSPA.

Additionally, we hold that plaintiff presented *prima facie* evidence of misappropriation of its trade secrets. "Direct evidence . . . is not necessary to establish a claim for misappropriation of trade secrets; rather, such a claim may be proven through circumstantial evidence." *Medical Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658, 670 S.E.2d 321, 329 (2009). Defendant testified that he is being asked to perform similar duties for ACF that he did at TSG, including evaluating customer needs and organizing production processes. Defendant acknowledged that TSG and ACF share customers and that he is currently working with multiple customers for ACF that he served at TSG. Specifically, he admitted that he had done independent research and experimentation for TSG on the needle punch, finish, and heating processes for one specific customer that he now serves at ACF, and that he talks about the various components of the TSG style data cards with ACF management personnel. This is precisely the type of threatened misappropriation, if not actual misappropriation, that the TSPA aims to prevent through issuance of a preliminary injunction. *See* N.C. Gen. Stat. § 66-154(a) (2013) ("[A]ctual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ."); *see also Horner Intern. Co.*, __ N.C. App. at __, 754 S.E.2d at 859 ("Courts have upheld grants of a preliminary injunction where plaintiffs have presented some evidence that former employees have or necessarily will use trade secrets.").

Based on the foregoing, we conclude that plaintiff demonstrated a likelihood of success on the merits of his claim for trade secret misappropriation.

II. Breach of Contract

[3] Plaintiff next argues that the trial court erred by concluding that it failed to present a likelihood of success on the merits of its claim for breach of the non-compete. We agree.

Due to a choice of law provision in the agreement, Pennsylvania law governs enforcement of the non-compete. "[R]estrictive covenants are

not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living." *Hess v. Gebhard & Co. Inc.*, 808 A.2d 912, 917 (Pa. 2002). However, "restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent." *Id.* Thus, in assessing whether to enforce a non-compete agreement, Pennsylvania law requires the court to balance "the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balance[e] the result against the interest of the public." *Id.* at 920.

Here, the trial court rejected plaintiff's argument that the non-compete was enforceable for three reasons: (1) the agreement does not contain an explicit "assignability" clause that would allow defendant to be bound to the contract after bankruptcy reorganization, wherein all of the company's assets and contracts were transferred from TSG, Inc. to its subsidiaries; (2) even if there were an assignability clause, there is no indication in the record that the non-compete was actually assigned from TSG, Inc. to plaintiff; and (3) even if the court concluded that there was an effective assignment, the balancing of the equities would require the trial court to find the non-compete unenforceable.

First, defendant relies on *Hess* for the proposition that an explicit assignability clause was necessary for plaintiff to enforce the non-compete. In *Hess*, the Pennsylvania Supreme Court determined that employment contracts are "personal to the performance of both the employer and the employee." *Hess*, 808 A.2d at 922. Thus, if an employer with a valid non-compete in an employment contract is later acquired by a separate entity, it does not necessarily follow that "the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking." *Id.* Thus, the *Hess* Court held that "a restrictive covenant not to compete, contained in an employment agreement, is not assignable to the purchasing business entity, in the absence of a specific assignability provision, where the covenant is included in a sale of assets." *Id.*

The situation in this case is not one where plaintiff was a "stranger to the original undertaking." Unlike the sale of assets between two companies at arms' length, like the transaction that took place in *Hess*, the assignment in this case took place in the context of a bankruptcy reorganization, where the same company policies and management were retained. Plaintiff is a wholly owned subsidiary of TSG, Inc., with whom

defendant entered into the non-compete. As Rosenstein testified at the hearing, "[i]t's not a new entity. . . . it's basically the same company it was." According to defendant, every aspect of his job remained unchanged after the assignment. Therefore, the facts here are more analogous to those cases where Pennsylvania courts have declined to make assignability provisions a requirement, such as with a stock sale or merger, because the contract rights are not given to a completely new entity. *See J.C. Ehrlich Co., Inc. v. Martin*, 979 A.2d 862, 865-66 (Pa. 2009) (holding that where an employee's obligations and duties did not change in any material way after a stock purchase, a non-compete agreement was enforceable by the company with whom the agreement was made without an explicit assignability clause). Accordingly, we reject the trial court's conclusion that the non-compete is unenforceable because it did not contain a specific assignability provision.

