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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 4, 2016

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

COURT OF APPEALS

CASES REPORTED

FILED 6 JANUARY 2015 AND 20 JANUARY 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Appeal and Error—fraud—constructive—not pled in complaint—not considered on appeal—Claims of unfair and deceptive trade practice and constructive fraud based on defendant allegedly "enhancing" plaintiff's financial data when obtaining automobile financing were not pled in the complaint and were not considered on appeal. **Hester v. Hubert Vester Ford, Inc, 22.**

Appeal and Error—interlocutory orders—sufficiency of service of process—Defendant's appeal from the trial court's interlocutory order denying his Rule 12 motion to dismiss based on insufficient process, insufficient service of process, and lack of personal jurisdiction was dismissed. Although defendant's motion was couched in terms of lack of jurisdiction under Rule 12(b)(2), it actually raised a question of sufficiency of service or process. Motions challenging only the sufficiency of service and process and not challenging the existence of sufficient minimum contacts with the State are not immediately appealable under N.C.G.S. § 1-277(b). **Crite v. Bussey, 19.**

SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA COURT OF APPEALS

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

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

September 5 and 19

October 3, 17, and 31

November 14 and 28

December 12

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CLARENCE EARL BUTLER, PLAINTIFF
v.
VIKKI ELAINE BUTLER (NOW REID), DEFENDANT

No. COA14-521

Filed 20 January 2015

Unjust Enrichment—federal retirement pension benefits—qualified domestic relations order—incorporated divorce settlement

The trial court erred by awarding $20,492.64 and attorney fees to defendant ex-wife based on the court's finding that plaintiff ex-husband was unjustly enriched when he received the entirety of 24 months of federal retirement pension benefits that defendant was entitled to share in based on the qualified domestic relations order incorporated into the parties' divorce settlement. Defendant's failure to receive her court-ordered portion of the benefits resulted solely from her own failure to comply with federal law and the terms of the order.

Appeal by Plaintiff from order entered 27 January 2014 by Judge Robert P. Trivette in Pasquotank County District Court. Heard in the Court of Appeals 6 October 2014.

Frank P. Hiner, IV, for Plaintiff.

The Twiford Law Firm, P.C., by Edward A. O'Neal, for Defendant.

STEPHENS, Judge.

Plaintiff Clarence Earl Butler appeals from the trial court's order awarding $20,492.64 and attorneys' fees to his ex-wife Defendant Vikki Elaine Butler (now Reid) based on the court's finding that Plaintiff was unjustly enriched when he received the entirety of 24 months of federal retirement pension benefits that Defendant was entitled to share in based on the qualified domestic relations order ("QDRO") incorporated into the parties' divorce settlement. Because we agree with Plaintiff's argument that Defendant's failure to receive her court-ordered portion of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the order, we hold that the trial court erred in its findings of fact and conclusion of law that Plaintiff was unjustly enriched. Accordingly, we reverse.

Facts and Procedural Background

Plaintiff and Defendant were married to each other on 21 April 1972. They separated on or about 4 March 1992, and on 12 May 1994, Plaintiff filed a complaint in Pasquotank County District Court for absolute divorce, accompanied by a Separation and Property Settlement Agreement ("Separation Agreement") drafted by Defendant's attorney and executed by the parties on 20 April 1994. At the time of the parties' separation, Plaintiff was employed as a Federal Civilian Employee with the Norfolk Naval Shipyard. Paragraph 15F of the Separation Agreement, entitled "Retirement Benefits," provided in relevant part that:

> The marital interest in [Plaintiff's] retirement benefits with the Norfolk Naval Shipyard shall be divided proportionately between the parties based on [Plaintiff's] length of service and the coincident turn of the parties' marriage. The parties agree to enter into a [QDRO] immediately following or simultaneously with the entry of a divorce judgment, which [QDRO] shall provide for a proportionate division (as defined in the preceding sentence) of [Plaintiff's] Norfolk Naval Shipyard retirement benefits payable when [Plaintiff] begins receiving such retirement benefits. The [QDRO] shall then be submitted to both the Norfolk Naval Shipyard and to the court of competent jurisdiction for approval and entry.

On 19 September 1994, a judgment of absolute divorce was entered incorporating the Agreement and, simultaneously, upon consent of all parties, the court entered a QDRO, referred to in the Agreement as an "Order for Division of Federal Civil Service Retirement Plan," drafted by Defendant's attorney. Paragraph 1 of the QDRO provided

the formula for computing Defendant's share of Plaintiff's benefits and Paragraph 4 directed the United States Office of Personnel Management ("OPM") to pay Defendant's share directly to her. Paragraph 7 of the QDRO provided that Defendant "shall be entitled to receive the benefits specified herein only in accordance with law and the terms of the Civil Service Retirement Spouse's Equity Act of 1984" and further stated that Defendant "shall comply with all terms and conditions of the Act . . . ." Paragraph 13 of the QDRO provided that a copy of the order "shall be served upon [OPM], Civil Service Retirement System, as the Administrator of the Retirement Plan herein, and the Administrator shall determine within a reasonable period of time whether this order can be administered by the Retirement System."

Plaintiff continued his employment in the federal civil service at the Norfolk Naval Shipyard until his retirement in October 2009. Prior to his retirement, in August 2009, Plaintiff—who had served as an active duty enlisted member of the United States Air Force from 11 July 1972 until his honorable discharge on 10 July 1978—paid $10,381.50 to the Defense Finance and Accounting Service in order to add his six years of active duty Air Force service to the computation of his overall federal civilian retirement benefits. By the time Plaintiff retired, Defendant had remarried, and Plaintiff did not inform her of his retirement. In fact, Plaintiff had been erroneously informed at a pre-retirement seminar he attended that because of her remarriage, Defendant would not be entitled to receive any share of his benefits. Beginning in November 2009 and continuing through October 2011, Plaintiff received his full retirement benefits from OPM, without any deductions for Defendant's share.

Sometime in 2011, Defendant discovered that Plaintiff had retired two years earlier. When she contacted OPM to inquire why she had not received any portion of the benefits she was entitled to share in under the QDRO, Defendant learned that the QDRO had never been filed with OPM. Defendant subsequently filed a copy of the QDRO with OPM and began receiving her share of Plaintiff's benefits in November 2011.

On 11 June 2012, Defendant sent Plaintiff a letter requesting that he reimburse her $25,616.63 in retirement back pay plus $200 in attorneys' fees. When Plaintiff refused, Defendant filed a Motion in the Cause in Pasquotank County District Court seeking (1) damages for Plaintiff's failure to advise her of his receipt of 24 months of unreduced retirement benefits and his refusal to repay her share; (2) specific performance of the Separation Agreement and a modification of the QDRO to proportionally increase her share of Plaintiff's benefits in light of his additional

six years of credited employment from his military service; (3) liquidated damages; and (4) attorneys' fees.

Defendant's motion was heard on 9 October 2013. Defendant testified that, prior to this litigation, she had not had any contact with Plaintiff since their divorce. Most of Defendant's testimony focused on her allegation that Plaintiff violated the Separation Agreement by failing to inform her that he had purchased additional years of credited employment. When Plaintiff testified, he admitted to having received 24 months of unreduced retirement benefits, but asserted that he had done nothing to breach the Separation Agreement, noting that it did not require him to do anything regarding Defendant's share of his retirement benefits, as both federal law and the terms of the QDRO explicitly conditioned Defendant's receipt of her share on her filing a copy of the QDRO with OPM. Defendant acknowledged that it was her and her attorney's responsibility to submit the QDRO to OPM and that until her discovery to the contrary in 2011, she had believed that her attorney had done so shortly after the 1994 divorce proceeding concluded. Toward the end of the hearing, the trial court asked Defendant's counsel:

> THE COURT: . . . [H]ow is it that it's [Plaintiff's] problem for the two year period —how come [Plaintiff] is responsible for that back payment based upon all this other information that indicates that it's clearly your client's duty to make sure that OPM is notified[?] I mean [Defendant] may have a gripe with [her lawyer from the divorce proceeding], she may have a gripe with OPM.
>
> [Defendant's counsel]: She doesn't have a remedy against OPM.
>
> THE COURT: Well, just because she doesn't have a remedy that doesn't mean it makes [Plaintiff] the party.
>
> [Defendant's counsel]: I'm not saying that he's a bad guy, Your Honor.
>
> THE COURT: I'm not saying he's a bad guy either, but why is he supposed to pay for [Defendant's lawyer from the divorce proceeding] or OPM's mistake?
>
> [Defendant's counsel]: He has received her money. That's exactly what it is. He received her money. It's not that he's paying back something that all of a sudden popped up. If he had—if he hadn't gotten her money I wouldn't ask—I'm not asking him to do anything but give back to her

what the Separation Agreement says she is entitled to receive. The Separation Agreement divides it and he got it and she's entitled to have it paid back to her.

THE COURT: Okay.

[Defendant's counsel]: And that is just as simple as I know how to make it, Your Honor.

THE COURT: I just find it hard to believe—again, you know, I don't think that I'm at all unique as a District Court Judge. You gentlemen are unique, and I appreciate that, but I just can't believe that these facts haven't come before a district court and there is not a case right on point. This just seems like something that would have happened again and again and again. And so it just—there's no case law on this?

[Defendant's counsel]: I didn't find any case law on it, on point.

THE COURT: All right. That's fine.

[Defendant's counsel]: But I'll tell you what I did find. I did find that interpretation of separation agreement divided these retirement benefits. The fact is that he received her benefits and he will be unjustly enriched by her share of those benefits. I can tell you and I'm going to—[Plaintiff's counsel] when he gets tired of it, he can stop me, but it is not unusual for OPM to lose these papers. I had a case exactly—

[Plaintiff's counsel]: I'm going to stop him.

[Defendant's counsel]: Well, I gave him the nod ahead of time. I didn't want him tearing out of that chair.

THE COURT: That's why I don't understand why there's not a case on it. I mean, that's my point. I can't believe this is the first time this has ever happened.

[Plaintiff's counsel]: Judge, I know [Defendant's counsel] has looked, and I have looked, and I haven't found anything.

On 27 January 2014 the trial court entered an order denying Defendant's claims for specific performance and liquidated damages but granting relief, as well as attorneys' fees, on her claim for her share of the

retirement benefits Plaintiff received between 2009 and 2011. In its findings of fact, the trial court found that

> Plaintiff has been unjustly enriched by receiving 24 months of unreduced federal retirement pension when Defendant received nothing—Defendant, during these 24 months, should have received 17.66% of Plaintiff's federal retirement pension. Thus . . . , Plaintiff should pay Defendant $20,492.64.

Accordingly, in its conclusions of law, the court held that

> Plaintiff has been unjustly enriched by erroneously receiving and retaining Defendant's share of the CSRS benefits in the amount of $20,492.64.

The trial court also awarded $4,000 in attorneys' fees to Defendant, based on a provision in the Separation Agreement entitling the prevailing party to recover suit costs in the event litigation proved necessary for its enforcement. Plaintiff gave written notice of appeal on 14 February 2014. In his appeal, Plaintiff contends that the trial court: (1) erred in its finding of fact and conclusion of law that Plaintiff was unjustly enriched; (2) erred by admitting improperly authenticated evidence; and (3) abused its discretion by awarding attorneys' fees to Defendant when both parties "prevailed" on some claims, and by failing to make findings regarding the reasonableness of that award.

Standard of Review

Under North Carolina law, it is well established that "[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and internal quotation marks omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). We review the trial court's conclusions of law *de novo*. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

Analysis

Plaintiff first contends that the trial court erred in its finding of fact and conclusion of law that he was unjustly enriched as a result of receiving two years of unreduced retirement benefits. Specifically, Plaintiff argues that unjust enrichment is not an appropriate remedy here, given that Defendant's failure to receive her court-ordered share of his federal

retirement benefits resulted solely from her own failure to comply with federal law and the terms of the QDRO. We agree.

Unjust enrichment is "a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556, *rehearing denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). The doctrine has been described as

> the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another.

Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (emphasis omitted). However, this Court has recognized that, "the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. There must be some added ingredients to invoke the unjust enrichment doctrine." *Id.* Indeed, as we recently explained, there are five elements to a *prima facie* claim for unjust enrichment:

> First, one party must confer a benefit upon the other party. . . . Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. . . . Third, the benefit must not be gratuitous. . . . Fourth, the benefit must be measurable. . . . Last, the defendant must have consciously accepted the benefit.

JPMorgan Chase Bank, Nat'l Ass'n v. Browning, __ N.C. App. __, __, 750 S.E.2d 555, 559 (2013) (citations, internal quotation marks, and emphasis omitted). Thus, in order to prevail on a claim of unjust enrichment, a plaintiff must show that "property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001). However, "[t]he recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982) (citation and internal quotation marks omitted). Moreover, we have long recognized

that "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 451, 312 S.E.2d 421, 426 (1984) (citation and internal quotation marks omitted). Indeed, "[t]hose who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, D.D.S., P.A. v. Kennedy*, 160 N.C. App. 1, 15, 584 S.E.2d 328, 337 (citation and internal quotation marks omitted), *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003).

In the present case, we note as an initial matter that the parties' appellate briefs offer wildly divergent accounts of the proceedings below. For example, Defendant argues that because Plaintiff did not make his argument against unjust enrichment before the trial court, he has failed to preserve the issue for our review as required by our Rules of Appellate Procedure and is now attempting to "swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). However, a careful review of the record reveals that, apart from Defendant's passing reference to the term toward the end of the hearing, the first time the words "unjust enrichment" were utilized in this litigation was in the trial court's order awarding it as a remedy. Defendant's Motion in the Cause did not specifically seek unjust enrichment as a remedy, nor did the parties meaningfully address its applicability during the 9 October 2013 hearing. We therefore conclude that Plaintiff had no opportunity to make this argument at trial, and because "the appealing party cannot be charged with impermissibly *swapping* horses when it never mounted one in the first place," *Rolan v. N.C. Dept. of Agric. & Consumer Servs.*, __ N.C. App. __, __, 756 S.E.2d 788, 795 (2014), we reject Defendant's argument to the contrary as baseless.

Defendant also contends in her brief that this case was actually pled and tried on a theory of breach of contract. However, the record before us flatly contradicts that claim. On the one hand, the first cause of action in Defendant's Motion in the Cause deals with Plaintiff's receipt of 24 months of unreduced retirement benefits, but it fails to allege the *prima facie* elements of a claim for breach of contract. If anything, Defendant's request for specific performance on her second cause of action makes clear that she was seeking equitable relief, rather than a legal remedy. On the other hand, during the 9 October 2013 hearing, Defendant did not allege that her failure to receive her share of the

retirement benefits resulted from Plaintiff's breach of any legal duty he owed to her. But perhaps the most significant reason that Defendant could not have prevailed below on a theory of breach of contract is that this is not a contract case. Our Supreme Court has long recognized that separation agreements lose their contractual nature and become orders of the court upon incorporation into a divorce judgment. *See*, *e.g.*, *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) ("These ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case."). As the proper remedy for violation of such an order is by an action for contempt, *see id.*, there simply is no basis for a breach of contract claim here. We therefore disregard as meritless Defendant's argument that, notwithstanding the plain meaning of the language used in the trial court's order awarding her the remedy of unjust enrichment, she prevailed below on a theory of breach of contract.

For his part, Plaintiff argues that the trial court erred in ordering unjust enrichment as a remedy because Defendant's failure to receive her court-ordered share of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the QDRO. In support of this argument, Plaintiff cites our recent decision in *Holmes v. Solon Automated Servs.*, __ N.C. App. __, 752 S.E.2d 179 (2013), which he contends establishes that unjust enrichment is an inappropriate remedy for a party who does not receive the benefit she hoped to under an agreement her counsel bargained for simply because of her own failure to meet the terms and conditions agreed upon.

In *Holmes*, we reviewed an opinion and award from the North Carolina Industrial Commission denying the plaintiff's estate's breach of contract claim to enforce the terms of a mediated settlement agreement. After suffering a compensable injury at work, the plaintiff reached a comprehensive settlement agreement with his employer, the terms of which included the funding of a Medicare Set-Aside Allocation ("MSA"). *Id.* at __, 752 S.E.2d at 180. The agreement provided that the MSA would be funded in part by $19,582.37 in seed money and in part by annual payments of $9,247.23 per year for eighteen years in annuity benefits for ongoing medical expenses, but its terms explicitly conditioned payment of these annuity benefits on the plaintiff's survival. *Id.* When the plaintiff died unexpectedly before the agreement was finalized, the employer refused to pay both the seed money and the annuity benefits to his estate. *Id.* at __, 752 S.E.2d at 181. After finding that the purpose of the MSA agreement, which was "to protect Medicare from bearing the

burden of future medical expenses arising from this workers' compensation case," had been frustrated by the plaintiff's failure to satisfy the implied condition of survival, *id.*, the Commission denied his estate's claim for payment of both the seed money and the annuity benefits. *Id.* at __, 752 S.E.2d at 182. The plaintiff's estate appealed to this Court, arguing that the defendants would be unjustly enriched if allowed to retain the MSA funds. We agreed with the plaintiff's estate's argument regarding the seed money and reversed the Commission's decision because, in contrast to the annuity benefits, the MSA agreement treated the seed money as a guaranteed benefit of a specific sum without any language conditioning payment on the plaintiff's survival. *Id.* at __, 752 S.E.2d at 185. However, based on the express terms of the MSA agreement, we rejected the estate's unjust enrichment claim regarding the annuity benefits. In affirming the Commission's decision denying payment of the annuity benefits, we reasoned that because the plaintiff "did not survive a single year, we conclude that [he] failed to meet an explicit condition precedent in the contract, survival." *Id.* at __, 752 S.E.2d at 184.

Here, Plaintiff contends that Defendant should be similarly barred from recovery under a theory of unjust enrichment because of her failure to satisfy an explicit condition precedent in the terms of the QDRO that was bargained for and drafted by her own attorney. Specifically, the QDRO expressly states that it is OPM, rather than Plaintiff, that is responsible for paying Defendant her share of Plaintiff's retirement benefits. The QDRO also provides that Defendant is only entitled to receive those benefits "in accordance with law" and that she must "comply with all terms and conditions of the [Civil Service Retirement Spouse's Equity] Act." The Act expressly authorizes payments of a federal employee's retirement benefits to a former spouse if a court so orders, but by its own terms it is only applicable "after the date of receipt [by OPM] of written notice of such decree, order, or agreement, and such additional information and documentation as [OPM] may prescribe." Act of Sept. 15, 1978, Pub. L. No. 95-366, 92 Stat. 600 (amending the Civil Service Retirement Act to authorize compliance by the Civil Service Commission with the terms of court orders regarding divorce, annulment, and legal separation), *codified at* 5 U.S.C. 8345(j)(2) (2012). Furthermore, Part 838 of the Code of Federal Regulations, which provides guidance for OPM's handling of court orders affecting federal employee retirement benefits, provides that "[c]laimants are responsible for . . . [f]iling a certified copy of court orders and all other required supporting information with OPM." 5 C.F.R. 838.123 (2014). In addition, the Code mandates that before OPM can make direct payments to a retired federal employee's former spouse, the "former spouse (personally or through a representative) must apply

in writing to be eligible for a court-awarded portion of an employee annuity." 5 C.F.R. 838.221. While the rationale behind these requirements is more likely based on increasing administrative efficiency, rather than barring recovery of benefits by former spouses, the implication is clear: OPM will not pay benefits to a retired federal employee's former spouse until it has received her application and a copy of the court order awarding them. Here, the QDRO drafted by Defendant's own counsel is not quite so explicit insofar as it only states that a copy "shall be served upon OPM," but it does specifically state that Defendant must comply with the Act's terms and conditions. At trial, Defendant admitted during cross-examination that she understood it was her responsibility to file the Retirement Order with OPM, and that she believed that her attorney had done so. Nevertheless, OPM had no record of any filing prior to Defendant's 2011 inquiry.

Thus, based on both federal law and the terms that the parties agreed to, the burden was on Defendant to file the QDRO with OPM, and that burden was not met until 2011. While we recognize that the procedural posture of this case is not directly analogous to *Holmes*, insofar as it deals with enforcement of a court order rather than a claim for breach of contract, we nevertheless find its logic persuasive. We therefore conclude that, as in *Holmes*, Defendant's injury here was caused by her own failure to satisfy an express condition precedent—namely, filing a copy of the QDRO with OPM.

While we acknowledge that it may seem unfair to deny Defendant her share of Plaintiff's retirement benefits that she would have been legally entitled to had she filed a copy of the QDRO with OPM, it is well established that "[t]hose who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, D.D.S., P.A.*, 160 N.C. App. at 15, 584 S.E.2d at 337. The trial court's attempt to fashion an equitable remedy here, without the benefit of controlling precedent, is understandable but erroneous because "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Pearce*, 310 N.C. at 451, 312 S.E.2d at 426.