Second, we find that the trial court erred by concluding that there is insufficient evidence in the record of an assignment between TSG, Inc. and plaintiff. The Bankruptcy Court order makes implicit mention of plaintiff as an "operating subsidiary" and of the assignability of the non-compete as an "executory contract." Specifically, the order contains the following:

> As of the Effective Date, all Executory Contracts that are not designated to be rejected by the Debtor in the Plan Supplement shall be deemed assumed. Any assumed Executory Contract to which the Debtor is a party shall be, as of the Effective Date, deemed assumed by the Reorganized Debtor and assigned to the TSG Real Estate Subsidiary or the TSG Operating Subsidiary, as the case may be. Entry of this Order shall constitute, pursuant to Section 365 of the Bankruptcy Code, approval of the assumptions and assignments described herein as of the Effective Date. The Debtor shall not be required to obtain any third party consents to affect such assignment.

At the hearing, Rosenstein specifically testified that the non-compete between TSG, Inc. and defendant was assigned to plaintiff. We conclude that Rosenstein's testimony, in addition to the Bankruptcy Court's approval of the executory contract assignments in its order, was sufficient to find that the non-compete was assigned to plaintiff in the course of the bankruptcy reorganization.

Additionally, we believe that the restrictions imposed in the non-compete are reasonable. Under Pennsylvania law, the burden is on

the employee to show how a non-compete is unreasonable in order to prevent its enforcement. *John G. Bryant Co., Inc. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1169 (Pa. 1977). The non-compete provided that upon termination, defendant would be prevented from participating in the field of "textile finishing" for two years in the prohibited territory, which was defined, in part, as all of North America. Specifically, the non-compete prevents defendant from:

> [E]ngaging, as an employee or contractor, in the performance of Textile Finishing, engaging in the manufacture of Textile Finishing machinery or equipment, including but not limited to a jobber, reseller, or dealers of used textile machinery or equipment or engaging in sales, marketing or managerial services for any individual or entity that competes with TSG directly or indirectly within the Prohibited Territory.

In contrast to unenforceable non-competes restricting "any work" competitive to the employer, *Zimmerman v. Unemployment Compensation Bd. Of Review*, 836 A.2d 1074, 1081 (2003), the non-compete here permissibly restricts defendant from engaging in the specific industrial practices that could harm the legitimate business interests TSG seeks to protect.

Furthermore, defendant has failed to carry his burden of demonstrating that the time and geographic restrictions are unreasonable and render the non-compete unenforceable. Pennsylvania courts have consistently enforced non-compete agreements restricting employment for two or more years. *See John G. Bryant Co., Inc.*, 369 A.2d at 1170 (holding that a three-year restriction was reasonably necessary for the protection of the employers to strengthen customer contact after a principal sales representative stopped working for the employer). Additionally, Pennsylvania courts have established a correlation between reasonableness of a geographic restriction and the employer's verifiable market. *See Volunteer Firemen's Ins. Servs., Inc. v. CIGNA Prop. & Cas. Ins. Agency*, 693 A.2d 1330, 1338 (Pa. Super. 1997). Specifically, Pennsylvania federal courts have upheld covenants restricting competition nationwide or throughout the region of North America, where appropriate. *See Quaker Chem. Corp. v. Varga*, 509 F.Supp.2d 469, 476 (E.D.Pa. 2007). TSG presented evidence that it serves customers throughout at least 38 states, in addition to Canada and Mexico. Defendant claims that TSG failed to explain how the geographic restrictions are reasonable, and also argues that the cases TSG cites in support of the time restriction are inapposite. However, the burden is not on TSG to establish that the

restrictions in the non-compete are reasonable; rather, the burden rests with defendant to show that they are unreasonable and that the contract he signed is unenforceable. *See John G. Bryant Co., Inc.*, 369 A.2d at 1169. Defendant has failed to carry that burden here.

Finally, we turn to the trial court's determination that the equities weighed against enforcing the non-compete. "Fundamental . . . to any enforcement determination is the threshold assessment that there is a legitimate interest of the employer to be protected as a condition precedent to the validity of a covenant not to compete." *Hess*, 808 A.2d at 920. "Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills." *Id.* "[T]he issue of enforceability is one to be determined on a case-by-case basis," *Missett v. Hub Intern. Pennsylvania, LLC*, 6 A.3d 530, 539 (Pa. Super. 2010), wherein the Court is to consider all relevant facts and circumstances, *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 734 (Pa. Super. 1995) (also noting that "[a] restrictive covenant found to be reasonable in one case may be unreasonable in others").

Among the important factors that Pennsylvania courts consider in assessing the enforceability of a non-compete are: (1) the circumstance under which the employment relationship was terminated; (2) the employee's skills and capacity; (3) the length of time of the previous employment; (4) the type of consideration paid to the employee; (5) the effect of restraint on the employee's life; and (6) circumstantial economic conditions. *See Brobston*, 667 A.2d at 737.

> It bears noting that there is a significant factual distinction between the hardship imposed by the enforcement of a restrictive covenant on an employee who voluntarily leaves his employer and that imposed upon an employee who is terminated for failing to do his job. The salesman discharged for poor sales performance cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer. . . . [O]nly when the novice has developed a certain expertise, which could possibly injure the employer if unleashed competitively, will the employer begin to think in terms of a restrictive covenant[.]

Id. at 735-36 (citation and quotation marks omitted).

Based on the record before us, we believe that these notions weigh in favor of enforcement of the non-compete. Defendant worked at TSG for 27 years and became one of its most trusted and skilled managers. Throughout his tenure he developed valuable expertise in the field of textile finishing through trial-and-error and industrial experimentation that was highly guarded by TSG and not known throughout the industry. In exchange for his assent to the non-compete, defendant was offered an annual increase of $1,300.00 to his regular salary and a signing bonus of $3,500.00; defendant considered TSG's offer for at least two weeks before eventually agreeing to the non-compete and accepting this increase in compensation. Rather than being terminated for poor work, defendant was specifically recruited and voluntarily left TSG to work for a direct competitor at a plant five miles away without giving prior notice or asking for a raise from TSG. ACF did not require defendant to provide a resume or interview for the position; defendant was hired after meeting with an ACF representative one time. Given that defendant possessed advanced expertise in the field of textile finishing and abruptly and voluntarily left his position at TSG after 27 years of service to work for a direct competitor, we find that he poses a significant competitive threat to TSG's legitimate business interests should the non-compete be unenforceable.

Despite these factors, defendant argues, and the trial court agreed, that enforcement of the non-compete essentially renders him unemployable for two years because he has "no experience outside of textile finishing, rudimentary computer skills, and no college education." We are unpersuaded. Defendant argued in his brief that ACF hired him for "his management skills in dealing with employees, human resources issues, equipment dealers, customer complaints and suppliers, not for any trade secrets or other confidential information which he might know from his time at TSG[.]" Skill in management and human resources is desirable in many fields, not just textile finishing. Although the non-compete does restrict defendant from working as an employee for any company that competes with TSG "in sales, marketing or managerial services," TSG's competitors only comprise a small subset of companies and industries where such skills are valuable. Defendant admitted that before leaving TSG for ACF, he did not look for other employment. TSG presented evidence of multiple job openings within 25 miles of Hickory, N.C., that were not competitive to TSG and listed experience in plant management and manufacturing as desirable traits. Therefore, we disagree with the trial court's conclusion that enforcement of the non-compete would effectively prevent defendant from attaining employment anywhere in North America.

We also find TSG's policy arguments in this case persuasive. TSG employs around 160 people. According to Rosenstein, the customers that defendant now serves at ACF could account for up to forty percent of TSG's business, and some of the customer relationships that TSG has had for many years are now "strained" due to defendant's transition from TSG to ACF. In weighing the equities, we are permitted to consider the effect that breach of a non-compete may have on an employer's protectable business interests. *Hess*, 808 A.2d at 920. Among these, we consider the potential harm done to other TSG employees should defendant be permitted to retain employment at ACF in contravention of the non-compete. The significant risk that defendant's actions pose to TSG's competitive advantage indirectly threaten the job security of many others who work for TSG. Thus, in balance, we find that the equities favor enforcement of the non-compete.