Moreover, we emphasize that while it is true as a general matter that a trial court has broad discretion to grant equitable relief and shape its remedies accordingly, unjust enrichment is a specific remedy that can only be applied when certain preconditions are present. The mere fact that one party benefited at the expense of another is not sufficient to invoke such remedy unless all five of the elements of the *prima facie*

case are met. *See JPMorgan Chase Bank, Nat'l Ass'n*, __ N.C. App. at __, 750 S.E.2d at 559. Here, Plaintiff clearly benefited by receiving 24 months of unreduced federal retirement benefits as a result of Defendant's failure to file a copy of the QDRO with OPM. The benefit Plaintiff received is measurable, which satisfies the fourth required element of unjust enrichment, *see id.*, and nothing in the record suggests that the benefit to Plaintiff resulted from Defendant's unjustifiable or officious interference in his affairs or desire that he keep her share of his benefits as a gift, thereby satisfying the second and third elements. *See id.* Indeed, as discussed above, the benefit to Plaintiff resulted solely from Defendant's failure to take action.

Plaintiff argues that this means Defendant cannot satisfy the first *prima facie* element's requirement that she conferred a benefit upon him, *see id.*, based on the definition of the term "confer" provided by the 1980 edition of the *Random House College Dictionary*, which Plaintiff contends implicitly requires knowing or conscious action. While we are generally reluctant to resort to decades-old dictionary definitions to resolve contemporary legal conflicts, Plaintiff's argument has some merit insofar as case law from this Court and our Supreme Court typically contemplates unjust enrichment as an appropriate remedy only in situations where the complaining party intentionally and deliberately undertook an action with an expectation of compensation or other benefit in return. *See*, *e.g.*, *Wright*, 305 N.C. at 351, 289 S.E.2d at 351 (analyzing unjust enrichment claims arising from mistaken but good faith improvements to another person's property); *JPMorgan Chase Bank, Nat'l Ass'n*, __ N.C. App. at __, 750 S.E.2d at 560 (analyzing unjust enrichment claims arising from unsolicited payments on deeds of trust). Here, by contrast, there is no suggestion that Defendant's failure to file a copy of the QDRO with OPM was done intentionally or with any expectation of benefit to Plaintiff or remuneration to herself. Thus, Defendant cannot satisfy the first required element of the *prima facie* case for unjust enrichment.

Furthermore, the record suggests that the fifth *prima facie* element is also lacking here because there is no evidence that Plaintiff consciously received the benefit. *See id.* at __, 750 S.E.2d at 559. During the trial, Plaintiff testified that prior to his retirement, he was informed that because Defendant had remarried, she would not be entitled to receive any share of his benefits. Although this advice proved incorrect, Plaintiff testified further that at no point during his first two years of receiving retirement benefits did OPM offer any indication that Defendant was still entitled to receive a share. Neither the QDRO nor the Settlement

Agreement obligated Plaintiff to notify Defendant of his retirement or take any further action regarding her share of his retirement benefits. Further, nothing in the record suggests that Plaintiff acted in bad faith, was aware that the QDRO had not been filed, or did anything to prevent Defendant from filing it.

Under these circumstances, Defendant perhaps could have asserted a claim against the attorney who represented her in her divorce proceedings and failed to file the QDRO with OPM. However, the law is clear that she has no claim for unjust enrichment on these facts. Thus, we hold that the trial court erred in its finding of fact and conclusion of law that Plaintiff was unjustly enriched and, accordingly, we vacate its award to Defendant. Because this issue is dispositive, we need not reach Plaintiff's additional arguments concerning the propriety of the trial court's admission of allegedly improperly authenticated evidence, nor his contention that the trial court abused its discretion by awarding attorneys' fees to Defendant. Accordingly, the trial court's order is

REVERSED.

Chief Judge McGEE and Judge DIETZ concur.

JEANNE A. CLARK, PLAINTIFF
v.
RICHARD J. BICHSEL, DEFENDANT

No. COA14-577

Filed 6 January 2015

1. Contracts—oral agreement to divide rent—findings of fact

The trial court did not err by finding that the parties made an oral agreement to divide the rent on an apartment they shared. Both parties testified that they had agreed to divide the rent.

2. Appeal and Error—preservation of issues—issue not raised at trial

The trial court did not err when it made no findings of fact about mitigation of damages in a breach of contract case. Failure to mitigate damages is an affirmative defense, and defendant's failure to raise it at trial waived it for appellate review.

3. Judgments—money judgments—enforced by execution

In a breach of contract case, the trial court erred by ordering defendant to pay a money judgment within 60 days. Under N.C.G.S. § 1-302, money judgments are enforced by execution, not contempt proceedings.

Appeal by defendant from order entered 23 December 2013 by Judge Lori G. Christian in Wake County District Court. Heard in the Court of Appeals 22 October 2014.

No brief filed for plaintiff-appellee.

Heidgerd Law Office, LLP, by Eric D. Edwards and Jason E. Spain, for defendant-appellant.

STEELMAN, Judge.

The trial court's findings of fact were supported by competent evidence, and in turn support the trial court's award of a monetary judgment in favor of plaintiff. Where defendant failed to raise the affirmative defense of mitigation at trial, that argument on appeal is dismissed. The trial court erred in ordering defendant to pay money damages within 60 days.

I. Factual and Procedural Background

Jeanne Clark (plaintiff) and Richard Bichsel (defendant) entered into a lease agreement with a third party for an apartment beginning 1 September 2012 and expiring 1 September 2013. The parties agreed that they would each pay half of the rent. Defendant paid his half of the rent for the months of September, October, November, and December of 2012. In December of 2012, defendant moved out of the apartment. Defendant notified the apartment leasing agency that he would be moving out, and that plaintiff would remain on the premises with her three children and one dog. Neither party attempted to renegotiate the lease. After defendant's departure, plaintiff paid the entire rent.

On 1 July 2013, plaintiff filed a complaint for money owed against defendant in the Small Claims Court for Wake County. On 1 August 2013, the magistrate entered judgment in favor of plaintiff, and ordered defendant to pay $5,000. Defendant appealed to the District Court of Wake County. The case went to arbitration pursuant to N.C. Gen. Stat. § 7A-37.1. On 7 October 2013, an arbitration award was filed in favor of

defendant, awarding nothing to plaintiff. On 1 November 2013, plaintiff appealed this decision to the District Court of Wake County.

The case was heard by the trial court, sitting without a jury. On 23 December 2013, the trial court entered its judgment in favor of plaintiff. Specifically, the trial court found that plaintiff and defendant had an oral contract to split the rent, that defendant breached that contract, and that plaintiff was damaged by the breach. The trial court ordered defendant to pay damages in the amount of $5,280. The trial court further ordered that "Defendant shall pay Plaintiff within 60 days of receipt of this order."

Defendant appeals.

II. Findings of Fact

[1] In his first argument, defendant contends that the trial court's findings of fact were not supported by the evidence at trial. We disagree.

A. Standard of Review

" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008)).

B. Analysis

Defendant contends that the trial court's findings of fact numbers 2, 8, 10, 12, and 14 are unsupported by and contrary to the evidence presented at trial. The trial court specifically found that:

> 2. The parties had a verbal agreement that they would each pay half the rent on said apartment.
>
> . . .
>
> 8. Plaintiff relied on Defendant's verbal agreement that the parties would to pay half of the rent for the term of the lease. The lease expired on September 1, 2013.
>
> . . .
>
> 10. Plaintiff could not pay the entire rent without Defendant's commitment to pay half the rent.
>
> . . .

> 12. Plaintiff relied on Defendant's commitment to pay half the rent.
>
> . . .
>
> 14. Plaintiff relied on Defendant's commitment to pay half the rent.

At trial, plaintiff stated that:

> The defendant and I signed a lease to establish residency together and it was a 12-month lease. And our agreement was to split the rent and expenses, which we did for four months, until he decided to establish residency elsewhere.

Defendant later testified, when discussing how he and plaintiff had planned to divide the rent:

> We were gonna split the rent and half the utilities while we were living together.

Given that both plaintiff and defendant testified that they agreed to divide the rent, we hold that there was evidence in the record to support the trial court's finding that the parties made a verbal agreement to divide the rent.

Plaintiff further testified that, after defendant moved out:

> I said I wasn't going to move out because I was financially bankrupt at that point. I wasn't -- I didn't have any other option but to stay there. I wasn't --
>
> Q You thought --
>
> A I didn't have the money to establish a new residence.
>
> Q Did you at that point talk to the leasing company, the landlord about trying to get out of the lease?
>
> A No. He did mention that. I can't remember if he paid like three months rent that we could get out of it. But as I just stated, I did not have the cash to do that. And he didn't offer to do that.

Plaintiff's repeated statements that she lacked the funds to move, and that she was financially bankrupt, tend to support a finding that she lacked the funds to pay the remaining rent, and that she relied on defendant's assurance that he would pay half of the rent. We hold that the trial court's findings were supported by competent evidence.

Defendant further contends that the trial court's conclusions of law based upon these findings were in error, because the findings were improper. As we have held that these findings were supported by competent evidence, we hold that the conclusions of law based thereon were also proper.

This argument is without merit.

III. Failure to Mitigate Damages

[2] In his second argument, defendant contends that the trial court erred in failing to make findings concerning plaintiff's failure to mitigate damages. Because defendant failed to raise this affirmative defense at trial, this argument is dismissed.

A. Standard of Review

"[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008); *see also* N.C. R. App. P. 28(b)(6).

B. Analysis

Defendant contends that plaintiff should have attempted to renegotiate her lease after defendant's departure, that plaintiff's failure to do so constitutes a failure to mitigate damages, and that the trial court erred in failing to make findings with respect to mitigation.

Failure to mitigate damages is an affirmative defense. *See e.g. Elm St. Gallery, Inc. v. Williams*, 191 N.C. App. 760, 762, 663 S.E.2d 874, 875 (2008). "The [breaching] defendants [bear] the burden of proof on [their] affirmative defense that [the nonbreaching party] failed to mitigate its damages." *Kotis Props., Inc. v. Casey's, Inc.*, 183 N.C. App. 617, 623, 645 S.E.2d 138, 142 (2007). In the instant case, defendant made no argument at trial concerning plaintiff's failure to mitigate. "A contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (quoting *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990)); *see also* N.C. R. App. P. 10(a)(1).

We hold that defendant's failure to raise the issue of mitigation at trial waives that issue for appellate review. This argument is dismissed.

IV. Money Judgment

[3] In his third argument, defendant contends that the trial court erred in ordering defendant to pay a money judgment within 60 days. We agree.

A. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Plaintiff brought this action against defendant seeking a money judgment. Money judgments are generally controlled by N.C. Gen. Stat. § 1-302, which provides that:

> Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt.

N.C. Gen. Stat. § 1-302 (2013). We have previously held that, as a general rule, once a judgment fixes the amount due, execution, not contempt, is the appropriate proceeding. *Brown v. Brown*, 171 N.C. App. 358, 361, 615 S.E.2d 39, 41 (2005). In the instant case, the trial court ordered payment within 60 days, which was not authorized by N.C. Gen. Stat. § 1-302, and was in error.

We vacate the portion of the trial court's judgment requiring defendant to pay the judgment within 60 days. Upon remand, plaintiff may attempt to enforce the judgment in accordance with the provisions of Article 28 of Chapter 1 of the General Statutes.[1]

AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART.

Judges CALABRIA and McCULLOUGH concur.

1. We further note that pursuant to N.C. Gen. Stat. § 1-305(b), the Clerk of Superior Court is not authorized to issue execution until the provisions of that statute have been complied with.

ROBIN CRITE, PLAINTIFF
v.
TIMOTHY SHAWN BUSSEY, DEFENDANT

No. COA14-743

Filed 20 January 2015

Appeal and Error—interlocutory orders—sufficiency of service of process

Defendant's appeal from the trial court's interlocutory order denying his Rule 12 motion to dismiss based on insufficient process, insufficient service of process, and lack of personal jurisdiction was dismissed. Although defendant's motion was couched in terms of lack of jurisdiction under Rule 12(b)(2), it actually raised a question of sufficiency of service or process. Motions challenging only the sufficiency of service and process and not challenging the existence of sufficient minimum contacts with the State are not immediately appealable under N.C.G.S. § 1-277(b).

Appeal by defendant from order entered 28 April 2014 by Judge A. Robinson Hassell in Guilford County Superior Court. Heard in the Court of Appeals 19 November 2014.

Sharpless & Stavola, P.A., by Eugene E. Lester III, for defendant-appellant.

No brief filed for plaintiff-appellee.

DIETZ, Judge.

Defendant Timothy Shawn Bussey appeals from the trial court's order denying his Rule 12 motion to dismiss based on insufficient process, insufficient service of process, and lack of personal jurisdiction. Although this appeal is interlocutory, Bussey contends that this Court has jurisdiction to hear it under N.C. Gen. Stat. § 1-277(b) (2013). Section 1-277(b) permits an immediate appeal from trial court rulings concerning "the jurisdiction of the court over the person."

For the reasons set forth in *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982), we reject Bussey's jurisdictional argument because the trial court's order concerns sufficiency of service and process, not whether Bussey had sufficient contacts with the State. Accordingly, section

1-277(b) does not apply and we must dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

On 19 June 2013, Robin Crite filed a complaint alleging that she was injured when Timothy Shawn Bussey, "a resident of Forsyth County, North Carolina," failed to use a turn signal and made an unsafe movement in his vehicle, resulting in a collision with Crite's car. At the time of the accident, Bussey was driving a vehicle owned by his employer, First Christian Church of Kernersville, North Carolina. An official Division of Motor Vehicles Crash Report, produced the day of the accident, listed the name and address of the owner-employer Church in addition to Bussey's personal contact information.

When Crite attempted personal service on Bussey at the home address listed on the report, the summons was returned undelivered with a notation that Bussey "[n]o longer lives at [the] address provided." Crite directed an alias and pluries summons to the same address, and when that was returned undelivered as well, she filed an Affidavit of Service of Process by Publication.

Crite published notice of the lawsuit in the Jamestown News, a Guilford County publication, for three consecutive weeks in September 2013. She made no further attempts at service on Bussey, by personal delivery, mail, or otherwise. Bussey filed an affidavit with the trial court stating that he never received service of process by personal delivery or mail, and he never received a copy of notice of service by publication at his residence or workplace.

On 9 December 2013, Bussey moved to dismiss the action for insufficient process, insufficient service of process, and lack of personal jurisdiction. In his answer filed on 16 December 2013, Bussey denied the allegations in the complaint and again asserted the defense of lack of personal jurisdiction, incorporating by reference his earlier motion to dismiss. The trial court denied Bussey's motion to dismiss, and he timely appealed.

Analysis

"Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court." *Campbell v. Campbell*, ___ N.C. App. ___, ___, 764 S.E.2d 630, 632 (2014). Bussey contends that this appeal falls into an exception to this general rule spelled out in N.C. Gen. Stat. § 1-277(b), which provides that "[a]ny interested party shall have the right of immediate appeal from an adverse

ruling as to the jurisdiction of the court over the person or property of the defendant."

But our Supreme Court has limited the scope of § 1-277(b). In *Love v. Moore*, the Supreme Court held that "G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint." 305 N.C. at 580, 291 S.E.2d at 145. Thus, the Court held that motions challenging only the sufficiency of service and process, and not challenging the existence of sufficient "minimum contacts" with the State, are not immediately appealable under § 1-277(b). *Id.* at 581, 291 S.E.2d at 146.

Applying *Love*, this Court has held that where a "defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b)." *Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 829 (1984).

That is precisely the case here. Bussey moved to dismiss under Rules 12(b)(2), 12(b)(4), and 12(b)(5) of the Rules of Civil Procedure, claiming that Crite was not justified in resorting to service by publication and that, even if she were, her method of publication was insufficient to provide him notice of the suit. Importantly, Bussey does not make any claim concerning the sufficiency of his contacts with North Carolina. Thus, his appeal pertains solely to the "process or service used to bring the party before the court" and is not immediately appealable under N.C. Gen. Stat. § 1-277(b). *Love*, 305 N.C. at 580, 291 S.E.2d at 145. Accordingly, this Court lacks appellate jurisdiction to hear this appeal.

DISMISSED.

Judges BRYANT and DILLON concur.

HESTER v. HUBERT VESTER FORD, INC.

[239 N.C. App. 22 (2015)]

JOANN HESTER, Individually and as Personal Representative of the Estate of Leland Hester, Plaintiff-Appellant
v.
HUBERT VESTER FORD, INC., and LARRY McPHAIL, Defendants-Appellants

No. COA14-233

Filed 6 January 2015

1. Unfair Trade Practices—car sale—two financing contracts—summary judgment

The trial court erred by granting summary judgment as to defendant Vester Ford on a claim for unfair and deceptive trade practices arising from the sale of a car and two financing contracts relating to that sale. There were issues of fact concerning the existence of the original contract, whether defendant committed an unfair or deceptive trade practice in threatening to repossess the car if plaintiff did not sign the second contract, whether plaintiff reasonably relied on the assertions of defendant's employee that the terms of the second contract were the same as the first, and whether plaintiff would have signed the second contract under duress if she had read it. Quasi-estoppel did not apply and plaintiff foretold some actual damages.

2. Fraud—summary judgment—automobile finance contracts

The trial court erred by granting summary judgment as to defendant Vester Ford on a claim for fraud arising from the sale of a car and two financing contracts. Plaintiff presented evidence that Vester Ford intentionally and falsely represented to plaintiff that Vester Ford could repossess the Jeep in order to induce her to sign the second contract.

3. Extortion—civil claim—not recognized in North Carolina

A civil cause of action for extortion does not exist in North Carolina, and the Court of Appeals declined to recognize such a tort, in an action arising from a car sale and two financing contracts, the second entered into under the threat of repossession.

4. Appeal and Error—fraud—constructive—not pled in complaint—not considered on appeal

Claims of unfair and deceptive trade practice and constructive fraud based on defendant allegedly "enhancing" plaintiff's financial data when obtaining automobile financing were not pled in the complaint and were not considered on appeal.

5. Unfair Trade Practices—enhanced financial information—mere authorization of contract—not sufficient for liability

Summary judgment was properly granted for an employee of an automobile dealer in an action arising from the sale and financing of an automobile. Plaintiff has not alleged that this defendant, Mr. McPhail, was aware of or in any way involved with the "enhancements" to plaintiff's financial data in the respective credit application that led to the terms of the contract. As such, Mr. McPhail's merely authorizing the contract alone was not sufficient to maintain an unfair and deceptive trade practices or fraud claim against him.

Appeal by Plaintiff from order and judgment filed 11 September 2013, *nunc pro tunc* 26 August 2013, by Judge Douglas B. Sasser in Superior Court, Bladen County. Heard in the Court of Appeals 26 August 2014.

Christopher W. Livingston for Plaintiff-Appellant.

Womble & Campbell, P.A., by H. Goldston Womble, Jr.; and C. Michael Thompson, for Defendants-Appellees.

McGEE, Chief Judge.

Plaintiff filed claims against Hubert Vester Ford, Inc. ("Vester Ford") and Larry McPhail ("Mr. McPhail") ("Defendants"), for unfair and deceptive trade practices, fraud, and common law extortion arising out of a vehicle purchase. Plaintiff alleged Defendants contracted to sell Plaintiff a Jeep vehicle under certain terms but then compelled Plaintiff to sign a second, less-favorable contract under the threat of repossession. We find that most, but not all, of Plaintiff's claims were properly resolved through summary judgment.

I. Standard of Review

This Court reviews a trial court's order allowing summary judgment *de novo*. *Builders Mut. Ins. Co. v. North Main Const., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). This review is limited to determining whether "there is no genuine issue as to any material fact" and whether the moving parties were entitled to judgment in their favor as a matter of law. *See Blades v. City of Raleig*h, 280 N.C. 531, 544, 187 S.E.2d 35, 43 (1972). It generally is sufficient for a nonmoving party to survive summary judgment where the party can "produce a forecast of evidence demonstrating that [the party] will be able to make out at least a *prima*

facie case at trial." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (citation and internal quotations omitted). However,

> in passing upon a motion for summary judgment, all affidavits, depositions, answers to interrogatories and other material filed in support or opposition to the motion must be viewed in the light most favorable to the party opposing the motion, and such party is entitled to the benefit of all inferences in [the party's] favor which may be reasonably drawn from such material.

Whitley v. Cubberly, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974). "The slightest doubt as to the facts entitles the non-moving party to a trial." *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978).