In sum, we hold that the non-compete was validly assigned to plaintiff through bankruptcy reorganization, the non-compete itself is reasonable to protect TSG's legitimate business interests, and the equities weigh in favor of enforcement under these facts. Therefore, because it is undisputed that defendant is in breach of the non-compete by working for ACF, a direct competitor of TSG, we hold that TSG has demonstrated a likelihood of success on the merits of its claim for breach of contract.

III. Irreparable Loss

[4] Having set out that TSG has demonstrated a likelihood of success on the merits of its claims, we must now turn to whether it has shown irreparable loss should the injunction fail to issue. *See A.E.P. Indus., Inc.*, 308 N.C. at 401, 302 S.E.2d at 759-60. This Court has recognized that "[i]ntimate knowledge of the business operations or personal association with customers provides an opportunity to [a] . . . former employee . . . to injure the business of the covenantee." *QSP, Inc. v. Hair*, 152 N.C. App. 174, 178, 566 S.E.2d 851, 854 (2002) (internal quotation marks omitted). Both the *QSP, Inc.* and *A.E.P. Indus., Inc.* Courts have "emphasized that this potential harm warrants injunctive relief," *Id.* Specifically, in *QSP, Inc.*, the Court held that the plaintiff company was likely to sustain irreparable loss unless a preliminary injunction was issued where the evidence showed that: (1) the defendant violated a non-compete agreement by soliciting customers for a rival company, (2) the defendant misappropriated the plaintiff company's confidential information for the rival company, and (3) the plaintiff would continue to suffer injury should the defendant not be restrained from further violating a confidentiality and non-compete agreement. *QSP, Inc.*, 152 N.C. App. at 179, 566 S.E.2d at 854. Here, the evidence shows that: (1) defendant

has the opportunity to misappropriate the confidential information and trade secrets that he developed for TSG; (2) ACF could benefit by having defendant's knowledge of TSG's trade secrets because it could produce similar products without expending resources on research and development; (3) defendant performs similar work at ACF for some of the same customers that he served at TSG; (4) Rosenstein testified that those customers could amount to as much as forty percent of TSG's business; (5) TSG had relationships with these customers for decades; and (6) TSG's relationships with these customers became "strained" once defendant left TSG to work for ACF. Like in *QSP, Inc.*, it is clear here that TSG has demonstrated that it is likely to suffer irreparable loss unless the injunction is issued, because TSG is at risk of losing its long-held customers and whatever competitive advantage it may have had in the textile finishing industry. *See also John G. Bryant Co., Inc.*, 369 A.2d at 1167 ("[A non-compete] is designed to prevent a disturbance in the relationship that has been established between [the employer] and their accounts through prior dealings. It is the possible consequences of this unwarranted interference with customer relationships that is unascertainable and not capable of being fully compensated by money damages.").

Conclusion

For the foregoing reasons, we conclude that the trial court erred by denying plaintiff's motion to issue a preliminary injunction. Plaintiff has demonstrated a likelihood of success on the merits for its claims of trade secret misappropriation and breach of contract and has shown irreparable loss absent the issuance of the preliminary injunction. Accordingly, we reverse the trial court's order and remand with instructions to issue the preliminary injunction.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge BELL concur.

WRIGHT v. WAKEMED

[238 N.C. App. 603 (2014)]

BETTY D. WRIGHT, PLAINTIFF
v.
WAKEMED ALSO KNOWN AS WAKE COUNTY HOSPITAL SYSTEM, INC., GURVINDER SINGH DEOL, M.D., AND JULIAN SMITH, PA-C, DEFENDANTS

No. COA14-695

Filed 31 December 2014

Medical Malpractice—motion to dismiss—sufficiency of evidence—res ipsa loquitur

The trial court did not err in a medical malpractice case by granting defendants' motion to dismiss based on plaintiff's failure to properly allege that she was entitled to relief on res ipsa loquitur grounds. Plaintiff explicitly alleged that she was injured in a specific manner by a specific act of negligence, a fact that bars her from any attempt to rely on the doctrine of res ipsa loquitur. Further, expert testimony would be necessary to establish the cause of the injury that plaintiff claimed to have suffered.