II. Background

Because this is an appeal by Plaintiff from a grant of summary judgment against her, we take the facts in the light most favorable for Plaintiff. Plaintiff's son, Ryan Hester ("Ryan"), became interested in purchasing a 2007 Jeep Wrangler ("the Jeep") from Vester Ford sometime near Labor Day in 2009. Ryan had a preliminary phone conversation with Melvin Scott ("Mr. Scott"), a salesperson for Vester Ford. During that phone call, Ryan obtained some type of "pre-approval," but Mr. Scott also notified Ryan that he would need a co-signer in order to purchase the Jeep. Plaintiff, Ryan's mother, agreed to be that co-signer.

Plaintiff and Ryan traveled to Vester Ford the following evening and test-drove the Jeep. While at Vester Ford, they interacted with Mr. Scott and Mr. McPhail, and both stayed late to accommodate Plaintiff's and Ryan's schedules. Plaintiff and Ryan presented Defendants with bank and pay documents that showed their respective incomes, which were modest. However, Defendants allegedly agreed to sell the Jeep to Plaintiff and Ryan for a base price of about $22,000.00, with a trade-in credit of $1,000.00 for Plaintiff's Mercury Grand Marquis ("the Grand Marquis"), and monthly payments in the $300.00 to $350.00 range for between sixty (60) and seventy-two (72) months. Plaintiff and Ryan testified during their depositions that: (1) all parties purportedly signed a purchase contract containing these terms (the "original" contract); (2) the Grand Marquis' license plate was transferred to the Jeep at signing; and (3) Plaintiff and Ryan left with the Jeep that evening.

Plaintiff has been unable to produce a copy of the "original" contract, and Defendants deny its existence. Defendants contend they

sold the Jeep to Plaintiff on 30 September 2009. However, Plaintiff presented an affidavit from a neighborhood Labor Day party attendee, averring that he saw Ryan in possession of the Jeep several weeks before 30 September 2009. Vester Ford also submitted a credit application on Plaintiff's behalf to Marine Federal Credit Union to finance the purchase of the Jeep ("Marine Credit application"); the Marine Credit application was dated 24 September 2009, six days before Defendants state they sold Plaintiff the Jeep. Notably, this credit application greatly exaggerated Plaintiff's finances. Finally, the Jeep was transferred to Plaintiff's insurance on 28 September 2009, two days before Defendants state they sold Plaintiff the Jeep.[1]

Plaintiff alleged that Mr. Scott contacted her in early October 2009 and stated that: (1) the financing for Plaintiff's recent Jeep purchase had fallen through; (2) Plaintiff needed to sign a new purchase contract for the Jeep, with new financing; and (3) if Plaintiff did not sign the new contract, the Jeep would be repossessed. Soon thereafter, Mr. Scott arrived at Plaintiff's residence and presented Plaintiff and her husband with the new contract, which was backdated to 30 September 2009 (the "30 September" contract). Mr. Scott allegedly informed Plaintiff and her husband that the terms in the 30 September contract were the same as those in the "original" contract. Plaintiff alleged that Mr. Scott then physically covered the top half of the 30 September contract when he presented it to Plaintiff and her husband, obscuring their view of the terms therein. Neither Plaintiff nor her husband asked to read the terms of the 30 September contract before signing it.[2]

The 30 September contract required that Plaintiff make monthly payments of $614.83, with an interest rate of 14.69 percent, for sixty (60) months — almost doubling the monthly payments that Plaintiff contends were required under the "original" contract. The terms in the 30 September contract were based on a line of credit that Vester Ford obtained on Plaintiff's behalf from Ford Motor Credit Company after financing for the "original" contract reportedly fell through. The credit application submitted to Ford Motor Credit Company by Vester Ford inflated Plaintiff's financial data even more than the Marine Credit application.

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1. Some of Vester Ford's documentation indicates that Vester Ford did not actually take title to the Jeep until 30 September 2009.

2. Plaintiff's co-plaintiff husband has since passed away, and Plaintiff is the personal representative of her husband's estate in this matter. Plaintiff's husband's involvement in this case primarily arises out of his signing the 30 September contract.

Ryan remained in possession of the Jeep approximately nine months after Plaintiff signed the 30 September contract, although he only made a couple of monthly payments thereon. The Jeep was repossessed in July 2010, was sold, and a deficiency judgment was entered against Plaintiff for the remainder of the amount owed under the 30 September contract. However, that deficiency judgment was set aside by a consent order, and Plaintiff currently owes nothing on the Jeep.

Plaintiff filed a complaint against Defendants for unfair and deceptive trade practices ("UDTP"), fraud, and common law extortion. Plaintiff and Defendants then moved for summary judgment against each other. By order filed 11 September 2013, the trial court granted Defendants' motion for summary judgment but denied Plaintiff's motion. Plaintiff appeals.

III. Plaintiff's Motion for Summary Judgment Denied

As a preliminary matter, Plaintiff appeals both the trial court's grant of summary judgment against her and the trial court's denial of her motion for summary judgment against Defendants. However, "the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). The trial court's grant of Defendants' motion for summary judgment was a final judgment on the merits. *See Id.* Therefore, on appeal, we will not review Plaintiff's denied motion for summary judgment.

IV. Defendants' Motion for Summary Judgment Granted

A. Claims Arising Under the 30 September Contract

1. Unfair and Deceptive Trade Practices

[1] Plaintiff presents this Court with a multitude of arguments on appeal, and many of them emanate from a core UDTP claim related to the formation of the 30 September contract. "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). The second requirement, that the act or practice be "in or affecting commerce," is not at issue in the present case. Thus, in order to survive summary judgment, Plaintiff must establish a material question of fact as to whether Defendants committed unfair or deceptive acts that proximately injured Plaintiff.

Plaintiff contends that she and Defendants entered into the "original" contract for the Jeep sometime before Labor Day in 2009. Plaintiff and Ryan testified during their depositions that they signed this "original" contract with Defendants. Plaintiff also presented the following circumstantial evidence in support of the existence of the "original" contract: (1) an affidavit from a neighborhood Labor Day party attendee, averring that he saw Ryan in possession of the Jeep early in September 2009; (2) a credit application that Vester Ford submitted on Plaintiff's behalf on 24 September 2009 to finance the purchase of the Jeep, six days before Defendants state they sold Plaintiff the Jeep; and (3) an automobile insurance policy statement showing that the Jeep was transferred to Plaintiff's auto insurance on 28 September 2009, two days before Defendants state they sold Plaintiff the Jeep. Plaintiff correctly points out that transferring auto insurance to a consumer's policy is only supposed to occur once financing is finalized and the consumer has taken title to the vehicle. *See* N.C. Gen. Stat § 20-75.1 (2013).

In light of this evidence, the fact that Defendants adamantly deny the existence of the "original" contract creates a material issue of fact in the case before this Court. *See Durham Life Broadcasting, Inc. v. Internat'l Carpet Outlet*, 63 N.C. App. 787, 788, 306 S.E.2d 459 (1983) ("There is clearly a dispute in the case *sub judice* where the defendant denies the existence of a contract."). However, Defendants argue that summary judgment for Defendants was proper nonetheless. They highlight the fact that Plaintiff has not produced a copy of the "original" contract and that Plaintiff's sworn statements as to the terms of this contract are less than precise. However, this is not necessarily dispositive of the circumstantial evidence that Plaintiff presented to the trial court as to the possible *existence* of the "original" contract.

Taking the evidence in a light most favorable to Plaintiff, the nonmoving party in Defendants' motion for summary judgment, and granting Plaintiff all reasonable inferences therefrom, we must assume that the "original" contract existed. Therefore, we assume that Plaintiff had a property interest in the Jeep before she was presented with the 30 September contract. As such, Mr. Scott's threat to repossess the Jeep if Plaintiff did not sign the 30 September contract presents a material question as to whether Vester Ford, through its agent, Mr. Scott, committed an unfair or deceptive act in or affecting commerce. If so, the resulting harm would be that Plaintiff was subjected to a subsequent purchase contract, the 30 September contract, on disadvantageous terms. Finally, contrary to Defendants' contention that Plaintiff has suffered no actual damages because her liability to Ford Motor Credit Company on the

loan for the Jeep was extinguished, Plaintiff has forecast *some* actual damages resulting from Vester Ford's alleged misconduct – for instance, losing the value of her Grand Marquis after the Jeep was repossessed.[3] Therefore, Plaintiff has sufficiently established the necessary elements to support an UDTP claim.

As Defendants correctly point out, notwithstanding the possible existence of the "original" contract, Plaintiff's failure to read the 30 September contract, and without even requesting an opportunity to do so, could preclude her from recovery under the new contract. "One who signs a written contract without reading it, when [she] can do so understandingly[,] is bound thereby unless the failure to read is justified by some special circumstance." *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962) (citations omitted). At its core, the question is whether Plaintiff acted with "reasonable prudence" by relying on Mr. Scott's assurances that the terms of the 30 September contract were the same as those in the "original" contract, except for the source of financing. *See id.* "What a reasonably prudent person will or will not do under various circumstances . . . is nearly always a question of fact, not of law. Only when the facts are such that reasonable minds can reach but one conclusion does the question become one of law." *Hulcher Brothers & Co. v. N.C. Dep't of Transportation*, 76 N.C. App. 342, 343, 332 S.E.2d 744, 745 (1985). Moreover,

> [i]t is only in exceptional cases that the issue of reasonable reliance may be decided by the summary judgment procedure. . . . [An aggrieved party who failed to read a contract] will not be charged with knowledge of the contents of [the contract she] signed *if it were obtained by trick or artifice.*

Northwestern Bank v. Roseman, 81 N.C. App. 228, 234, 344 S.E.2d 120, 125 (1986), *aff'd*, 319 N.C. 394, 354 S.E.2d 238 (1987) (emphasis added) (citations omitted).

Although Plaintiff's failure to read the 30 September contract likely is harmful to her claim, Plaintiff contends that her signature on the

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3. Because Plaintiff appeals from the trial court's grant of summary judgment against her, our review of Plaintiff's damages need not probe beyond finding the existence of actual damages. *See Creech*, 347 N.C. at 526, 495 S.E.2d at 911 ("[It is sufficient for a nonmoving party to survive summary judgment where the party can] produce a forecast of evidence demonstrating that [the party] will be able to make out at least a *prima facie* case at trial.").

30 September contract was made under duress and obtained through fraud. Given that we must presume Plaintiff was operating under the notion that the "original" contract established a set, binding, and existent agreement between her and Vester Ford, there remains the question of whether Plaintiff reasonably relied on Mr. Scott's assertions that the terms of the 30 September contract were identical to those in the "original" contract, except for the source of financing. Alternatively, when faced with Mr. Scott's threat to repossess the Jeep, there is a question as to whether Plaintiff would have signed the 30 September contract under duress, even if she had read it and objected to the new terms. These are questions of fact for a jury to determine.

Defendants further assert that Plaintiff is estopped from recovery because she accepted the benefits of the 30 September contract by using the Jeep for a number of months after signing the 30 September contract. To support this contention, Defendants note that "the acceptance of benefits [under a contract] precludes a subsequent inconsistent position [by an aggrieved party], even where acceptance is involuntary, arises by necessity, or where . . . a party voluntarily accepts a benefit to avoid the risk of harm". *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999) (citing *Carolina Medicorp, Inc. v. Board of Trustees*, 118 N.C. App. 485, 493–93, 456 S.E.2d 116, 120 (1995)) (quotes omitted).

This authority, however, is distinguishable from the present case. *Carolina Medicorp*, on which Defendants' authority relies, involved a contractual dispute between some North Carolina hospitals and the North Carolina state employee health insurance plan. *Carolina Medicorp*, 118 N.C. App. at 487–88, 456 S.E.2d at 117–18. The plaintiff hospitals had contracted to accept lower reimbursement rates in exchange for being designated "preferred providers" by the state health plan; state employees, in turn, would pay less out-of-pocket for services received at "preferred providers," making the hospitals financially attractive to patients. *Id.* The hospitals subsequently challenged the lower reimbursement rates under their contracts, contending that the hospitals entered into the contracts involuntarily. *Id.* However, the hospitals were estopped from litigating the issue because they had already accepted the benefits of being "preferred providers" under the plan. *Id.* at 492–94, 456 S.E.2d at 120–21 ("[V]oluntariness is not an element under the doctrine of quasi estoppel. Furthermore, even if it were an element of quasi estoppel, petitioners were not compelled to sign the contracts. They chose to avoid the risk of losing patients to other preferred provider hospitals by signing the contracts.").

In the present case, Plaintiff is not challenging the *enforcement* of the 30 September contract with Vester Ford; indeed, a default judgment was entered against Plaintiff after she stopped making monthly payments to Ford Motor Credit Company, and that default judgment was later set aside. There is nothing left to enforce under the 30 September contract. Instead, Plaintiff contends that Defendants engaged in unfair and deceptive trade practices during the *formation* of the 30 September contract, which presents a different legal question.

"[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions" under a contract. *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001). North Carolina's UDTP laws, however, are designed to provide consumers with a remedy for injuries done to them by dishonest and unscrupulous business practices. *See* N.C. Gen. Stat. § 75-16 (2013). Even where an aggrieved party is estopped from taking a subsequent inconsistent position under a contract due to quasi-estoppel, the party on the other side of the agreement is not categorically absolved of its unlawful acts during the formation of that same contract. Therefore, quasi-estoppel does not apply in the present case.

Plaintiff has established a *prima facie* UDTP claim against Vester Ford regarding the formation of the 30 September contract. The fact that Plaintiff has not produced the "original" contract and did not read the 30 September contract is not necessarily dispositive. Moreover, because Plaintiff's UDTP claim does not challenge the enforcement of the 30 September contract, quasi-estoppel does not apply. As such, the trial court erred by granting summary judgment as to Vester Ford on this claim.

2. Fraud

[2] Plaintiff's complaint also raised an alternative, but related, fraud claim against Defendants based on the same facts that gave rise to Plaintiff's UDTP claim above. The elements of fraud are well-established: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Helms v. Holland*, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996) (citation and quotes omitted). Plaintiff presented evidence that Vester Ford intentionally and falsely represented to Plaintiff that Vester Ford could repossess the Jeep in order to induce her to sign the 30 September contract. Therefore, for reasons similar to those discussed in the previous section, Plaintiff's alternative claim for fraud as to Vester Ford should survive summary judgment.

3. Common Law Extortion

[3] Plaintiff's complaint raised a third alternative tort claim for common law extortion based on the same facts that gave rise to her UDTP and fraud claims. However, no civil cause of action for extortion currently exists under North Carolina law. *See Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 585, 664 S.E.2d 8, 12 (2008). Nonetheless, Plaintiff proposes that "[e]ven if extortion is not yet a recognized tort [under North Carolina law], it must become one."

To date, this Court has not been presented with a direct, supported, or convincing argument that extortion should be a cognizable tort under North Carolina law. *See, e.g., Brawley v. Elizabeth Townes Homeowners Ass'n, Inc.*, __ N.C. App. __, __ S.E.2d __, COA14–135, *slip op.* at 9–10 (Aug. 19, 2014) (unpublished) (affirming the dismissal of, *inter alia*, a *pro se* extortion claim on collateral estoppel grounds); *Lawson v. White*, 197 N.C. App. 758, 680 S.E.2d 904, COA07-296-2, *slip op.* at 5 (July 7, 2009) (unpublished) ("Plaintiff fails to cite any cases on point and fails to set forth what the elements of [extortion] might be."); *Free Spirit Aviation*, 191 N.C. App. at 585, 585 n.3, 664 S.E.2d at 12, 12 n.3 (2008) ("[Plaintiffs' complaint . . . expressly states a claim for extortion. . . . [However,] the issue of whether a civil claim for extortion exists in North Carolina was not argued [on appeal, so] we make no ruling either way on this issue."). Although "this Court will not shirk its duty to fully consider new causes of actions when they are properly presented," *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 233, 336 S.E.2d 716, 718 (1985), *aff'd*, 316 N.C. 550, 342 S.E.2d 523 (1986), *overruled on other grounds by Johnson v. Ruark Obstetrics*, 327 N.C. 283, 300–01, 395 S.E.2d 85, 95 (1990), so too must we proceed with the utmost caution and deliberateness in the face of such a request.

Plaintiff, in support of her argument that extortion should be a cognizable tort under North Carolina law, presents this Court with non-controlling authority from New Jersey, *People Exp. Airlines, Inc. v. Consol. Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985), which discusses the adaptability of the common law in the face of significant, long-term shifts in societal norms. Plaintiff also cites the Open Courts Clause of the North Carolina Constitution, which states that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. Art. 1 § 18. In light of this authority, Plaintiff contends that her remedy for Defendants' inducing her to sign the 30 September contract, "falls between the two stools of fraud (if deception is absent) and conversion

(if consent is present)[.]" Between these two "stools," Plaintiff argues, necessarily sits her claim for extortion. We disagree.

First, we note that Plaintiff *has* raised a claim for fraud, alleging deception by Defendants, which allegedly was aimed at inducing Plaintiff to sign the 30 September contract. Second, the space between the two "stools" of fraud and conversion has been fully, and adequately, occupied by Plaintiff's UDTP claim. Plaintiff argues in her brief that she would need to prove two things for an extortion claim against Defendants: (1) that Defendants unlawfully threatened Plaintiff with repossession of the Jeep (2) in order to obtain value from Plaintiff by binding her to the allegedly disadvantageous terms of the 30 September contract. These essentially are the same facts that Plaintiff needs to prove in her UDTP claim and to obtain appropriate relief from the alleged harm done to her by Defendants. As such, Plaintiff is not being denied a "remedy by due course of law" presently, and we decline to use this case to recognize a cognizable tort of common law extortion under North Carolina law.

B. Claims Arising Under the "Enhanced" Credit Applications

1. Unfair and Deceptive Trade Practices

[4] On appeal, Plaintiff attempts to argue that Defendants committed unfair and deceptive trade practices by submitting credit applications on her behalf for the purchase of the Jeep that greatly "enhanced" Plaintiff's financial data. However, Plaintiff did not plead this claim in her complaint. Therefore, we will not consider it. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

2. Fraud

Plaintiff also alleged fraud against Defendants based on Defendants' purportedly "enhancing" Plaintiff's financial information when submitting credit applications on her behalf. Again, the elements of fraud are: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Helms v. Holland*, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996) (citation and quotes omitted). Plaintiff does not contend that Defendants made false representations to Plaintiff regarding her financial information. Instead, Plaintiff's fraud claim here rests on the contention that Ford Motor Credit Company was deceived by Defendants' "enhancing"

Plaintiff's financial data when submitting credit applications on her behalf and that Plaintiff was subsequently injured thereby. Plaintiff asserts that "[e]lements (2), (3), and (4) [of fraud] do not require that the deceived person be the same person as the injured party." However, Plaintiff provides this Court with no authority to support this argument, and we do not agree.

Notably, Plaintiff did not file a claim of constructive fraud against Defendants. A claim for constructive fraud would require only that Plaintiff show that she and Defendants were in a "relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which [Defendants are] alleged to have taken advantage of [their] position of trust to the hurt of [Plaintiff]." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). "[C]harging actual fraud is 'more exacting' than charging constructive fraud." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981).

We need not, and do not, decide whether Defendants, by allegedly "enhancing" Plaintiff's financial data while obtaining credit on her behalf, may have committed constructive fraud against Plaintiff; Plaintiff did not plead such a claim in her complaint. *See* N.C.R. App. P. 10(a)(1). Thus, restricting our analysis to the "exacting" elements of "actual" fraud, Plaintiff has not sufficiently pleaded facts that Defendants made deceptive statements to Plaintiff regarding her financial data and in the course of obtaining a line of credit on her behalf. Therefore, Plaintiff has not established a *prima facie* fraud claim against Defendants here, and the trial court did not err by granting summary judgment on this claim.

C. Summary Judgment as to Mr. McPhail

Finally, Plaintiff assigns error to the trial court's granting summary judgment as to her claims against Mr. McPhail.

1. Mr. McPhail's Liability Regarding the 30 September Contract

[5] On appeal, Plaintiff argues that Mr. McPhail should be held personally liable in the present case because Mr. McPhail knew of Plaintiff's modest finances, but he authorized the 30 September contract nonetheless, and this resulted in harm to Plaintiff. "As an essential element of a cause of action under G.S. 75-16 [for UDTP], [P]laintiff must prove . . . that [P]laintiff has suffered actual injury as a proximate result" of Defendants' actions. *Bailey v. LeBeau*, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464 (1986), *aff'd as modified*, 318 N.C. 411, 348 S.E.2d 524 (1986). The same is true for a claim of fraud. *See Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 599–601, 534 S.E.2d 233, 236–37 (2000).