Appeal by plaintiff from order entered 12 March 2014 by Judge Beecher R. Gray in Vance County Superior Court. Heard in the Court of Appeals 19 November 2014.

Rogers and Rogers Lawyers, by Michael F. Rogers, for Plaintiff.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb, Crystal B. Mezzullo, and Andrew C. Buckner, for Defendants.

ERVIN, Judge.

Plaintiff Betty D. Wright appeals from an order granting Defendants' motion to dismiss Plaintiff's complaint. On appeal, Plaintiff contends that the trial court erred by allowing Defendants' dismissal motion on the grounds that Plaintiff's complaint was not certified as required by N.C. Gen. Stat. § 1A-1, Rule 9(j) despite the fact that Plaintiff had attempted to assert a medical malpractice claim against Defendants. After careful consideration of Plaintiff's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 21 September 2010, Plaintiff was admitted to WakeMed hospital for spinal surgery. Following the procedure, Plaintiff was discharged by WakeMed's Surgical and Recovery ACUTE unit and transferred to the WakeMed REHAB unit on 28 September 2010.

At the time of the transfer, Plaintiff was provided with a document entitled "WakeMed REHAB Admission Orders; Admission Medication Orders," which contained a list of medications that had been prescribed for Plaintiff, including prescription and general medications that had not been included in a previous medication list prepared by WakeMed ACUTE for Plaintiff. More specifically, Defendants negligently directed that Xanax, Geodon and Lithium be included in the "Admission Medication Orders," resulting in the ingestion of these medications and an episode of somnolence and lethargy from which Plaintiff suffered for several days.

On 8 August 2013, Plaintiff filed a complaint seeking the recovery of damages for personal injury from Defendants in which Plaintiff alleged that she was entitled to prevail on a *res ipsa loquitur* theory. On 16 October 2013, Defendants filed an answer in which they denied the material allegations set out in Plaintiff's complaint and sought to have Plaintiff's complaint dismissed on a number of grounds, including a failure to state a claim upon which relief could be granted. After a hearing held on 3 March 2014 for the purpose of considering the issues raised by Defendants' dismissal motion, the trial court entered an order dismissing Plaintiff's complaint. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

In her sole challenge to the trial court's order, Plaintiff contends that the trial court erred by granting Defendant's dismissal motion. More specifically, Plaintiff contends that the trial court erred by failing to determine that she had properly alleged that she was entitled to relief on *res ipsa loquitur* grounds.[1] We do not find Plaintiff's argument persuasive.

A. Standard of Review

When ruling on a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), the trial court is required to determine "whether, as a

1. Although Plaintiff seems to suggest that she stated a claim for relief on "general negligence" as well as *res ipsa loquitur* grounds, she has not advanced any "general negligence" argument in her brief. As a result, our decision in this case will focus solely on whether Plaintiff's complaint stated a valid *res ipsa loquitur* claim.

matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In the course of analyzing the sufficiency of the plaintiff's pleading, the complaint must be liberally construed and "should not be dismissed for failure to state a claim unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987). "On appeal of a [] motion to dismiss [lodged pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)], this Court conducts 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." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (internal quotation marks and citation omitted), *disc. review denied and appeal dismissed*, 361 N.C. 425, 647 S.E.2d 98, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

B. Applicable Legal Principles

N.C. Gen. Stat. § 1A-1, Rule 9(j) provides, in pertinent part, that:

> Any complaint alleging medical malpractice by a health care provider pursuant to [N.C. Gen. Stat. §] 90-21.11(2) a. in failing to comply with the applicable standard of care under [N.C. Gen. Stat. §] 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under [N.C. Gen. Stat. § 8C-1,] Rule 702 [] and who is willing to testify that the medical care did not comply with the applicable standard of care; [or]
>
> . . . .
>
> (3) The pleading alleges facts establishing negligence under the existing common law doctrine of res ipsa loquitur.

As a result, given that Plaintiff's complaint lacks a certification in the form required by N.C. Gen. Stat. § 1A-1, Rule 9(j), the trial court correctly dismissed that pleading unless Plaintiff successfully asserted a claim based on the doctrine of *res ipsa loquitur*.