Although Mr. McPhail may have been aware of the modest finances of Plaintiff and Ryan, the financing terms in the 30 September contract that Mr. McPhail approved were those given to Vester Ford by the Ford Motor Credit Company. Plaintiff has not alleged that Mr. McPhail was aware of, or in any way involved with, the "enhancements" to Plaintiff's financial data in the respective credit application that lead to the terms of the 30 September contract. As such, Mr. McPhail's merely authorizing the 30 September contract alone is not sufficient to maintain an UDTP or fraud claim against him.

2. Mr. McPhail's Liability Regarding the "Original" Contract

On appeal, Plaintiff also asserts certain additional facts as to her interactions with Mr. McPhail. Specifically, she argues that Mr. McPhail should be held personally liable in the present case because he was the Vester Ford employee who negotiated and agreed to the "original" contract; yet he still authorized the 30 September contract. Notably, in Plaintiff's complaint, she asserted that

> 14. Mr. Scott or Mr. McPhail on behalf of Vester told Mrs. Hester and Ryan that their credit was approved, and agreed unconditionally to sell the Jeep to Ryan and Mrs. Hester for a principal amount of about $23,000, paid in installments of about $320 per month (but not more than $350/month) for 60 months, in return for a trade-in allowance of $1,000 on Mrs. Hester's 1993 Mercury Grand Marquis.

Although Plaintiff's complaint named "Mr. Scott or Mr. McPhail" as the one who negotiated and agreed to the "original" contract, the depositions of Plaintiff and Ryan do not implicate Mr. McPhail as such. Plaintiff and Ryan even testified that they almost exclusively dealt with Mr. Scott during the purchase of the Jeep and that Mr. McPhail performed only ministerial functions in relation thereto. In fact, the only evidence presented to the trial court that Mr. McPhail was the Vester Ford employee who negotiated and agreed to the "original" contract came in the form of nearly identical affidavits, filed by Plaintiff and Ryan, only four days before the summary judgment hearing on 26 August 2013. On this point, it is clear:

> The affidavits [presented by Plaintiff and Ryan] materially alter the deposition testimony in order to address gaps in the evidence necessary to survive summary judgment. . . . [I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his [or her] own prior testimony, this

> would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

See Marion Partners, LLC v. Weatherspoon & Voltz, LLP, 215 N.C. App. 357, 362-63, 716 S.E.2d 29, 33 (2011) (citation and quotes omitted). Therefore, the trial court properly was not persuaded by this "evidence" in granting summary judgment as to Mr. McPhail. Plaintiff has presented no other argument that Mr. McPhail should be held personally liable in this case for his involvement in the purported execution of the "original" contract.

V. Conclusion

The trial court properly granted summary judgment to Mr. McPhail on all of Plaintiff's claims against him. The trial court also properly granted summary judgment to Vester Ford with respect to Plaintiff's common law extortion claim, as well as her UDTP and fraud claims arising out of Vester Ford allegedly "enhancing" Plaintiff's financial information on credit applications. However, the trial court erred by granting summary judgment to Vester Ford on Plaintiff's UDTP and fraud claims arising out of the formation of the 30 September contract.

Reversed in part, and remanded; affirmed in part.

Judges BRYANT and STROUD concur.

IN THE MATTER OF A.E.C.

No. COA14-854

Filed 20 January 2015

1. Appeal and Error—preservation of issues—termination of parental rights—no notice of appeal from permanency planning review—appeal from termination order

A father properly preserved his right to challenge permanency planning review orders where he did not give timely notice of appeal from those orders, but appealed from the termination order and cited the review orders as issues he wished to address.

2. Termination of Parental Rights—findings—implicit cessation of reunification

The trial court erred in ceasing reunification efforts with respect to father in a termination of parental rights case. The trial court implicitly ceased reunification by changing the permanent plan to adoption and ordering the filing of a petition to terminate parental rights. The trial court made no findings as to whether the Department of Social Services (DSS) made reasonable efforts to reunite the father, whether reunification would be futile, and why placement with the father was not in the child's best interest, and the termination order, taken together with the earlier orders, did not contain sufficient findings of fact to cure the defects in the earlier orders.

Appeal by father from orders entered 10 April 2012, 24 August 2012, 23 August 2012, and 11 April 2014 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

Christopher L. Carr for petitioner-appellee Cumberland County Department of Social Services.

Beth A. Hall for respondent-appellee guardian ad litem.

Joyce L. Terres, Assistant Appellate Defender, for respondent-appellant father.

STEELMAN, Judge.

Where the trial court's permanency planning orders did not contain the findings required by N.C. Gen. Stat. §§ 7B-507 and 7B-906.1, the trial court erred in ceasing reunification efforts with father. Where the trial court erred in ceasing reunification efforts, it erred in terminating father's parental rights.

I. Factual and Procedural Background

J.M. (father) began dating E.C. (mother) in 2008. Mother and her children were living with a mutual friend at the time; mother was married, but separated from her husband. After mother had a falling out with her friend, she and her children moved in with father. Mother lived in father's home for only a few weeks.

Mother then moved to Fayetteville, but maintained the relationship with father, who visited her on several occasions. Mother informed father that she was pregnant with his child; father did not believe it, and checked regularly for a "baby bump." On one of father's visits, mother's husband was present, and confronted father. Father told mother to handle the situation with her husband, and left. Father lost contact with mother, and moved to Virginia.

On 16 January 2009, mother gave birth to A.E.C. Her husband was named on the birth certificate as the child's father.

When A.E.C. was less than five months old, she was found home alone; mother did not return to the house for more than forty-five minutes. On 11 June 2009, Cumberland County Department of Social Services (DSS) filed a petition alleging that A.E.C. and her siblings[1] were neglected and dependent. This petition alleged that mother's husband and a "John Doe" were the putative fathers of A.E.C. At the time, father's identity was unknown. The children were temporarily placed in nonsecure custody with Mr. and Mrs. S., believed at the time to be A.E.C.'s paternal great grandparents. On 27 October 2009, adjudication and disposition hearings were held, at which A.E.C. was adjudicated neglected and dependent based on the petition. On 20 November 2009, the trial court entered its order on adjudication and disposition. Mother's husband was named as A.E.C.'s putative father.

On 5 January 2010, the trial court held its first review hearing. It found that the whereabouts of mother and her husband were unknown, and relieved DSS of reunification and visitation efforts. On 2 February

1. Mother's children other than A.E.C. are not the subject of the instant case.

2010, a permanency planning hearing was held, where the trial court again found that the whereabouts of mother and her husband were unknown. As Mr. S. had suffered a stroke, the court recommended that alternate placement be sought for the children. No permanent plan was established at this time, and DSS was ordered to present a permanent plan at the next hearing.

On 27 April 2010, the trial court held its next permanency planning hearing, at which mother was present. She reported that she was living in Arkansas. The trial court established the permanent plan as relative placement.

On 29 September 2010, the trial court held another permanency planning hearing. A.E.C.'s guardian *ad litem* (GAL) reported that a paternity test had been ordered for mother's husband in another court. A.E.C. had provided a DNA sample. The permanent plan remained relative placement, with a concurrent plan of adoption.

On 5 January 2011, the trial court held another permanency planning hearing. A.E.C.'s GAL reported that, according to the results of the paternity test, mother's husband was not A.E.C.'s father. DSS reported that A.E.C. and her siblings had been moved from the home of Mr. and Mrs. S. into foster care on 10 November 2010. No findings were made that mother's husband was not A.E.C.'s father, and no inquiries were made into her paternity. The trial court changed the permanent plan to adoption.

On 26 April 2011, the trial court held another permanency planning hearing. DSS reported that A.E.C. had been moved to a new foster home on 7 January 2011, and that the foster parents were interested in adoption. The trial court found and concluded that adoption and termination of parental rights should be pursued. This determination was upheld at a subsequent hearing on 1 September 2011.

Sometime in September of 2011, mother was able to acquire father's contact information. At the end of September or beginning of October in 2011, mother contacted father and informed him that he was the father of A.E.C., who was in foster care. Mother gave father the phone number for DSS. Father spoke with A.E.C.'s social worker about paternity testing, and she told father he would need to attend a hearing scheduled for 2 February 2012. Father also contacted the judge's chambers and was given the same information.

On 2 February 2012, father appeared in court for the permanency planning hearing. DSS requested that its petition be amended to include

father as A.E.C.'s father. Father requested paternity testing and custody of A.E.C. The court amended the petition and appointed counsel for father. It ordered paternity testing and continued the permanency planning review.

On 26 March 2012, at a permanency planning hearing, the trial court directed that DNA testing be expedited. The court maintained a permanent plan of adoption and ordered DSS to proceed with a termination of parental rights. The trial court further ordered that, should the DNA test confirm that father was A.E.C.'s father, the matter would return to court to address possible visitation rights.

On 26 April 2012, father received notice that he was A.E.C.'s father. On 29 June 2012, an order of paternity was entered in child support enforcement court.

On 2 and 3 July 2012, at another permanency planning hearing, father requested visitation, which was denied. The trial court ordered DSS to perform a complete home study and background check on father. The permanent plan remained adoption and termination of parental rights.

On 18 July 2012, father had back surgery. His hearing scheduled for 26 July 2012 was continued to 30 August 2012 due to his recovery. A permanency planning hearing was held on 1 August 2012, at which father's attorney requested a continuance for his recovery. This request was denied. Father's attorney informed the court that father was living with his ex-wife during his recovery, but the trial court found that this information had "not been verified." The trial court found that father's whereabouts were unknown, and that he was not cooperating with DSS because he had not provided an address for his home study. The plan remained adoption, with a concurrent plan of custody with relatives, and termination of parental rights.

On 3 October 2012, Harnett County Department of Social Services completed a study of father's home, and recommended placement of A.E.C. with father.

On 23 October 2012, child support court entered a permanent order for child support. Father was ordered to pay $50.00 per month effective 1 September 2012, to be deducted from his worker's compensation.

On 13 December 2012, DSS filed a petition to terminate parental rights against mother, her husband, and father, in regard to A.E.C. and her siblings. The grounds alleged against father were neglect, failure to make reasonable progress toward correcting the conditions leading to A.E.C.'s removal from the home, willful failure to pay a

reasonable portion of the cost of care, failure to establish paternity, and willful abandonment.

On 19 December 2012, the trial court held a permanency planning hearing, at which father was present, but mother was not. The hearing was continued to allow mother to be present. The trial court denied father's motion to have a Christmas visit with A.E.C.

On 7 March 2013, at another permanency planning hearing, DSS reported the results of Harnett County's positive home study. The trial court made no findings regarding the home study, instead finding that father did not cooperate with the home study process. The court found that visitation with father would not be in A.E.C.'s best interest. The trial court reaffirmed these findings at a later hearing on 21 November 2013.

On 24 February 2014, the trial court began the termination of parental rights proceeding. DSS voluntarily dismissed the petition in regard to A.E.C.'s siblings. The trial court determined that grounds existed to terminate father's parental rights in regard to A.E.C. on the basis of neglect, failure to make reasonable progress toward correcting the conditions leading to A.E.C.'s removal from the home, willful failure to pay a reasonable portion of the cost of care, and willful abandonment. The dispositional phase began on 25 February 2014 and concluded on 26 February 2014. The trial court found that it was in the best interests of A.E.C. to terminate father's parental rights.

Father appeals from the permanency planning review orders entered on 10 April 2012, 24 August 2012, and 23 August 2012, and also the order terminating his parental rights entered on 11 April 2014.

II. *Certiorari*

[1] "At any hearing at which the court orders that reunification efforts shall cease, the affected parent, guardian, or custodian may give notice to preserve the right to appeal that order in accordance with [N.C. Gen. Stat. §] 7B–1001." N.C. Gen. Stat. § 7B–507(c) (2013). According to N.C. Gen. Stat. § 7B–1001 (a)(5)(a):

> The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.

> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2013). In an unpublished opinion, this Court held that, where the review of an order ceasing reunification efforts was not preserved, but the order was raised as an issue in the timely appeal from a termination order, N.C. Gen. Stat. § 7B-1001 permitted the adjudication to be reviewed directly on appeal. *In re J.R.*, ___ N.C. App. ___, 759 S.E.2d 712 (2014) (unpublished). Although that case is not binding precedent, we find its reasoning persuasive.

The record in the instant case shows that father did not preserve the right to appeal the permanency planning review orders by giving timely notice of appeal. However, he did appeal the termination order in a timely fashion. In his appeal from the termination order, father cited the review orders as issues he wished to address on appeal. These orders ceased reunification efforts. We hold therefore that father has properly preserved his right to challenge the review orders, and dismiss his petition for the issuance of a writ of *certiorari* as moot.

We examine his challenge to these orders directly on appeal.

III. Ceasing Reunification

[2] In his first argument, father contends that the trial court, in its permanency planning orders, erred in implicitly ceasing reunification by maintaining a permanent plan of adoption for A.E.C. We agree.

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.'" *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

B. Analysis

Father first contends that, although the trial court did not issue explicit findings in its permanency planning orders ceasing reunification, it implicitly ceased reunification by changing the permanent plan

to adoption and ordering the filing of a petition to terminate parental rights. Father is correct; we have previously held that "where a trial court failed to make any findings regarding reasonable efforts at reunification, the trial court's directive to DSS to file a petition to terminate [a parent's] parental rights implicitly also directed DSS to cease reasonable efforts at reunification." *In re A.P.W.*, ___ N.C. App. ___, ___, 741 S.E.2d 388, 390-91, *disc. review denied*, ___ N.C. ___, 747 S.E.2d 251 (2013) (citations and quotations omitted). We hold that the trial court's order to file a petition to terminate parental rights implicitly ceased reunification with father.

Although the order need not explicitly cease reunification efforts, it "must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, ___ N.C. ___, ___, 752 S.E.2d 453, 455 (2013) (quotations omitted). Father contends that the trial court failed to address these statutory concerns in its findings.

1. Reasonable Efforts

Father notes first that an order placing or keeping a child in DSS custody must contain findings regarding the provision of reasonable efforts by DSS "to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines . . . that such efforts are not required or shall cease[.]" N.C. Gen. Stat. § 7B-507(a)(3) (2013). Father became a party to the case in February of 2012, at which time the trial court had already decided to pursue a plan of adoption and termination of parental rights. Despite the revelation of A.E.C.'s biological father, the trial court determined that the existing plan was consistent with A.E.C.'s best interest, and would not change. The trial court made no findings as to whether DSS made reasonable efforts to reunite father with A.E.C.

2. Futility

The trial court may order that reasonable efforts at reuniting the child with parents shall cease if it finds:

> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;
>
> (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

> (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or
>
> (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; has committed sexual abuse against the child or another child of the parent; or has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-507(b). While subsections (2)-(4) do not apply to the facts before us, we acknowledge that the trial court had an obligation to determine that efforts to reunite A.E.C. with father would be futile before it could direct reunification efforts to cease. We have previously held that the trial court cannot merely recite findings of fact; it must "link . . . these findings to the two prongs set forth in N.C. Gen. Stat. § 7B–507(b)(1)." *In re I.R.C.*, 214 N.C. App. 358, 362, 714 S.E.2d 495, 498 (2011). "This Court cannot simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home where the trial court was required to make *ultimate* findings specially based on a process[] of logical reasoning." *Id.* at 363-64, 714 S.E.2d at 499 (citations and quotations omitted).

In the first order to which father was a party, entered 21 March 2012, the only finding concerning father was that he had not yet taken a DNA test. In the second order, entered 10 April 2012, the only findings concerning father were that he had requested paternity testing, which the court directed to be expedited. In the third order, entered 24 August 2012, the trial court found that father first became aware of A.E.C. in October of 2011 when he was contacted by mother; that he was A.E.C.'s biological father; that he had not provided any support for A.E.C.; and that he should have investigated the birth, as he had reason to believe that mother could be pregnant. The trial court also ordered a home study. In the fourth order, entered 23 August 2012, the court found that father had requested to become a part of A.E.C.'s life; that he and A.E.C. shared no bond; that he was unaware of A.E.C. until October 2011; that DSS was ordered to perform a home study; that father had failed to provide an address for the home study; that he was not present

in court and his whereabouts were unknown; that he had not contacted DSS or the court since the last hearing date; that counsel indicated that he was with his ex-wife while recovering from back surgery; and that he was not cooperating with DSS. None of these findings address the ultimate finding of fact required of the trial court, which is whether reunification with father would have been futile.

3. Best Interests

At the conclusion of any hearing in which a child is not returned home, a trial court is required to consider and make findings regarding:

> (1) Whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests.
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.
>
> (3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption.
>
> (4) Where the juvenile's placement with a parent is unlikely within six months, whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why.
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e) (2013).[2] Father cites to *In re I.K.*, in which we held that the trial court's findings failed to explain why the child could not be returned home. *In re I.K.*, ___ N.C. App. ___, ___, 742 S.E.2d 588, 595-96 (2013). We remanded that case for further findings of fact and conclusions of law. Father also cites to *In re Eckard*, in

2. Father, in his brief, cites to N.C. Gen. Stat. § 7B-907(b), which has since been repealed. N.C. Gen. Stat. § 7B-906.1(e) contains substantially the same provisions.

which the trial court found that the father made a "late appearance" and dismissed him as a candidate for custody because the child was "too bonded to her current placement[.]" *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (2002). We held that the trial court erred, in that the statute required it to consider custody with a relative, and reversed and remanded for reunification proceedings.

We find the instant case to be controlled by *Eckard*. As the father in *Eckard*, father in the instant case made a late appearance. Despite his appearance and subsequent confirmation as A.E.C.'s biological father, the trial court saw no need to change its permanent plan. It failed to determine whether DSS had made reasonable efforts to reunite A.E.C. with father, whether reunification would be futile, or why placement with father was not in A.E.C.'s best interest, in any manner other than the issuance of conclusory statements.

4. Termination Order

Our Supreme Court has held that we are to construe orders to cease reunification together with termination orders. *In re L.M.T.*, ___ N.C. at ___, 752 S.E.2d at 457. Specifically, the Court in *L.M.T.* held that "[b]ecause we consider both orders 'together,' incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order." *Id.*

In its termination order, the trial court adopted its findings from its earlier permanent planning orders. Beyond these, the trial court made other findings, but none had any bearing on the issues outlined above. We hold that the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders. We further hold that the trial court erred in ceasing reunification efforts with respect to father.

IV. Conclusion

Because the trial court erred in ceasing reunification efforts with respect to father, it erred in entering its order terminating father's parental rights with respect to A.E.C. *See In re A.P.W.*, ___ N.C. App. at ___, 741 S.E.2d at 392. We vacate the order ceasing reunification with father and the order terminating father's parental rights, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges GEER and STEPHENS concur.

IN RE A.N.S., A MINOR CHILD

No. COA14-892

Filed 20 January 2015

Termination of Parental Rights—failure to conduct preliminary hearing—putative father

The trial court did not err in a termination of parental rights case by failing to conduct a preliminary hearing pursuant to N.C.G.S. § 7B-1105 in order to definitively determine the name or identity of the minor child's father. The petition alleged that respondent was the putative father. Further, the contingency that "John Doe" was the child's father was consistent with the other allegations that respondent was not named on the birth certificate and paternity had not been judicially established.

Appeal by respondent from judgment entered 28 May 2014 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 4 December 2014.

Ellis Family Law, P.L.L.C., by Gray Ellis, for petitioner-appellee.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant.

GEER, Judge.

Respondent father appeals from a judgment terminating his parental rights with respect to his daughter, "Angela."[1] Respondent's sole argument on appeal is that the trial court erred in failing to conduct a preliminary hearing pursuant to N.C. Gen Stat. § 7B-1105 (2013) in order to definitively determine the name or identity of Angela's father. However, we conclude that, under the circumstances of this case, the trial court was not required by N.C. Gen. Stat. § 7B-1105 to conduct such a hearing. We, therefore, affirm.

Facts

Angela was born to petitioner mother on 23 September 2011 in Onslow County. On 12 December 2012, petitioner filed a complaint

1. The pseudonym "Angela" is used throughout this opinion to protect the privacy of the minor and for ease of reading.

asking that respondent's paternity of Angela be "judicially established," that petitioner be granted "sole and exclusive legal and physical custody" of Angela, and that respondent be ordered to pay child support. Although respondent filed an answer to the complaint and received proper notice of the custody hearing, he did not appear. On 20 February 2013, the trial court ordered respondent to submit to paternity tests, but he never did so.

On 26 September 2013, petitioner filed a verified petition to terminate parental rights to Angela alleging that respondent was Angela's biological father or, "[i]n the alternative, the Respondent 'John Doe' is the father of [Angela]." On 28 May 2014, the trial court entered a "judgment" that found the following facts.

Although petitioner and respondent never married, at the time of the termination hearing petitioner was "married and her husband would like to adopt the minor child." Petitioner and respondent were 20 and 26 years old, respectively, when they had an intimate relationship. Petitioner's "choice of [respondent] as a boyfriend did not show the best judgment."

During the relationship, respondent lived in a halfway house, had a criminal history, and was in a Drug Court program that had conditions on fathering a child during the program. Respondent lied to the judge in Drug Court "about fathering a child, prior to the birth [of Angela] because he did not want to be extended in the program another year[,]" and, ultimately, respondent was imprisoned for two weeks for lying to the judge.

The day that Angela was born, respondent informed petitioner that he wanted to break off their relationship, although the intimate relationship did continue. Respondent nonetheless showed up at the hospital the following day with his mother, which resulted in friction between petitioner's and respondent's families. Petitioner did not name respondent as the father in filling out Angela's birth certificate at the hospital.

After Angela was born, respondent made no effort to establish his paternity or have his name added to Angela's birth certificate. He never paid any money to petitioner to support Angela and only "help[ed] to purchase a few clothing items" for Angela, despite the fact that he had the means to provide more. Although respondent had occasional contact with Angela, he relied exclusively on petitioner or his own mother to initiate any visitation. While petitioner and Angela were visiting respondent and his parents for Easter 2012, respondent's mother threw Angela's Easter gift at petitioner following an argument.

Respondent was able to see Angela on her first birthday in September 2012. However, in October 2012, respondent and petitioner broke off their relationship, which caused the relationship between their families to deteriorate. After the breakup, respondent and his mother, "the paternal grandmother," visited petitioner at her residence but petitioner told them to leave or else she would call the police.

Respondent and his family members also tried to contact petitioner after the breakup by phone, but "the phone was either not answered or if answered, would be hung up as soon as the party identified themselves." Petitioner filed criminal charges of harassing phone calls against respondent for which he was convicted. Although respondent bought Angela a Christmas gift in 2012, he never delivered it.

After petitioner filed her custody action on 12 December 2012, respondent "admitted the allegation of paternity 'upon paternity test' but made no counterclaim for custody or visitation." Although the trial court ordered respondent to submit to a paternity test, "the Respondent putative father failed to comply with the Order of the court to submit to a paternity test to establish paternity."

While respondent was not in jail the six months preceding the filing of the termination of parental rights petition, he "has either been incarcerated, resided in three different half-way houses or his mother's house over the past several years; he has not maintained any independent residence." He has also "been unable to maintain steady employment."

The trial court also found, with respect to the potential "John Doe" father, that "John Doe has never had any contact with the minor child since birth"; "John Doe has never provided any support for the minor child since birth"; and "John Doe has never taken steps to establish paternity of the minor child."

Based on these findings, the trial court further found that it was in the "best interests of the minor child to terminate the parental rights of [respondent] or in the alternative John Doe[.]" These findings included that "[w]hile the paternal grandmother wants a relationship with the child, [respondent] has not shown any similar interest."

The trial court concluded that, "by clear, cogent and convincing evidence," respondent abandoned and neglected Angela as provided in N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(7). It also concluded separately that, "by clear, cogent and convincing evidence," John Doe abandoned and neglected Angela as provided in N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(7). Further, the trial court concluded that "it is in the best

interests of the minor child to terminate the parental rights of [respondent] or in the alternative John Doe" and ordered the termination of their parental rights with respect to Angela. Respondent timely appealed to this Court.

Discussion

When reviewing a trial court's order terminating parental rights, this Court must determine

> whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. However, [t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

In re D.T.L., 219 N.C. App. 219, 220-21, 722 S.E.2d 516, 517 (2012) (internal citations and quotation marks omitted).

Respondent does not contend that any of the trial court's findings are inadequately supported by the evidence. Rather, respondent argues that the trial court erred in terminating his "parental rights" as a "putative father" because no preliminary hearing was conducted pursuant to N.C. Gen. Stat. § 7B-1105 to determine the actual identity of the biological father. He further contends that the trial court was not authorized to enter an order terminating his "parental rights" because the trial court did not specifically find that he was Angela's father, as it was required to do after conducting a preliminary hearing under N.C. Gen. Stat. § 7B-1105.

N.C. Gen. Stat. § 7B-1105(a) sets out the procedure for the trial court to follow when "the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner . . . ." When this provision is triggered, a trial court is required to conduct a preliminary hearing, generally within 10 days of the filing of the petition to "ascertain the name or identity of [the unknown] parent." *Id.* Additionally, "[s]hould the court ascertain the name or identity of the parent, it shall enter a finding to that effect[.]" N.C. Gen. Stat. § 7B-1105(b).

We note initially that, given the language "not known to the petitioner," and because N.C. Gen. Stat. § 7B-1105 contemplates a preliminary hearing to be conducted prior to the expiration of the 30-day time period for a respondent to file an answer to the petition, *see* N.C. Gen. Stat. §§ 7B-1106(a) and 7B-1107 (2013), the legislature intended the preliminary hearing described in N.C. Gen. Stat. § 7B-1105 to apply only

when the petition demonstrates that the petitioner is unaware of "the name or identity" of a parent, regardless of the respondent's answer.

Here, the petition alleges that "the Respondent is the putative father," that "the Petitioner did not have an intimate relationship with anyone else during the relevant period that could be the father of [Angela]," and that "the Petitioner is informed and believes that the Respondent putative father is the biological father of the minor child." These allegations unquestionably indicate that petitioner knew that respondent was Angela's father.

Respondent, however, contends that "[t]he petition in this case plainly alleged that the petitioner did not know who Angela's father was" because it alleged "[*i*]*n the alternative*, the Respondent 'John Doe' is the father of [Angela]." (Emphasis added.) However, this allegation is contingent, and there are no factual allegations actually suggesting John Doe's paternity of Angela. Further, the contingency of the allegation that "John Doe" is Angela's father appears to be consistent with the other allegations that respondent "is not named on the birth certificate and paternity has not been judicially established." *See In re J.S.L.*, 218 N.C. App. 610, 610, 723 S.E.2d 542, 542 (2012) ("Because no father was named on the birth certificate, petitioner also sought to terminate the parental rights of any possible unknown father."). The allegations regarding "John Doe," we conclude, provide no reason to suppose that petitioner did not know the identity of Angela's father when she filed the petition. Thus, the trial court was not required to conduct a preliminary hearing under N.C. Gen. Stat. § 7B-1105.

Respondent cites *In re M.M.*, 200 N.C. App. 248, 684 S.E.2d 463 (2009), in support of his position that the trial court did not comply with N.C. Gen. Stat. § 7B-1105 and, therefore, erred. However, in *In re M.M.*, the preliminary hearing under N.C. Gen. Stat. § 7B-1105 was triggered when the petitioner Department of Social Services alleged that although the juvenile had a "legal father," the juvenile's "biological father was unknown." 200 N.C. App. at 250, 684 S.E.2d at 465.

Respondent also contends that the trial court's findings "did not identify Angela's father." Rather, the petition "variously referred to [respondent] as the 'putative father,' the 'father,' and 'Mr. [respondent's last name]'." Respondent further points out that the order "included findings regarding John Doe's complete absence from Angela's life" and "it found that both [respondent] and John Doe neglected and abandoned [Angela]."

"Section 7B-1111 of our statutes, which establishes grounds for terminating parental rights, is used to determine a *putative father's*

commitment to his child." *In re Williams*, 149 N.C. App. 951, 958, 563 S.E.2d 202, 206 (2002) (emphasis added). While respondent's putative status was sufficient to terminate his putative parental rights, nonetheless, we find that the trial court made findings positively identifying respondent as Angela's father: the judgment found that respondent lied to Drug Court about fathering Angela, and it also referred to respondent's mother as Angela's "paternal grandmother."

Although the order references "John Doe" in its findings, these findings contingently refer to "John Doe" as Angela's father, which is consistent with findings of respondent's paternity. The "John Doe" findings, in turn, supported the termination of John Doe's parental rights and not respondent's. This is also consistent with respondent's paternity. *See In re R.R.*, 180 N.C. App. 628, 633, 638 S.E.2d 502, 505 (2006) (holding that inclusion of grounds for terminating parental rights of "unknown father" was consistent with terminating parental rights of father identified in order). Further, the uncontradicted evidence at the hearing affirmatively established respondent as Angela's father; there was no evidence suggesting that "John Doe" was Angela's father.

Affirmed.

Judges STEELMAN and STEPHENS concur.

IN RE B.L.H.

[239 N.C. App. 52 (2015)]

IN THE MATTER OF B.L.H., A MINOR CHILD

No. COA14-910

Filed 20 January 2015

1. Termination of Parental Rights—subject matter jurisdiction

The trial court did not err by exercising subject matter jurisdiction over a termination of parental rights proceeding. Although a Virginia court entered the initial custody order, under N.C.G.S. § 50A-203 the trial court had subject matter jurisdiction to terminate the father's parental rights because North Carolina was the child's home state and neither the child nor the parents resided in Virginia at the time the motion was filed.

2. Termination of Parental Rights—statutory right to counsel—ineffective assistance of counsel

Respondent received ineffective assistance of counsel in a termination of parental rights proceeding and was entitled to a new hearing. Trial counsel did not attempt to communicate with respondent before the hearing and did not present any evidence or make a cogent argument during the hearing.

Appeal by respondent from order entered 29 April 2014 by Judge Angela B. Puckett in Surry County District Court. Heard in the Court of Appeals 22 December 2014.

H. Lee Merritt, Jr. for petitioner-appellee.

Peter Wood for respondent-appellant.

DAVIS, Judge.

R.H.L. ("Respondent") appeals from the trial court's 29 April 2014 order terminating his parental rights to his daughter, B.L.H. ("Barbara").[1] On appeal, Respondent argues that (1) the trial court lacked subject matter jurisdiction to terminate his parental rights; and (2) he received ineffective assistance of counsel at the termination of parental rights proceeding. After careful review, we affirm in part, vacate in part, and remand for further proceedings.

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1. The pseudonym "Barbara" is used throughout this opinion to protect the identity of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

Factual Background

M.M.W.N. ("Petitioner") and Respondent are the natural parents of Barbara, who was born in 2001. The parties married in February 2003 and lived together with Barbara in Patrick County, Virginia until Respondent and Petitioner separated in December 2003. Following the parties' separation, Petitioner and Barbara moved to Surry County, North Carolina, and Respondent remained in Patrick County, Virginia. The parties subsequently divorced.

On 1 July 2004, a custody order was entered in Patrick County, Virginia granting the parties joint legal custody of Barbara and primary physical custody to Petitioner. The order contained provisions for visitation by Respondent, which he exercised on a regular basis until July 2006. In late July 2006, Respondent was charged with federal drug-related offenses. On 5 October 2006, the Virginia court entered an order modifying the terms of Respondent's visitation to permit supervised visitation only. Respondent was convicted of the drug offenses and sentenced to active imprisonment in May 2007. Respondent is currently serving his sentence at a federal prison in Texas, and his projected date of release is 10 July 2017.

Petitioner remarried in September 2006 and since that time has continuously lived with Barbara and her present husband in Surry County, North Carolina. Petitioner's husband filed a petition to adopt Barbara in October 2013. On 16 December 2013, Petitioner filed a motion in Surry County District Court to terminate Respondent's parental rights, alleging that Respondent had neglected and abandoned Barbara. The summons issued to Respondent in connection with that proceeding contained a notice that an attorney had been temporarily assigned as Respondent's counsel. The notice also contained contact information for the attorney and encouraged Respondent to contact him immediately. The return of service indicated that service was effectuated upon Respondent on 17 January 2014.

Respondent filed a *pro se* response on 7 February 2014, opposing the termination of his parental rights and the proposed adoption of Barbara by Petitioner's husband. In his response, he asserted that he had written letters to Barbara but that Petitioner had refused to give the letters to her. He also alleged that despite his incarceration, he had made child support payments from 2007 to May 2013, at which time his funds were depleted. The response was addressed to the "Surry County Court" in care of the temporarily-assigned attorney.

On 24 February 2014, the trial court officially appointed the same attorney to represent Respondent in the termination of parental rights proceeding. At a hearing held on 27 February 2014, the trial court concluded that it possessed subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and scheduled an adjudication hearing on the motion to terminate Respondent's parental rights for 26 March 2014. Respondent's attorney asked the trial court for sufficient time to communicate with Respondent and expressed concerns about his ability to contact Respondent in prison. However, the attorney ultimately agreed to the 26 March 2014 hearing date and stated that if he encountered a problem, he would discuss it with Petitioner's counsel.

At the beginning of the 26 March 2014 proceeding, Respondent's trial counsel requested that the following information be noted in the record: (1) Respondent was incarcerated in federal prison in Texas; (2) the attorney had not yet spoken to Respondent but had spoken to "Kristin," Respondent's adult daughter who was in "some type" of contact with Respondent; (3) the attorney had not spoken to anyone else about the case after his conversation with Kristin; and (4) even though he had not communicated with Respondent, the attorney believed that he had enough information to cross-examine Petitioner and that "if [Respondent] were present and if he had communicated [with the attorney,]" Respondent would have wanted the attorney to proceed in representing Respondent at the hearing.

After counsel's statements were read into the record, the following colloquy occurred between him and the trial court:

> THE COURT: All right. And what efforts have you made to contact [Respondent]?
>
> [COUNSEL]: Your Honor, there was a -- I did not write [Respondent], Your Honor. I sent a request to the prison to find out about the email down there because it is my understanding just through my research that inmates do have, for a fee, an email service that they can use. I heard no response from [Respondent], Judge. I did not write him. Honestly, I did not have a way to phone him and speak to him as well. As I indicated, I spoke to his daughter. She essentially raised some of the same issues as her father had raised in response.
>
> THE COURT: Has she — had she spoke to him about this trial?

> [COUNSEL]: I think she had spoken to him. That's my understanding, Your Honor.
>
> THE COURT: Okay, and has he made any effort to contact you or write you at your address?
>
> [COUNSEL]: No, Your Honor, he has not.
>
> THE COURT: And it looks like he was given your name and address through the summons. All right. Then, are you ready to proceed today, then, [Counsel]?
>
> [COUNSEL]: Yes.
>
> THE COURT: Okay. All right.

The trial court then proceeded to conduct the adjudication hearing. Petitioner was the only witness to testify at the hearing, and Respondent's counsel conducted the following cross-examination of her:

> Q. Ma'am, you indicated that [Barbara] — I mean, excuse me, your stepdaughter is [Kristin]; is that correct?
>
> A. It is. . . .
>
> Q. Okay. I understand. And you and [Kristin] stay in kind of regular contact?
>
> A. Yes.
>
> Q. Have you ever told [Kristin] that you did not want [Barbara] to see, observe, look at any letters that her father may have sent to [Kristin]?
>
> A. Whenever — he hadn't spoken to her — Do you mind if I explain?
>
> When he was first sent away and hadn't talked to her, it had been years, three years that he was away and one conversation the first time that she was allowed to stay the night at her sister's house three years later, he called his oldest daughter and wanted to speak with [Barbara] and [Barbara] got very upset. And at that point there was nothing else.
>
> Q. So getting back to my question. So is it your testimony that you did not want [Barbara] to have any type of correspondence or any letters that her father may've sent?

A. No, my — I never once stopped her from ever speaking to him.

Q. Has [Kristin] tried to ever give you any letters that —

A. Nope.

Q. — your — her father has sent to her to give to [Barbara]?

A. No.

[COUNSEL]: That's the only questions, Your Honor.

The trial court asked Respondent's attorney whether he had any evidence to offer. Counsel replied, "No evidence, Judge, on adjudication." The guardian *ad litem* also declined to present evidence. The trial court then invited arguments from the parties' attorneys. After arguments were made by Petitioner's counsel, Respondent's attorney stated the following:

[COUNSEL]: Thank you, Your Honor.

Your Honor, obviously counsel (inaudible) [Respondent] — and that (inaudible). I'm not an expert, Judge, on the workings of the Federal Prison System. I do know that — I don't know what actions [Respondent] could have taken to've [sic] availed himself to be present at this hearing. I don't know how easy it is for [Respondent] to be moved from Texas to North Carolina. That — Judge, whether the county or whether the Federal Prison System would allow a writ to be issued for him to be present in court, my guess is probably no. The only evidence I can offer up — and we've all heard cases. Mr. Merritt and I have had cases involving this issue, Your Honor. In the case law — I think we all agree the case law is pretty clear, that just because one is incarcerated it's kind of a double-edged sword, that does not automatically equate to grounds to terminate one[']s parental rights. But on the other edge of the sword, it doesn't mean that your rights or your duties as a parent doesn't [sic] end. In our (inaudible) estimate, the testimony I can offer, Judge, would be that . . . I mean [Petitioner] testified that a few years after he had been incarcerated that the daughter [Barbara] spent the night with her half sister [Kristin] in — I believe up in Virginia, and that at that point in time the respondent called his — [Kristin], the other daughter and wanted to speak to

> [Barbara] but [Barbara] was somehow upset by this. And I don't know what happened after then but — the only thing I can argue, Judge, is that perhaps the reaction that he got, Judge, and probably, again, estimation that — thinking that this is probably not going to happen again, Judge, letting him not to have any contact with the — with his daughter. Again, without him being here, I can't -- I don't have any way to contradict what the testimony would be with him, Judge. So we would simply argue that due to his circumstances, Judge, he has made all efforts that he can, (coughing/inaudible) preponderance of the evidence, the facts as alleged in the petition and the facts — the issue that they contend that should lead this Court to terminate his parental rights.

The trial court concluded that grounds existed to terminate Respondent's parental rights and proceeded to the disposition hearing. During the disposition phase of the proceeding, Petitioner was once again the only witness to testify. Respondent's counsel did not cross-examine her and did not present any evidence on Respondent's behalf. When offered the opportunity to be heard, Respondent's counsel stated, "Judge, for those reasons I've stated, I'd contend it's not in the best interest . . . (inaudible)." No other argument by Respondent's counsel appears in the record.

The trial court entered an order on 29 April 2014 terminating Respondent's parental rights based on its determination that (1) the two alleged grounds for termination — abandonment and neglect — were proven by clear, cogent, and convincing evidence; and (2) termination of Respondent's parental rights was in Barbara's best interests. Respondent filed a timely notice of appeal to this Court.

Analysis

I. Subject Matter Jurisdiction

[1] Respondent first contends that the trial court lacked subject matter jurisdiction to terminate his parental rights because (1) the Virginia court that entered the initial custody order did not relinquish jurisdiction; and (2) Respondent remained domiciled in Virginia.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter

jurisdiction may be raised for the first time on appeal." *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

"In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). For termination of parental rights proceedings, the statute establishing jurisdiction is N.C. Gen. Stat. § 7B-1101, which provides in pertinent part:

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.

N.C. Gen. Stat. § 7B-1101 (2013).

The above-referenced statutes listed within N.C. Gen. Stat. § 7B-1101 are all provisions of the UCCJEA, which defines a "child-custody determination" as "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." N.C. Gen. Stat. § 50A-102(3) (2013). The jurisdictional requirements of the UCCJEA apply to termination of parental rights proceedings. *In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 53, *disc. review denied*,

___ N.C. ___, 763 S.E.2d 517 (2014). As such, N.C. Gen. Stat. § 7B-1101 requires that the trial court "have jurisdiction to make a child-custody determination under the provisions of N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203 in order to terminate the parental rights of a nonresident parent." *Id.*

As Respondent does not reside in North Carolina and is therefore a nonresident parent, we must determine whether the trial court possessed subject matter jurisdiction under either N.C. Gen. Stat. § 50A-201 or N.C. Gen. Stat. § 50A-203. Because N.C. Gen. Stat. § 50A-201 pertains only to *initial* custody determinations and the initial custody order in the present case was made by a Virginia court, § 50A-201 is inapplicable. *See In re J.D.*, ___ N.C. App. ___, ___, 759 S.E.2d 375, 378 (2014) (concluding that § 50A-201 could not confer jurisdiction upon North Carolina court because initial custody determination had been made by Indiana court). As such, N.C. Gen. Stat. § 50A-203 is the only possible basis for the trial court's exercise of jurisdiction over this matter.

N.C. Gen. Stat. § 50A-203 states that a court of this State may not modify a child-custody determination of another state

> unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) and:
>
> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (2013).

N.C. Gen. Stat. § 50A-201(a)(1) requires either that (1) North Carolina is the home state[2] of the child on the date of the commencement of the proceeding; or (2) North Carolina was the home state of the child within six months before the commencement of the proceeding and, although

2. The UCCJEA defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7).

the child is presently absent from this State, a parent continues to reside here. N.C. Gen. Stat. § 50A-201(a)(1) (2013).