"*Res ipsa loquitur* (the thing speaks for itself) simply means that the facts of the occurrence itself warrant an inference of defendant's negligence, i.e., that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking." *Sharp v. Wyse*, 317 N.C. 694, 697, 346 S.E.2d 485, 487 (1986) (quotation marks, citation, and emphasis omitted). "The doctrine of *res ipsa loquitur* applies when (1) direct proof of the cause of an injury is not available, (2) the instrumentality involved in the accident is under the defendant's control, and (3) the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." *Alston v. Granville Health System*, __ N.C. App. __, __, 727 S.E.2d 877, 879 (internal quotation marks and citation omitted), *disc. review dismissed*, 366 N.C. 247, 731 S.E.2d 421 (2012). Thus, in order to successfully assert a claim based on the doctrine of *res ipsa loquitur*, a "plaintiff must [be] able to show – without the assistance of expert testimony – that the injury was of a type not typically occurring in the absence of some negligence by defendant." *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000) (emphasis omitted). As a result of the fact that the doctrine of *res ipsa loquitur* only applies in the absence of direct proof of the cause of the plaintiff's injury, a plaintiff is not entitled to rely on it in the event that there is direct evidence of the reason that the plaintiff sustained the injury for which he or she seeks relief. *Robinson v. Duke University Health Systems, Inc.*, __ N.C. App. __, __, 747 S.E.2d 321, 330 (2013), *disc. review denied*, __ N.C. __, 755 S.E.2d 618 (2014).

In order for the doctrine of *res ipsa loquitur* "to apply in a medical malpractice claim, a plaintiff must allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Smith v. Axelbank*, __ N.C. App. __, __, 730 S.E.2d 840, 843 (2012). "Our Courts have consistently found that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion." *Robinson*, __ N.C. App. at __, 747 S.E.2d at 329 (internal quotation marks and citation omitted). Nevertheless,

> where proper inferences may be drawn by ordinary men from approved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things, where proper care is exercised.

Mitchell v. Saunders, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941).

C. Validity of Trial Court's Ruling

In granting Defendants' dismissal motion, the trial court stated that:

> 6. Under North Carolina law, the doctrine *Res Ipsa Loquitur* is limited to situations in which the plaintiff can show--without the assistance of expert medical testimony --that the plaintiff's injury was a result of a negligent act by the defendant(s) and that the injury would not have occurred in the absence of negligence or dereliction of a relevant duty on the part of the defendant(s). *Res Ipsa Loquitur* is not appropriate when the question of injury is peculiarly in the province of expert opinion.
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> 7. The allegations in plaintiff's Complaint involve purported negligence in medication reconciliation and in the administration of certain medications which the Complaint alleges caused the plaintiff to become somnolent and lethargic. Purported negligence as to these issues cannot be inferred absent expert testimony and, as such, the doctrine of *res ipsa loquitur* does not apply under North Carolina law.

Plaintiff's contention that she has stated a claim for relief on the basis of the doctrine of *res ipsa loquitur* fails for multiple reasons.

In her complaint, Plaintiff has alleged that the injuries for which she seeks redress were sustained as the result of an explicitly delineated series of events. More specifically, Plaintiff has alleged that her injuries resulted from the ingestion of specific medications that she should not have received and that her ingestion of these medications resulted from the fact that medications that she had not been prescribed were included on the materials that accompanied her transfer from WakeMed ACUTE to WakedMed REHAB. In support of this assertion, Plaintiff produced a list of the medications that were originally prescribed for her and "Admission Medications Orders" signed by Dr. Deol showing that Xanax, Geodon, and Lithium had been added to the list of medications that she had originally been instructed to take at or about the time of her transfer. As a result, Plaintiff has explicitly alleged that she was injured in a specific manner by a specific act of negligence, a fact that bars her from any attempt to rely on the doctrine of *res ipsa loquitur*.