In this case, Barbara has been living in North Carolina with Petitioner since December 2003. Accordingly, North Carolina is Barbara's home state, and the first prong of N.C. Gen. Stat. § 50A-203 is therefore satisfied. However, because nothing in the record indicates that the Virginia court determined either that it no longer had exclusive, continuing jurisdiction or that a North Carolina court would be a more convenient forum, N.C. Gen. Stat. § 50A-203(2) must be satisfied in order for a North Carolina court to possess jurisdiction to modify the initial custody determination regarding Barbara.

Respondent contends that N.C. Gen. Stat. § 50A-203(2) is not satisfied because although Petitioner and Barbara no longer live in Virginia, Respondent remains domiciled there despite being physically incarcerated in Texas. We disagree.

N.C. Gen. Stat. § 50A-203 does not require that the parties no longer be *domiciled* in the state which initially exercised jurisdiction over the child in order for another state to modify the existing custody determination. Rather, the relevant statutory provisions permit modification of another state's custody determination if neither the child nor the parents "presently reside" in the state which entered the initial custody order. N.C. Gen. Stat. § 50A-203; *see* N.C. Gen. Stat. § 50A-202(a)(2) (2013) (explaining that if child and parents "do not presently reside" in state that made initial custody determination, that state no longer possesses exclusive, continuing jurisdiction). Indeed, the official comment to N.C. Gen. Stat. § 50A-202 clarifies that the phrase "do not presently reside" was intended to mean

> that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.
>
> The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.
>
> If the child, the parents, and all persons acting as parents have all left the State which made the custody

> determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

N.C. Gen. Stat. § 50A-202 cmt.

"Residence simply indicates a person's actual place of abode, whether permanent or temporary." *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972). It is undisputed that neither Respondent, nor Petitioner, nor Barbara *actually resided* in Virginia at the time of the filing of the motion to terminate Respondent's parental rights. Consequently, Virginia no longer possessed exclusive, continuing subject matter jurisdiction, and a North Carolina court was legally authorized to assume jurisdiction. Respondent's argument on this issue is therefore overruled.

II. Ineffective Assistance of Counsel

[2] Respondent next contends that he received ineffective assistance of counsel because his trial counsel made no effort to communicate with him prior to the 26 March 2014 hearing.[3] We agree.

An indigent parent has a statutory right to counsel in a termination of parental rights proceeding. N.C. Gen. Stat. § 7B-1101.1(a) (2013).

> A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation.

In re Bishop, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) (internal citation omitted).

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3. Respondent also asserts that his trial counsel's failure to present evidence regarding his state of domicile constituted ineffective assistance of counsel. As explained in the preceding section, however, a party's physical residence, rather than his domicile, is the relevant issue when determining subject matter jurisdiction under the UCCJEA. As such, Respondent was not prejudiced by trial counsel's failure to offer evidence regarding Respondent's domicile. *See In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (explaining that parent must show that he was prejudiced in order to establish ineffective assistance of counsel in termination of parental rights proceeding), *appeal dismissed*, 363 N.C. 564, 686 S.E.2d 676 (2009).

The right to counsel provided by statute "includes the right to effective assistance of counsel." *Id.* at 665, 375 S.E.2d at 678. "A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

Here, the record reveals that Respondent's counsel did not have any actual contact whatsoever with Respondent. Counsel did not write any letters or send any emails to Respondent. Nor did he engage in any conversation with Respondent by telephone. The record indicates that the only affirmative act undertaken by counsel even arguably constituting an attempt to communicate with Respondent was to contact the federal prison to learn about the prison's email system.

Our Supreme Court has explained that "a lawyer cannot properly represent a client with whom he has no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). Indeed, counsel's argument at the termination hearing revealed how this lack of contact hindered his ability to effectively represent Respondent. Counsel did not present any evidence on Respondent's behalf at either phase of the hearing, failed to present a cogent argument at the adjudication phase, and declined to make any substantive argument during the disposition phase of the hearing.

"It is well established that attorneys have a responsibility to advocate on the behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010). A parent facing the termination of his parental rights is "entitled to procedures which provide him with fundamental fairness in this type of action." *Id.* at 561, 698 S.E.2d at 79. "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L.Ed.2d 599, 606 (1982).

This is not a case in which a parent failed to cooperate with his attorney or declined to respond to inquiries from his attorney. To the contrary, Respondent acted promptly upon receiving the summons and motion to terminate his parental rights by filing a response, which he directed to his appointed counsel. Respondent also acted in a timely fashion by returning the affidavit of indigency form that had been mailed to him by the clerk of court. Nothing in the record suggests that Respondent personally received notice of the 26 March 2014 hearing or that Respondent wanted his appointed attorney to proceed on his behalf at the hearing in the absence of any prior consultation with him.

Accordingly, we conclude that Respondent's counsel did not make sufficient efforts to communicate with Respondent in order to provide him with effective representation and that this failure deprived Respondent of a fair hearing. As a result, Respondent is entitled to a new hearing on the termination of his parental rights.

Conclusion

For the reasons stated above, we conclude that the trial court possessed subject matter jurisdiction over this action. However, because Respondent was denied effective assistance of counsel, we vacate the order terminating his parental rights and remand for a new hearing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge STEELMAN concur.

IN THE MATTER OF J.D.R.

No. COA14-697

Filed 20 January 2015

1. Child Abuse, Dependency, and Neglect—neglected juvenile determination—supported by evidence

The trial court's determination that a child was a neglected juvenile, as defined under N.C.G.S. § 7B-101(15), was supported by the evidence where the trial court found that mother had previous problems with drugs and that she had previously injured the child while abusing drugs, that the mother had continued to use drugs illegally, that the mother had hit and kicked the child, and that she had refused to cooperate with the Department of Social Services to assess the child's safety. Moreover, even though the child had been diagnosed with oppositional defiant disorder, the trial court found that the child treated the mother like a friend and that this relationship seemed to contribute to the child's defiant behavior.

2. Child Abuse, Dependency, and Neglect—dependent—alternative care arrangement—no finding

The trial court erred by adjudicating a child as dependent. A dependent juvenile is defined, in pertinent part, as one in need of assistance or placement because the juvenile's parent, guardian,

or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement. In the present case, the Department of Social Services failed to present any evidence on child care at the hearing and the trial court made no finding of fact that the mother lacked an alternative child care arrangement.

3. Child Abuse, Dependency, and Neglect—jurisdiction terminated—custody award to father—findings sufficient

The trial court complied with N.C.G.S. § 7B-911 when it awarded custody to a father and terminated its jurisdiction. Although the mother argued the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50, and therefore the trial court's order awarding custody to the father did not comply with N.C.G.S. § 7B-911(a), the court's findings were relevant to the child's interest and welfare and were sufficient under N.C.G.S. § 7B-911(a).

4. Child Abuse, Dependency, and Neglect—jurisdiction terminated—custody transferred to Chapter 50 case—findings—no need for further State intervention

The trial court erred by terminating its jurisdiction over a child pursuant to Chapter 7B by transferring the issue of the child's custody to a Chapter 50 case. The trial court's order did not contain the required ultimate finding that there was no need for continued State intervention on the child's behalf, and no findings from which it could be inferred that the issue had been considered.

5. Child Abuse, Dependency, and Neglect—dependency—mother's visitation—at father's discretion

The trial court improperly delegated its judicial authority in a dependent child proceeding by granting the father discretion in determining the terms of the mother's visitation. The trial court effectively turned the father into the mother's case worker and also gave the father the authority to determine whether the mother complied with the trial court's directives.

Appeal by Respondent-Mother from order entered 18 March 2014 by Judge Laura Powell in District Court, Rutherford County. Heard in the Court of Appeals 22 December 2014.

No brief for Petitioner-Appellee Rutherford County Department of Social Services.

Leslie Rawls for Respondent-Appellant Mother.

Callahan Law Office, PLLC, by J. Christopher Callahan, for Respondent-Appellee Father.

Smith Moore Leatherwood LLP, by Kip D. Nelson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Appellant Mother ("Mother") appeals from an adjudication and disposition order ("the disposition order") adjudicating J.D.R ("the Child") a neglected and dependent juvenile, awarding custody of the Child to Respondent-Appellee Father ("Father"), granting Mother visitation, and transferring the case to a Chapter 50 civil action. For the following reasons, we affirm in part, reverse in part, and remand.

I. Background

At the time the following events occurred, the Child had a diagnosis of mild oppositional defiant disorder, although his "symptoms [were] confined to only one setting, [the] home." The Child was eight-years-old and primarily had lived with Mother for most of his life.

The Rutherford County Department of Social Services ("DSS") filed a petition on 30 October 2013, based upon reports concerning the Child's safety, alleging that the Child was a neglected and dependent juvenile. DSS alleged that when the Child went to school on 29 October 2013, he had scratches near his eye. The Child told school personnel that Mother had hit and kicked him. Mother took the Child to the hospital later that day and the Child told the doctor Mother had kicked him and had pulled him from under the bed. Mother would not allow a DSS social worker to interview the Child at the hospital and would not allow Father to assist her. DSS took non-secure custody of the Child and subsequently placed the Child with Father. By orders entered 6 and 11 November 2013, the trial court continued its non-secure custody order.

The trial court held an adjudication and disposition hearing in January and February of 2014. During the February hearing, the trial court suspected that Mother was intoxicated. At the conclusion of the hearing, the trial court ordered Mother to submit to a drug test, which was administered approximately twenty minutes later. Mother tested positive for opiates, amphetamines, and methamphetamines. By order entered 18 March 2014, the trial court adjudicated the Child

neglected and dependent. The trial court further ordered that the court's jurisdiction be terminated, initiated a Chapter 50 civil custody case, awarded custody of the Child to Father, and granted Mother visitation. Mother appeals.

Mother's first notice of appeal, filed 18 March 2014, does not have a certificate of service attached and states only that Mother was "appealing the adjudication in these matters." Mother's second notice of appeal, filed 19 March 2014, states that Mother was appealing from both the disposition order as well as the trial court's 26 November 2013 order continuing the non-secure custody order of the Child. This second notice was served only on counsel for the Guardian ad Litem. Mother's third, and final, notice of appeal, filed 28 March 2014, states only that Mother is appealing from the disposition order, and this notice was served on counsel for the Guardian ad Litem, as well as counsel for Father.

II. Scope of Review

As a preliminary matter, we note that Mother filed three separate notices of appeal in this action. Notwithstanding possible issues with Mother's first two notices of appeal, the arguments in Mother's brief focus exclusively on the disposition order. As such, our review of Mother's appeal will be limited accordingly. N.C.R. App. P. Rule 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

III. Standard of Review

On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact are supported by clear and convincing evidence, and (2) whether its conclusions of law are supported by the findings. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007). The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*. *In re N.G.*, 186 N.C. App. 1, 13, 650 S.E.2d 45, 53 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

IV. Adjudication of Neglect

[1] Mother first challenges the trial court's adjudication of the Child as neglected. A neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is

> not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). We have consistently held that an adjudication of neglect requires "that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (internal quotation marks omitted).

In support of its neglect adjudication, the trial court made the following findings of fact:

> 3. On October 29, 2013, the minor child went to school with scratches and bruises on his face.
>
> 4. On the 29th[,] the minor child met with the school counselor and told her that his mother had hit and kicked him that morning.
>
> 5. The hitting and kicking occurred when the minor child would not get ready for school.
>
> 6. Later in the day, the minor child hid under the bed and while trying to get him out the child hit his back on the bed causing an abrasion.
>
> 7. The mother called the police that morning in order to aid her in getting him to school.
>
> 8. The mother came to pick the minor child up at school on the 29th after school had been released. The Minor Child was in the school office, waiting for his mother [to] arrive, but was not there for disciplinary reasons.
>
> 9. The minor child left with his mother but came back into the school and said his mother had locked him out of the car and would not let him in until he apologized.
>
> 10. The mother was not in the car at this time but was sitting outside the school and would not let the minor child in the car until he apologized.
>
> 11. The mother was very agitated and at that point called Kevin Blackwell with juvenile services.

12. After describing behaviors to Mr. Blackwell, which only the mother observed and which were not occurring at the school, Mr. Blackwell told her she may want to take the child to the hospital for an evaluation.

. . . .

15. During the month of September, the mother had taken the minor child to the Department of Juvenile Justice because of his defiant behavior.

. . . .

17. The Department [of Juvenile Justice] did tell the mother that if the child committed a crime and she felt it necessary then she should call the police. The Department never told her to call the police if the child would not go to school.

. . . .

20. [The mother] has provided financially for the child with the help of child support from the father. She has provided [for] all necessary medical care and all the child's educational needs. She testified that [t]he minor child treats her like a friend and at times she testified that [t]he minor child was her "buddy".

21. This relationship seems to contribute to [t]he minor child's defiance.

22. The mother had a drug problem in the past and had involvement with the Department of Social Services because she slapped the child in the face, leaving a handprint bruise on his face.

. . . .

25. The mother takes pain medication for different injuries she received [in] at least one and possibly two car wrecks. She no longer has a prescription but she still continues to use the medication. She testified that she last used the pain medication approximately one week prior to this hearing, but that she was unsure what the medication was.

26. The mother testified that she purchases or is given painkillers by different individuals.

27. The mother testified [at the hearing] and was very erratic. She would talk around the question and would talk of grandiose ideas and reasons for her and [t]he minor child's behavior.

28. On October 29th, 2013[,] the mother took the minor child to the hospital for an evaluation. During the evaluation the child disclosed that he had been hit and kicked by the mother.

29. The hospital called [DSS].

30. [DSS] had received a report earlier that day regarding the bruising, hitting[,] and kicking and also regarding the mother's erratic behavior at school.

31. The school was concerned about her emotional state when she came to pick the minor child up that day.

32. The school secretary, counselor, principal[,] and assistant principal all testified and the Court finds that the mother was so upset and irrational that she posed a threat to the minor child's safety in light of what had happened earlier that day.

33. The DSS worker arrived at the hospital and spoke with the mother. She let the worker know that her attorney was on the way.

34. The DSS worker was not allowed to meet with the minor child although her attorney [] said that he would make the child available the next day at [DSS].

. . . .

37. Reasonable efforts were made in that DSS attempted to [substantiate] the allegations by interviewing the minor child and observing the marks that were alleged to have been made by the minor's parent by other than accidental means. Due to [respondent's] failure to comply with the request and her own refusal to speak about the allegations and give any explanation, [the] safety [of the Child] could not [be] assessed.

Mother does not challenge the trial court's findings of fact and, therefore, they are binding on appeal. *See C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337. Instead, Mother contends the trial court's findings are insufficient to support its conclusion that the Child was neglected.

The trial court found that Mother had previous problems with drugs and that she had previously injured the Child while abusing drugs. It also found that Mother had continued to use drugs illegally, that Mother had hit and kicked the Child on or around 29 October 2013, and that she had refused to cooperate with DSS to assess the Child's safety. Moreover, even though the Child had been diagnosed with oppositional defiant disorder, the trial court found that the Child "treats [Mother] like a friend" and that "[t]his relationship seems to contribute" to the Child's defiant behavior. These findings support the trial court's conclusion that the Child was not receiving proper care and supervision under the care of Mother, and that he was living in an environment injurious to his welfare. Therefore, the trial court's determination that the Child was a neglected juvenile, as defined under N.C.G.S. § 7B-101(15), is supported by the evidence.

V. Adjudication of Dependency

[2] Mother next challenges the trial court's adjudication of the Child as dependent. A dependent juvenile is defined, in pertinent part, as one "in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

In the present case, DSS failed to present any evidence on child care at the hearing and the trial court made no finding of fact that Mother lacked an alternative child care arrangement. Without the necessary findings in support of the trial court's conclusion that the Child was a dependent juvenile, this conclusion was in error. *See id.* (trial court's order reversed when it failed to make any findings regarding the availability of alternative child care arrangements). Because we reverse, based on the lack of findings pertaining to the second prong of dependency, we need not address Mother's challenge to the first prong.

VI. Civil Child Custody Order

[3] Mother further contends the trial court failed to comply with N.C. Gen. Stat. § 7B-911 when it awarded custody to Father and terminated its jurisdiction. N.C. Gen. Stat. § 7B-911 (2013) provides, in part:

> (a) Upon placing custody with a parent or other appropriate person, the court shall determine whether or

not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

. . . .

(c) When entering an order under this section, the court shall satisfy the following:

(1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7.

(2) Make the following findings:

a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.

b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Mother first argues the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50 and, therefore, the trial court's order awarding custody to Father did not comply with N.C. Gen. Stat. § 7B-911(a). We disagree. N.C. Gen. Stat. § 50-13.2(a) (2013) provides, in part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child[.]

"The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child." *Green v. Green*, 54 N.C. App. 571, 572, 284 S.E.2d 171, 173 (1981). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

In this case, the trial court's order contains findings of fact relevant to the issue of the Child's interest and welfare. The trial court specifically made findings that establish Mother tested positive for opiates, amphetamines, and methamphetamines; that Mother showed up late for visits; that Mother's behavior was erratic during visits; that Father tested negative for drugs; that Father's residence was appropriate for the Child; and that Father had sufficient financial resources to support the Child. Further, the trial court made the necessary conclusion that it was in the best interest of the Child to award custody to Father. Therefore, we conclude the trial court made sufficient findings pursuant to N.C.G.S. § 7B-911(a).

[4] Mother also argues the trial court failed to make the necessary finding pursuant to N.C.G.S. § 7B-911(c)(2)(a) that there was no need for continued State intervention on behalf of the Child and, therefore, the trial court erred in terminating its jurisdiction. On this contention, we agree. The trial court's order does not contain the required ultimate finding that there was not a need for continued State intervention on the Child's behalf. Further, the disposition order contains no findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary. *See In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403–04 (2007) (upholding order entered under N.C.G.S. § 7B-911(c)(2)(a) where the trial court failed to explicitly find

that further state intervention was not needed, but included findings that: (1) the respondent parents were able to coordinate visitations between themselves; (2) the parents both had "suitable homes for visitation and/or custody of [the] . . . children[;]" (3) the mother was "capable of properly supervising and disciplining the . . . children and keeping them safe while in her care and custody[;]" and (4) DSS "wishes to be relieved of further involvement in this case."). In the present case, because the trial court did not make the required findings in compliance with N.C.G.S. § 7B-911(c)(2)(a), the trial court erred in terminating its jurisdiction over the Child pursuant to Chapter 7B by transferring the issue of the Child's custody to a Chapter 50 case. Accordingly, we reverse the trial court's order and remand this case to the trial court for further proceedings, at which the trial court must make findings of fact and conclusions of law in accordance with N.C. Gen. Stat. § 7B-911(c)(2)(a) (2013).

VII. Visitation Plan

[5] Mother contends the trial court improperly delegated its judicial authority by granting Father discretion in determining the terms of Mother's visitation. We agree. Our General Assembly recently codified a separate section entitled "Visitation" in N.C. Gen. Stat. § 7B-905.1 (2013), which provides in part:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, *any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.* The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

(emphasis added).

In the present case, the trial court's disposition order removed custody from Mother and placed custody with a relative, Father. The disposition order further provides that:

4. The Respondent Mother will have a full psychological evaluation by a PhD level psychologist and comply with [] treatment.

5. The Respondent Mother will have another substance abuse assessment and will comply with the results of the assessment. She will give the results of all of the assessments and treatment to the Respondent Father.

6. The Respondent Mother shall have supervised visitation with the Minor Child from 9 a.m. until 5 p.m. three (3) Saturday's [sic] a month. Said visits shall be supervised by her mother, her aunt[,] or anyone else that the Respondent Father deems appropriate. He may supervise the visit but he is not required to supervise.

7. The Respondent Mother will not be impaired during the visits and will not act inappropriately. She will not corporally punish the Minor Child during the visits.

8. If and when the Respondent Mother successfully completes drug treatment, provides to the Respondent Father multiple negative drug tests and completes the above conditions, she may have unsupervised weekend visitation from Friday afterschool until Sunday at 5 [p.m.]

. . . .

10. The Respondent Father may determine whether [Mother] is allowed to eat lunch with the minor child so long as she does not cause a disturbance at the school.

11. The Respondent Mother shall have supervised visitation with the Minor Child on either Christmas [D]ay or Christmas Eve, Thanksgiving Day or the day before or after, Easter or the day before or after[,] and Mother's Day for a minimum of four hours. The Respondent Father may allow more time in his discretion.

12. Once the Respondent Mother complies with the above conditions[,] the parties will divide all major school holidays according to the school schedule.

13. Once she complies with all conditions above the Respondent Mother shall have two non-consecutive weeks of vacation during the summer.

. . . .