In seeking to persuade us to reach a different result, Plaintiff contends that she had not alleged the existence of direct proof concerning the manner in which her injuries occurred given that the drugs that she

claims had been erroneously administered to her had metabolized and had left her body by the time of her discharge, thereby depriving her of scientific evidence of their presence in her body. We do not believe that this fact has any bearing on our analysis given that the issue raised by Plaintiff's claim is not whether Plaintiff actually ingested the medications in question, but rather how Plaintiff came to have ingested the medications and what impact their ingestion had on her. As we have already noted, Plaintiff alleged that a specific error that occurred during the transfer process resulted in the administration of these medications to her. Thus, the absence of chemical evidence that Plaintiff ingested the medications upon which her claim rests does not suffice to establish that Plaintiff is entitled to rely on the doctrine of *res ipsa loquitur*.

In addition, we do not believe that Plaintiff is entitled to rely on the doctrine of *res ipsa loquitur* in this case given that expert testimony would be necessary to establish the cause of the injury that Plaintiff claims to have suffered. In *Axelbank*, the plaintiff alleged that she had been injured as the result of the fact that the defendant negligently prescribed a particular medication for her and asserted that the existence of negligence on the part of the defendant could be established without the benefit of expert testimony, so that the plaintiff was entitled to proceed on a *res ipsa loquitur* theory. *Axelbank*, __ N.C. App. at __, 730 S.E.2d at 843. In rejecting the plaintiff's argument, this Court concluded that "a lay person would not be able to determine that plaintiff's injury was caused by Seroquel or be able to determine that Dr. Axelbank was negligent in prescribing the medication to plaintiff without the benefit of expert witness testimony." *Id.* In this case, as in *Axelbank*, a jury would not be able to determine whether Plaintiff's injury resulted from the ingestion of Xanax, Geodon, and Lithium without having the benefit of expert witness testimony, since a lay juror would not necessarily know what these medications are, how they affect the human body, and how they might be expected to affect Plaintiff specifically.

In Plaintiff's view, *Axelbank* has no bearing on the proper resolution of this case since *Axelbank* involved a situation in which the defendant allegedly prescribed the wrong medication while this case involves a situation in which errors were made in transferring a list of medications from one document to another. According to Plaintiff, one need not be a medical expert to know that the medication list was erroneously transferred and that this error constituted negligence. In making this argument, however, Plaintiff appears to confuse the meaning of "negligence" as used in the legal context with the meaning of the same word as used in common parlance. Although the inaccurate copying of a

medication list might be understood as a negligent act, that fact, standing alone, does not suffice to establish a valid negligence-based claim for the recovery of damages, which also requires proof that the negligent act on which the plaintiff's claim rests resulted in the injury for which the plaintiff seeks redress. *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009). Assuming, without in any way deciding, that Plaintiff can establish a deviation from the applicable standard of care by showing the existence of the copying error upon which she relies, Plaintiff cannot demonstrate that the injuries of which she complains resulted from this specific negligent act in the absence of expert testimony.[2] Simply put, since "the average juror [is] unfit to determine whether [P]laintiff's [somnolence and lethargy] would rarely occur in the absence of" the ingestion of Xanax, Geodon, and Lithium, *Schaffner v. Cumberland County Hosp. System, Inc.*, 77 N.C. App. 689, 692, 336 S.E.2d 116, 118 (1985), *disc. reviews denied*, 316 N.C. 195, 341 S.E.2d 578-79 (1986), Plaintiff's attempt to distinguish our decision in *Axelbank* is not persuasive. As a result, since Plaintiff has not established that she successfully pled a claim against Defendants on the basis of the doctrine of *res ipsa loquitur*, the trial court correctly dismissed her complaint.

III. Conclusion

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

AFFIRMED.

Judges ELMORE and DAVIS concur.

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2. In addition, we note that, even if a lay person could be expected to understand the effect that the specific medications that Plaintiff claims to have negligently ingested would have on the human body, a successful plaintiff would still be required to obtain expert proof that her injuries resulted from the ingestion of these specific medications given that the "Admission Medication Orders" indicate that over a dozen medications had been prescribed for Plaintiff and that expert medical testimony would be necessary to explain the interactions among this collection of medications and whether the injuries that Plaintiff claims to have sustained could have resulted from the ingestion of one or more of these other medications.

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