15. The Respondent Mother may have reasonable telephone contact if the child so desires and in the Respondent Father's discretion between the hours of seven o'clock and eight o'clock each night.

The disposition order does specify a certain "minimum frequency and length" for some of Mother's visits and indicates whether those visits must be supervised as required by N.C.G.S. § 7B-905.1. Specifically, the disposition order provides that Mother "shall have supervised visitation with the Minor Child from 9 a.m. until 5 p.m. three (3) Saturday's [sic] a month" as well as "supervised visitation with the Minor Child on either Christmas [D]ay or Christmas Eve, Thanksgiving Day or the day before or after, Easter or the day before or after[,] and Mother's Day for a minimum of four hours." However, the disposition order delegates to Father substantial discretion over other kinds of visitation, such as Mother having lunch with the Child at school. It also provides a number of future, conditional expansions of Mother's visitation rights that effectively are contingent on Father deciding that Mother has complied with the trial court's directives. For instance, the disposition order states that Mother "may have unsupervised weekend visitation from Friday afterschool until Sunday at 5 [p.m.]" after she "successfully completes drug treatment, [and] provides to the Respondent Father multiple negative drug tests." The disposition order further states that Mother "will divide all major school holidays" with Father and will have "two non-consecutive weeks of vacation during the summer" after she complies with other directives from the trial court, which include Mother providing Father with her future substance abuse assessments. This Court has been very clear that

> [the] judicial function [of awarding visitation] may [not] be . . . delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where[,] and under what circumstances a parent may visit his or her child . . . would be delegating a judicial function to the custodian.

In re Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). In the present case, we find that the trial court impermissibly delegated its judicial function to Father. The trial court effectively turned Father into Mother's case worker and also gave Father the authority to determine whether Mother complied with the trial court's directives. The present case is distinguishable from cases such as *In re E.C.*, 174 N.C. App. 517, 621 S.E.2d 647 (2005) and *Stancil*, 10 N.C. App. at 545, 179 S.E.2d 844, in which this Court vacated visitation orders that gave the respective juveniles' custodians *complete* discretion over the juveniles' parents' visitation rights, in that the trial court did place some bounds on Father's discretion. However, in the present case, the trial court's delegation to Father still goes too far. Therefore, we remand in order that the trial court can make findings and conclusions relating to visitation rights that comport with this opinion.

VIII. Conclusion

Our review of Mother's appeal has been limited to the arguments in her brief regarding the disposition order. We find that the trial court's adjudication of the Child as neglected was supported by the evidence, although the trial court made insufficient findings to support its adjudication of the Child as dependent. Moreover, the trial court made sufficient findings to award custody of the Child to Father, pursuant to N.C.G.S. § 7B-911(a). However, the trial court did not make sufficient findings in order to terminate its jurisdiction over this action, pursuant to N.C.G.S. § 7B-911(c)(2)(a). Finally, the trial court impermissibly delegated its judicial function to Father in determining Mother's visitation plan.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and DAVIS concur.

IN RE M.G.

[239 N.C. App. 77 (2015)]

IN THE MATTER OF M.G. & H.G.

No. COA14-934

Filed 20 January 2015

Constitutional Law—right to counsel—erroneous attorney withdrawal prior to client notification

The district court erred when it granted an attorney's request to withdraw from representing respondent mother in a termination of parental rights (TPR) case without first confirming that respondent had been notified of the attorney's intention to do so. The superficial inquiry failed to confirm all three prerequisites that our Supreme Court held in *Smith v. Bryant*, 264 N.C. 208 (1965), must be satisfied before an attorney is allowed to withdraw from representing a client after making an appearance on their behalf. The TPR order was vacated and the case was remanded.

Appeal by Respondent-mother from order entered 3 July 2014 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

Elizabeth Kennedy-Gurnee for Petitioner Cumberland County Department of Social Services.

Richard Croutharmel for Respondent-mother.

Beth A. Hall for guardian ad litem.

STEPHENS, Judge.

Respondent-mother ("Respondent") appeals from an order terminating her parental rights to her minor children, "Melvin" and "Hannah."[1] Respondent argues that the district court abused its discretion by: (1) denying her trial counsel's motion to continue the termination of parental rights ("TPR") hearing because Respondent was not present and had not received notice of the hearing date, and (2) by allowing Respondent's trial counsel to withdraw from her representation at the start of the TPR hearing without first confirming that Respondent had been notified of

1. For the purpose of protecting their privacy, in accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juveniles by pseudonyms in this opinion.

counsel's intent to do so. After careful review of the record, we vacate the TPR order and remand the case to the Cumberland County District Court for further proceedings necessitated by its erroneous decision to allow Respondent's counsel to withdraw.

Facts and Procedural History

On 17 August 2011, Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging abuse, neglect, and dependency ("AND") of Respondent's five-year-old son Melvin and eight-year-old daughter Hannah, and also obtained an order for nonsecure custody of them. The petition alleged that on 3 August 2011, Melvin's father beat him severely enough that he sustained "black and blue" bruises from his waistline to his buttocks and thigh, as well as a handprint on his face from multiple slaps, while Hannah sustained bruising on her hip from being beaten or spanked with a belt by her father's girlfriend.[2] Respondent reported her children's injuries to the Fayetteville Police Department, but at that time had no permanent address and a history of unstable housing, unstable employment, drug use, and anger management problems. DSS also presented evidence of domestic violence by the children's father against Respondent, and further alleged that Respondent "put pills in the juice of the children for them to drink." On 22 August 2011, attorney Mona Burke was appointed as Respondent's trial counsel for the AND proceedings and the court continued its order of nonsecure custody for the children with DSS but granted Respondent supervised visitation rights.

On 27 April 2012, the parties engaged in a permanency mediation and agreed for Melvin and Hannah to be adjudicated neglected and for dismissal of the abuse and dependency claims. On 25 July 2012, the district court entered a Dispositional Order wherein Respondent was ordered to complete a psychological evaluation, a parenting assessment, and age appropriate parenting classes, as well as obtain and maintain safe, stable, and suitable housing and employment sufficient to sustain herself and her children.

A permanency planning hearing was held over the course of three days in late October 2012. The hearing was originally scheduled for 23 October 2012, on which date Respondent was initially present in the courthouse but disappeared without explanation prior to the matter

2. Criminal charges were subsequently filed against the juveniles' father, whose parental rights were terminated in the same proceeding from which Respondent now appeals. However, as he did not appeal from the TPR order entered against him, this opinion focuses solely on the issues raised by Respondent.

being called. The hearing was continued to 25 October 2012, but when Respondent again failed to appear and Ms. Burke could not explain her absence, the court temporarily suspended Respondent's visitation rights with her children. Respondent finally appeared on 31 October 2012, attributing her prior absences to transportation issues; she also informed the court that she had obtained housing and was working cleaning houses, although she did not provide any written verification. The district court reinstated Respondent's visitation rights, contingent on negative drug screens, set the permanent plan for reunification, and ordered Respondent to successfully complete a psychological evaluation, a parenting assessment, age appropriate and cooperative parenting classes, and anger management classes; submit to random drug testing and not use, possess, or consume alcohol or controlled substances; and actively engage in individual therapy and substance abuse counseling and treatment.

Respondent failed to appear at the next permanency planning hearing on 10 January 2013, and Ms. Burke was unaware as to the reasons for her absence. The court found Respondent had not made any progress toward complying with its orders but left the permanent plan as reunification. Respondent did attend the next permanency planning hearing on 29 April 2013, but the court found that she had failed to obtain permanent housing and had not yet completed a psychological evaluation or parenting assessment, and therefore changed the permanent plan to custody with other court-approved caretakers concurrent with reunification. The court also stated that, "[t]he parties have been put on notice on this date, that should [Respondent] continue to fail to make progress, the Court will relieve of further reunification efforts at the next setting in this matter."

Respondent failed to appear at the next permanency planning hearing on 29 July 2013. The court found that there had been no substantial change in circumstances since the previous hearing, that Respondent had not made any progress in alleviating the conditions which led to removal of the juveniles from her home, and that her attendance at visitations was becoming inconsistent. As a result, the court changed the permanent plan to custody with other court-approved caretakers concurrent with adoption and ordered DSS to pursue adoption and termination of parental rights.

On 15 January 2014, DSS filed a TPR petition against Respondent. On 16 January 2014, Ms. Burke, who had represented Respondent throughout the AND proceedings, was assigned as Respondent's counsel for the TPR proceeding and served with the TPR petition via first-class

mail. That same day, in accordance with N.C. Gen. Stat. § 7B-1106, DSS attempted to serve a summons on Respondent at her last known address on Indian Creek Drive in Fayetteville. However, on 23 January 2014, the Cumberland County Sheriff's Office reported that Respondent no longer lived at that address. DSS then came to believe that Respondent lived at an address on Sweetwater Road in Dunn and attempted to serve her there.[3] On 6 February 2014, the Cumberland County Sheriff's Office returned that summons to DSS as well, noting "[t]he defendant[s] do not live at listed address." Nevertheless, on 10 March 2014, DSS again attempted to serve Respondent at the Sweetwater Road address by certified mail package, but the package was returned as "unclaimed" and "unable to forward" on 8 April 2014. On 21 March 2014, DSS finally succeeded in serving Respondent with the help of a process server who went to the Sweetwater Road address and learned that Respondent had another child who was staying there in the care of family members but that Respondent herself was in Fayetteville. The process server reached Respondent by telephone and arranged to meet her at a nearby convenience store, where Respondent was served with the TPR petition and summons.

A pre-trial hearing was held on 2 April 2014. Respondent failed to appear but the district court found that all parties had been properly served and scheduled the TPR hearing for 29 April 2014. On 9 April 2014, DSS sent notice of the date, time, and location of the TPR hearing to Respondent at the Sweetwater Road address in Dunn. Respondent contends she never received this notice.

Neither Respondent nor Melvin's and Hannah's father was present in court when the TPR hearing began on 29 April 2014. Ms. Burke requested a continuance on Respondent's behalf, explaining that

> [m]y client has a corresponding case that was on, I believe, yesterday, and she was not here at the call which was very early in the morning, but apparently she did come to court after that. I would simply ask that this case be set. I think that case was set 30 days out. That this case be set 30 days out on the same date.

The district court denied that request but held the matter open to see if the parents would appear.

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3. The record does not indicate why DSS reached this conclusion. Both DSS and the juveniles' guardian *ad litem* submitted supplements to the record pursuant to N.C. R. App. P. 9(b)(5), which are discussed *infra*.

The district court reconvened the matter the next day, 30 April 2014, and again neither Respondent nor Melvin's and Hannah's father was present. Ms. Burke again asked for a continuance, explaining:

> Your Honor, she did have [a] case on Monday. We went ahead—I think it was very close to 8:30 and she did show up after that, and she was given a next court date on that day. So, she did [unintelligible], so I would ask that everything be continued to that court date.

DSS objected to this request for a continuance and stated that it wanted to conduct a permanency planning hearing before starting the TPR hearing. The district court denied Ms. Burke's motion for continuance, prompting her to inquire:

> MS. BURKE: Your Honor, then I don't know if I should withdraw or not because [Respondent] sort of maintains contact with me she's coming through the other case. So, Your Honor, [unintelligible] at this point.
>
> THE COURT: She knew to be here. Notice was given. We held the other case open from yesterday. So, I will allow you to withdraw.
>
> MS. BURKE: At least as to this——
>
> THE COURT: As to this hearing, yes.
>
> MS. BURKE: Would that be in regards to the TPR as well, Your Honor? Because I am in the same position. If the Court's not going to be inclined to continue that, this afternoon.
>
> THE COURT: I'm not going to be inclined to continue it. I'll hold it until we call it, however. Because I don't know how the rest of the docket is going to go.

The district court then conducted a permanency planning hearing. When the TPR hearing started later that afternoon, Ms. Burke suggested that Respondent might have confused the date of the TPR hearing with her other case that had been continued and made another motion to continue the TPR hearing, which the court denied. Ms. Burke then made a motion to withdraw. The trial court inquired if Ms. Burke had been in contact with Respondent since Monday, 28 April 2014. Ms. Burke replied that she had not, and explained that she did not have a phone number for Respondent and that her only known contact information was the Sweetwater Road address where DSS had previously failed in

its attempts to serve Respondent. The court then granted Ms. Burke's motion to withdraw and subsequently entered a written order confirming her withdrawal based on the denial of Ms. Burke's motion to continue and the fact that "the Respondent was served but has failed to appear."

During the TPR hearing that followed, DSS offered into evidence the district court's prior orders and Melvin's and Hannah's parents' criminal records, then called for testimony from social worker Anne Saleeby. Ms. Saleeby testified that she had been involved in the case for two years and provided background on Respondent's repeated failure to comply with the court's orders or make any progress toward reunification, noting that Respondent had ceased visiting her children after the court ceased reunification efforts on 29 July 2013. Ms. Saleeby was the sole witness to testify at the TPR hearing. The district court then found by clear, cogent, and convincing evidence that grounds existed to terminate Respondent's parental rights on the bases of neglect, willful failure to make any reasonable or substantial progress toward alleviating the conditions which led to the children's removal from her home, and failure to pay financial support. On disposition, the court found that the likelihood of adoption was high and that the children were in a pre-adoptive home, that they no longer had any bond with their parents, that they had bonded with their foster mother, and that it was in their best interests to terminate Respondent's parental rights. On 3 July 2014, the district court entered an order terminating Respondent's parental rights.

Respondent filed a *pro se* notice of appeal on 23 May 2014. However, that notice did not include Ms. Burke's signature as required by our Rules of Appellate Procedure. On 13 June 2014, Respondent and Ms. Burke filed an amended notice of appeal containing both of their signatures.

Analysis

On appeal, Respondent argues that the trial court abused its discretion by: (1) denying her trial counsel's motion to continue the TPR hearing due to Respondent's absence and alleged lack of notice as to the date, time, and location of the hearing; and (2) allowing her trial counsel to withdraw from her representation without first notifying Respondent of her intent to do so. Because we find the issue of Respondent's counsel's withdrawal to be determinative of the outcome in this case, we address only Respondent's second argument.

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (citation and internal quotation marks omitted),

disc. review denied, 361 N.C. 354, 646 S.E.2d 114 (2007); *see also* N.C. Gen. Stat. § 7B-1101.1 (2013). It is well established that after making an appearance in a particular case, an attorney may not cease representing a client without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citation omitted). "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). An abuse of discretion occurs only when the trial court's ruling is "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, "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion" and "must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984). As a result,

> before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a [TPR] proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.

In re D.E.G., __ N.C. App. __, __, 747 S.E.2d 280, 284 (2013) (citation omitted).

We acknowledge that one of our General Assembly's goals in enacting a procedure for the termination of parental rights was "to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age . . . ." N.C. Gen. Stat. § 7B-1100.2 (2013). We are always loath to delay that goal. Nevertheless, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982)). Consequently, this Court has consistently vacated or remanded TPR orders when questions of "fundamental fairness" have arisen due to failures to follow basic procedural safeguards. *See id.* (vacating TPR order where issues of lack of proper notice were raised and the respondent-parent's counsel was allowed to withdraw leaving her with no representation at a termination hearing that lasted only 20 minutes); *see also*, *e.g.*, *D.E.G.*, __ N.C. App. at __, 747 S.E.2d at 286 (vacating and remanding in part a TPR order where the

respondent-parent was not present for the TPR hearing and the district court allowed his counsel to withdraw from his representation without having appeared in court, notified the respondent of his intention to withdraw, or shown good cause for the allowance of his request); *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010) (remanding TPR order for determination by the district court regarding efforts by the respondent-parent's counsel to contact, consult, and adequately represent him at the TPR hearing where the respondent was not present and the court after minimal inquiry allowed his counsel, who the record indicated spent a total of 1.1 hours on the case, to not participate at the hearing); *In re K.R.B.*, __ N.C. App. __, 723 S.E.2d 173 (2012) (unpublished), *available at* 2012 WL 1117863 (vacating and remanding TPR order where the respondent-parent was not present at the hearing and the district court allowed his counsel to withdraw without inquiring into his efforts to contact the respondent prior to the hearing or notify him of his intention to withdraw).[4]

In the present case, the record is devoid of any evidence whatsoever that Respondent received any notice from her trial counsel that counsel would seek to withdraw from her representation at the start of the TPR hearing. When the court inquired whether she had any contact with Respondent, Ms. Burke replied that she did not know why Respondent was absent, that she had a history of difficulty communicating with Respondent and did not have her telephone number, and that she believed Respondent might have been confused about her court dates. Ms. Burke did state that Respondent had shown up late to court earlier in the week for another matter in which Ms. Burke was representing Respondent, but she offered no elaboration as to what discussion, if any, they had about Respondent's TPR hearing and the potential consequences that might follow if she failed to appear. The trial court then allowed Ms. Burke to withdraw without any further inquiry.

The failures to comply with basic procedural safeguards in the present case raise the same questions of fundamental fairness as those this Court addressed in prior cases such as *K.N.*, *D.E.G.*, and *S.N.W.* In fact, these concerns are exacerbated here by the difficulties DSS encountered in serving Respondent with the summons and notice of hearing. We note that although the record before us does not provide a clear explanation

4. Although Rule 30(e)(3) of our Rules of Appellate Procedure holds that this Court's unpublished decisions do not constitute controlling legal authority, given the factual and procedural similarities between *K.R.B.* and the present case, we find it persuasive and consistent with the precedent established in *K.N.*

for these issues, we can infer that Respondent was unusually difficult to reach given her lack of stable permanent housing and that DSS made a good-faith effort to serve the notice and summons for the TPR proceeding against her. In an attempt to clarify these issues, both DSS and the juveniles' guardian *ad litem* sought to supplement the record pursuant to N.C.R. App. P. 9(b)(5).[5] However, because both these supplements contain documents from another case that were not before the trial court in this case and raise issues that were never considered by the trial court, the documents in these supplements are not properly before us in this appeal. Thus, we cannot consider them, and we strongly admonish counsel for DSS and the guardian *ad litem* not to file materials with this Court that were not before the trial court. Nevertheless, we can and do conclude that the district court erred when it granted Ms. Burke's request to withdraw after conducting a superficial inquiry that failed to confirm all three of the prerequisites that our Supreme Court held in *Smith* must be satisfied before an attorney is allowed to withdraw from representing a client after making an appearance on her behalf.

DSS attempts to persuade us to reach a different result by arguing that the district court did not err by allowing Ms. Burke to withdraw because it was required to do so by N.C. Gen. Stat. § 7B-1101.1(a) given Respondent's failure to appear at the TPR hearing. DSS's argument is premised on the basic legal principle, recognized by our Supreme Court's decision in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), that TPR proceedings are independent from any underlying abuse, neglect,

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5. In its Rule 9(b)(5) supplement, DSS purports to show that: during the proceedings involving Melvin and Hannah, Respondent gave birth to another child; that DSS obtained an order for nonsecure custody of that child based on allegations of neglect and dependency; that the child was placed in the custody of his paternal grandmother who resided at the Sweetwater Road address in Dunn; and that during a face-to-face visit at that residence on 21 February 2014, a social worker came to believe that Respondent was residing there. DSS asserts that this is why so many fruitless attempts were made to serve Respondent at the Sweetwater Road address, with the implication being that the failure of those attempts resulted from Respondent acting in bad faith to avoid being served. However, the Rule 9(b)(5) supplement filed by the juveniles' guardian *ad litem* cites the same information as a basis for vacating and remanding the TPR order for defective notice of the TPR hearing because it tends to show that DSS was notified during the 21 February 2014 home visit that Respondent was planning to move to a new address on Dunn Road in Fayetteville at the beginning of March. Indeed, the order for nonsecure custody of Respondent's new child featured in both supplements lists the Dunn Road address in Fayetteville as Respondent's address, yet in April, DSS erroneously mailed the notice of the date, time, and location of the TPR hearing, required by N.C. Gen. Stat. § 7B-1106(b)(5), to the Sweetwater Road address, which may well explain Respondent's confusion over her court dates that Ms. Burke alluded to just before withdrawing at the start of the TPR hearing, as well as Respondent's failure to appear for the TPR hearing in this case.

or dependency proceedings. Thus, DSS asserts that although Ms. Burke served as Respondent's appointed counsel in the AND proceedings, her role in the TPR proceedings was only provisional, and section 7B-1101.1(a), which governs the appointment of provisional counsel in TPR proceedings, requires the court to dismiss a respondent-parent's provisional counsel if the respondent-parent "[d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1) (2013). However, this Court previously considered the very same argument in our *D.E.G.* decision, where we rejected it because it rests on a selective reading of the statute that ignores the fact that "the appointment of provisional counsel is unnecessary in the event that 'the parent is already represented by counsel.' " __ N.C. App. at __, 747 S.E.2d at 285 (quoting N.C. Gen. Stat. § 7B-1101.1(a)). Here, as in *D.E.G.*, the summons served upon Respondent clearly indicated that her trial counsel, who had represented her throughout the underlying proceedings, would continue to represent her in the TPR proceeding. Thus, because she was already represented by Ms. Burke, Respondent had no need for provisional counsel, Ms. Burke did not assume a provisional role in the TPR proceeding, and the trial court was not "excused from the necessity for compliance with the usual procedures required prior to the entry of an order allowing a parent's counsel to withdraw in this case by virtue of the provisions of [section 7B-1101.1(a)(1)]." *Id.*

Therefore, because the district court erred in allowing Ms. Burke to withdraw from representing Respondent without first confirming that Respondent had been notified of Ms. Burke's intention to do so, we conclude that the TPR order must be vacated and this case remanded for further proceedings consistent with this opinion.

VACATED and REMANDED.

Judges STEELMAN and GEER concur.

KHWAJA v. KHAN

[239 N.C. App. 87 (2015)]

TARIQ M. KHWAJA, PLAINTIFF
v.
MOHAMMED S. KHAN AND WIFE, HASEEB AKHTAR, MOHAMMED PERVEZ IQBAL AND WIFE, IRSHAD BEGUM, DEFENDANTS

No. COA14-728

Filed 20 January 2015

Perpetuities—commercial lease—renewal options—first refusal to purchase

A provision in a commercial lease granting the tenant a right of first refusal to purchase the building (the preemptive right) was subject to and violated the common law rule against perpetuities and was therefore void. Though the lease provided for an initial term of 15 years, it also provided the tenant the option to extend the lease for an additional term of 5 to 10 years, making it possible that the duration of the lease and the tenant's preemptive right would be 25 years. There was a possibility that the tenant's preemptive right would not vest, if at all, within 21 years of any life in being at the time the lease was executed; it did not matter that the landlord ultimately agreed upon terms to sell the property within the 21-year period.

Judge BRYANT concurring in result only.

Appeal by Defendants from an order entered 25 April 2014 by Judge W. David Lee and orders entered 29 October 2013 by Judge Theodore S. Royster in Davidson County Superior Court. Heard in the Court of Appeals 19 November 2014.

Sharpless & Stavola, P.A., by Eugene E. Lester, III, for Defendant-appellants.

Morgan Herring Morgan Green & Rosenblutt, L.L.P., by John Haworth and James F. Morgan for Plaintiff-appellee.

DILLON, Judge.

Defendants seek review of orders granting summary judgment and costs, including attorneys' fees, in favor of Plaintiff and of the denial of their Rule 60(b) motion for relief from these orders. For the following reasons, we reverse and remand the orders granting summary judgment and costs, and we vacate the order denying the Rule 60(b) motion as moot.

I. Synopsis

Plaintiff, who is a tenant of a commercial building, brought this action against his landlord and others to enforce a provision in his lease granting him a preemptive right, otherwise known as a right of first refusal, to purchase the building, claiming that this preemptive right vested when the landlord agreed on terms to sell the building to a third party.

Based on this Court's holding in *New Bar Partnership v. Martin*, ___ N.C. App. ___, 729 S.E.2d 675 (2012), we hold that the provision in the lease granting the tenant the preemptive right is subject to and violates the common law rule against perpetuities and is, therefore, void. Specifically, the period during which Plaintiff's preemptive right could have vested under the lease provision was not tied to any life in being and, otherwise, extended beyond 21 years. Accordingly, we conclude that Defendants – and not Plaintiff - are entitled to judgment on Plaintiff's claims as a matter of law.

II. Background

Plaintiff (hereinafter referred to as "the Tenant") commenced this action to enforce his preemptive right under the Lease and for other relief. Defendants answered, praying that the Tenant's claims be dismissed with prejudice. The parties filed cross motions for summary judgment, and the evidence presented at the hearing on those motions tended to show as follows:

In 2009, Defendants Mohammed S. Khan and his wife Haseeb Akhtar (the "Landlord") entered into a written agreement (the "Lease") to lease a commercial building in Davidson County to the Tenant, Plaintiff Tariq M. Khwaja. The Lease provided for an initial term of 15 years and granted the Tenant an option to renew for an additional term of "5 to 10 years." The Lease further provided that if at any time "during [the] period of [the Lease]" the Landlord agreed on terms with a third party to sell the property, the Landlord was required to first allow the Tenant the opportunity to purchase the property under said terms. The Lease was not initially recorded in the Davidson County Registry.

In late 2011, the Landlord approached the Tenant to see whether he had any interest in purchasing the property; however, the Tenant responded that he did not have the desire or the money to do so.

Shortly thereafter, the Landlord negotiated with Defendants Mohammed Pervez Akhtar and his wife Irshad Begum (the "Third-Party

Buyers") to sell them the property. On 13 April 2012, the Landlord sold the property to the Third-Party Buyers, delivering them a deed; however, this deed was erroneously recorded in Guilford County rather than in Davidson County.

On 24 April 2012, the Tenant recorded the Lease in Davidson County. As of this date, there was nothing recorded *in Davidson County* indicating that the Landlord had sold the property to the Third-Party Buyers.

In June of 2012, the Third-Party Buyers sold the property back to the Landlord, financing the entire sales price pursuant to a ten-year promissory note and securing it with a deed of trust (the "Deed of Trust") on the property. The deed and the Deed of Trust were recorded in Davidson County.

In July of 2012, the Tenant – having become aware that the property was again owned by the Landlord – sent a letter demanding that the Landlord sell him the property for $100,000.00.[1] However, the Landlord refused to sell him the property. The Tenant continued making rent payments under the Lease, but has made them under protest.

On 29 October 2013, the trial court entered orders granting summary judgment in favor of the Tenant, decreeing essentially that the Landlord sell the property to the Tenant for $100,000.00 free and clear of the Deed of Trust in favor of the Third Party Buyers; and that the costs of the action, including $10,000.00 for attorneys' fees, be taxed to the Landlord.

Through neglect, Defendants' attorney failed to notice an appeal from these 29 October 2013 orders in a timely manner. Defendants subsequently filed a Rule 60(b) motion at the trial court seeking relief from the 29 October 2013 orders; however, this motion was denied. Defendants timely appealed the order denying their Rule 60(b) motion, and a panel of this Court granted *certiorar*i to review the 29 October 2013 orders.

III. Analysis

This matter involves the interpretation and application of a lease provision granting a preemptive right, a right which our Supreme Court has defined as one which "requires that, before property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." *Smith v. Mitchell*, 301

1. The revenue stamps from each transaction between the Landlord and the Third Party Buyers reflect a sale price of $100,000.00. We note that Defendants contend that the actual amount of consideration was greater than $100,000.00.

N.C. 58, 61, 269 S.E.2d 608, 610 (1980). The preemptive right in the present case is found in Paragraph 21 of the Lease, a paragraph which also grants the Tenant an option to extend the term of the Lease, which states as follows:

> 21. Option to Sell Property or renew lease: If Lessor decide to sell property during period of signed agreement, Lessee shall has first right to buy this property on competent estate market price offered by other buyers. Option provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to renew the lease for an additional term of ***5 to 10 years*** commencing at the expiration of the initial lease term.[2]

(Emphasis in original).

The parties' arguments in their briefs raise a number of interesting issues, among which are the following:

> Whether there is an issue of fact that the Tenant, at least temporarily, waived his preemptive right based on his alleged statement to the Landlord that he had no desire nor the means to purchase the property.
>
> The effect of the timing of the recordation of the Lease and of other documents in the Davidson County Registry has on the rights and liabilities of the parties.
>
> Assuming the Tenant's preemptive right has vested, whether there is an issue of fact regarding the terms under which the right could be exercised.

However, we do not reach any of these issues. Rather, based on our holding in *New Bar Partnership v. Martin*, ___ N.C. App. ___, 729 S.E.2d 675 (2012), we are compelled to conclude that the Lease provision granting the Tenant a preemptive right violates the common law rule against perpetuities and is, therefore, void and unenforceable.

The common law rule against perpetuities has been defined by our Supreme Court as follows:

> No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some

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2. The evidence tended to show that English was not the first language of the parties.

> life or lives in being at the time of the creation of the interest. ***If there is a possibility*** such future interest may not vest within the time prescribed, the gift or grant is void.

Rich v. Carolina Construction, *355 N.C. 190*, *193*, *558 S.E.2d 77*, *79 (2002)* (emphasis added).

As a tenant's preemptive right is a contingent right which does not vest until his landlord agrees on terms to sell the property, this Court held in *New Bar* that such "a preemptive right or right of first refusal" as contained in a commercial lease is subject to the common law rule against perpetuities and *not* subject to the Uniform Statutory Rule Against Perpetuities, codified in N.C. Gen. Stat. § 41-15, *et seq. New Bar*, ___ N.C. App. at ___, 729 S.E.2d at 684. The lease at issue in *New Bar* was for an initial term of five years, but provided for optional renewal terms extending for 35 years. The duration of the preemptive right contained in that lease was tied to the lease's duration. Accordingly, this Court held that since the time during which the preemptive right could vest extended beyond 21 years and was not otherwise tied to any life in being, the lease provision granting the preemptive right violated the common law rule against perpetuities and was, therefore, "void." *Id.* at ___, 729 S.E.2d at 685.

In the present case, Defendants argue in their brief that the language in the Lease providing "the time within which the [preemptive right] may be exercised" renders the provision "unenforceable." Specifically, the Lease provides this "time" to be "during period of signed agreement[,]" and is otherwise not tied to any life in being.[3] Though the Lease provides for an initial term of 15 years, it also provides the Tenant the option to extend the Lease for an additional term of "5 to 10 years," making it "possible" that the duration of the Lease – and the Tenant's preemptive right - to be 25 years. Accordingly, the preemptive right provision violates the common law rule against perpetuities. That is, at the time the Lease was entered into in 2009, there was a "possibility" that the Tenant's preemptive right would not vest, if at all, within 21 years of any life in being at the time the Lease was executed. This "possibility" is illustrated in the following scenario:

In 2009, the Landlords and the Tenant execute the Lease.

In 2010, the Landlords have a child, and the Tenant becomes a father.

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3. The Lease provides that its provisions are "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties."

In 2011, the Landlords and the Tenant die. Their respective wills name their newborn children as successors in the Lease.

In 2024, the Tenant's child exercises the right to extend the Lease for an additional term of ten years, to 2034.

In 2032, the Landlord's child decides to sell the property, *at which time* the preemptive right would finally vest.

Under this scenario, the vesting of the Tenant's preemptive right in 2032 – 22 years after the death of the original parties to the Lease — occurs more than 21 years after the death of any life that was in being at the time the Lease was executed in 2009. Accordingly, the provision in the Lease granting the preemptive right is in violation of the common law rule against perpetuities. It does not matter here that the Landlord ultimately agreed upon terms to sell the property within the 21-year period. Rather, the provision was in violation of the rule against perpetuities from the outset since there was at that time the "possibility" that the right might not vest within the required time. *See Rich*, *supra*.

The common law rule against perpetuities is grounded in the sound public policy concern regarding unreasonable restraints upon alienation. *Starnes v. Hill*, 112 N.C. 1, 19, 16 S.E. 1011, 1016 (1893); *see also Sandlin v. Weaver*, 240 N.C. 703, 707, 83 S.E.2d 806, 809 (1954) (recognizing that an option to purchase which violates the rule is void as an unreasonable restraint upon alienation). As such, the provision in the Lease granting the Tenant a preemptive right in violation of the common law rule against perpetuities was *void ab initio* and is unenforceable in our courts. *Building Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968) (holding that a void contract "is no contract at all; it binds no one and is a mere nullity"); *Cansler v. Penland*, 125 N.C. 578, 581, 34 S.E. 683, 684 (1899) (stating that "when the court discovers that it is invoked to aid in enforcing an illegal transaction, the court *ex mero motu* will withdraw its hand").

IV. Conclusion

Based on the foregoing, we reverse the orders of the trial court entered 29 October 2013 granting Plaintiff summary judgment and costs; we vacate the 25 April 2014 order denying Defendants' Rule 60(b) motion as moot; and we remand the matter to the trial court, directing it to enter an order granting Defendants' motion for summary judgment on Plaintiff's claims.

REVERSED AND REMANDED in part, VACATED, in part.

Judge DIETZ concurs.

Judge BRYANT concurs in the result only.

BRYANT, Judge, concurring in result only.

I concur in the result reached by the majority in this opinion. I write separately to emphasize that my concurrence is based on the fact that the result reached in the majority opinion—holding the commercial lease in the instant case to be void—is controlled by *New Bar P'ship v. Martin*, ___ N.C. App. ___, 729 S.E.2d 675 (2012).

In *New Bar P'ship*, "we conclude[d] that the USRAP [Uniform Rule Against Perpetuities] did not replace the common law RAP as to preemptive rights arising from nondonative transfers such as that at issue here. As such, the USRAP is inapplicable to this appeal." *Id.* at ___, 729 S.E.2d at 683. Due to its reliance on *New Bar P'ship*, the majority opinion concludes that the USRAP is inapplicable to the appeal in the instant case.

I also write separately to express my concern that we should proceed with caution in applying the common law RAP to non-donative transfers, commonly known as commercial leases. When our legislature specifically excluded these types of commercial transactions from the statutory RAP, it reflected an intent that the common law rule "is a wholly inappropriate instrument of social policy to use as a control over such arrangements." *Rich*, 355 N.C. at 194, 558 S.E.2d at 79-80 (citations omitted). Clearly, the legislature was making a distinction between donative transfers and commercial transactions. However, as noted in *New Bar P'ship*, "a preemptive right or a right of first refusal to be valid must not extend beyond the period of the common law RAP". *New Bar P'ship*, ___ N.C. App. at ___, 729 S.E.2d at 684 (citation omitted) (holding the right of first refusal violated the common law RAP and, thus, was void). Because the lease in the instant case contained a section that made the preemptive rights under the lease "binding upon and insures [sic] to the benefit of the heirs [and] successors in interest to the parties[,]" it went beyond the period of the common law RAP, and therefore, based on our case law, is void and unenforceable.

Because the instant case cannot be distinguished from *New Bar*, I concur in the result reached by the majority.

NEEDHAM v. PRICE

[239 N.C. App. 94 (2015)]

STEPHANIE L. NEEDHAM, Individually, And as "Guardian Ad Litem" for John Doe, Jane Doe and June Doe, Minor Children Plaintiffs
v.
ROY ALAN PRICE, Defendant

No. COA14-706

Filed 20 January 2015

1. Appeal and Error—interlocutory orders and appeals—partial summary judgment

An order granting partial summary judgment was interlocutory and ordinarily could not be appealed. However, the order affected a substantial right because plaintiff could proceed to trial on her individual claims, which overlapped with and arose from the same set of facts as the minor children's claims. A second trial arising from the same facts as plaintiff's individual claims could result in an inconsistent jury decision on overlapping issues.

2. Negligence—partial summary judgment—parent-child immunity—claims barred

The trial court's decision to dismiss the minor children's claims of negligence, premises liability based on ordinary negligence, and negligent infliction of emotional distress were not at issue in an appeal from partial summary judgment. Plaintiff conceded that the doctrine of parent-child immunity would bar the minor children's claims for ordinary negligence.

3. Emotional Distress—intentional—parental injury—claim by minor children—summary judgment

The trial court erred by granting summary judgment against the minor children's claim for intentional infliction of emotional distress (IIED) in an action involving estranged parents and an injury to the mother witnessed by the children. The forecasted evidence was sufficient to raise genuine issues of material fact as to each essential element. The trial court also erred by dismissing the minor children's claim for punitive damages related to the IIED claim.

4. Negligence—gross—parental injury—claim by minor children—summary judgment

The trial court erred by granting summary judgment against the minor children's gross negligence claim in an action involving estranged parents and an injury to the mother witnessed by

the children. The claim for properly alleged wanton conduct, the time and nature of defendant's entry into the residence, his conduct towards plaintiff in the presence of the minor children despite her vulnerable physical condition, and the minor children's resulting injuries forecast evidence sufficient to raise genuine issues of material fact as to each essential element. The trial court also erred by dismissing the minor children's claim for punitive damages stemming from the gross negligence claim.

Appeal by plaintiff from order entered 3 February 2014 by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 3 December 2014.

Paul Louis Bidwell and Douglas A. Ruley, for plaintiff-appellant Guardian Ad Litem.

Jack W. Stewart, for defendant-appellee.

ELMORE, Judge.

Plaintiff, Guardian Ad Litem and parent of three minor children, appeals from an order granting defendant's motion for summary judgment against plaintiff on her claims on behalf of the minor children. After careful consideration, we affirm, in part; reverse, in part.

I. Facts

Stephanie L. Needham (plaintiff) and Roy Alan Price (defendant) had engaged in a long-term domestic relationship but were separated at some point before 20 November 2009. Three children were born of the relationship (the minor children). Plaintiff filed a complaint on 26 September 2012 alleging individual claims against defendant and also bringing claims on behalf of her minor children against defendant (the minor children's claims) for negligence, premises liability, negligent infliction of emotional distress, intentional infliction of emotional distress (IIED), gross negligence, and punitive damages. In the complaint, plaintiff alleged, in relevant part, the following facts:

> 5. That [plaintiff and the minor children] were occupying a home owned by Defendant . . . when, at approximately 1:25 a.m., Defendant surreptitiously entered the residence through the garage and attic; as Defendant attempted to enter the dwelling area, he caused an attic ladder to unfold

> to the hallway below, striking [plaintiff] on the back of her head, neck and right shoulder and causing her serious and permanent injuries.
>
> 6. That [the] minor children were awakened by the noise from the attic and observed [plaintiff] being struck by the ladder; they recoiled in terror, screaming as [plaintiff] collapsed to the floor crying out in pain; and watched in shock as their father descended the ladder shouting obscenities at their fallen mother, causing them severe emotional distress.
>
> 7. That [plaintiff] sustained injuries in the subject incident including, but not limited to, cervical spine, right upper and lower extremities, left upper and lower extremities, nerve damage, and post-traumatic stress disorder.
>
> 8. That [the] minor children sustained emotional/psychological injuries, including but not limited to, post-traumatic stress disorder, as a direct result of the subject incident.

Defendant filed a motion for summary judgment on all of the minor children's claims, arguing that "there [was] no genuine issue as to any material fact in controversy due to the parent-child immunity doctrine[.]" After a hearing on said motion, the trial court entered an order (the order) granting summary judgment in defendant's favor and dismissing all of the minor children's claims.

II. Analysis

a.) Interlocutory Appeal

[1] We must first address the interlocutory nature of this appeal. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citations omitted). An order granting partial summary judgment is interlocutory and ordinarily cannot be appealed "because it does not completely dispose of the case[.]" *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation and quotation marks omitted).

However, immediate appeal of an interlocutory order is available when it "affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations and quotation marks omitted). Our Supreme Court has noted that "the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Bockweg v. Anderson*, 333 N.C. 486, 490-91, 428 S.E.2d 157, 160 (1993) (citation and internal quotation marks omitted). The possibility of a second trial "affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

This appeal clearly arises from an interlocutory order because the trial court would be required to address plaintiff's claims notwithstanding the dismissal of the minor children's claims. However, the order affects a substantial right because should we dismiss this appeal, plaintiff could proceed to trial on her individual claims, which overlap with, and arise from, the same set of facts as the minor children's claims. Thus, if plaintiff later appeals the trial court's dismissal of the minor children's claims, and we were to rule that the trial court erred, then a trial on the minor children's claims could occur. A second trial arising from the same facts as plaintiff's individual claims could result in an inconsistent jury decision on overlapping issues. Accordingly, we hold that the order affects a substantial right and address the merits of plaintiff's arguments on behalf of the minor children.

b.) Summary Judgment

i. Parent-Child Immunity

[2] Plaintiff argues that the trial court erred by granting defendant's motion for summary judgment on the minor children's claims for gross negligence, IIED, and punitive damages. Specifically, plaintiff avers that the doctrine of parent-child immunity does not apply to claims based on willful and malicious acts. We agree.

Plaintiff concedes that the doctrine of parent-child immunity would bar the minor children's claims for ordinary negligence. Thus, the trial court's decision to dismiss the minor children's claims of negligence, premises liability based on ordinary negligence, and negligent infliction of emotional distress are not at issue.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that

'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). We must consider "the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party[.]" *Pine Knoll Ass'n, Inc. v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997) (citations omitted).

The parent-child immunity doctrine "bar[s] actions between unemancipated children and their parents based on *ordinary* negligence." *Doe By & Through Connolly v. Holt*, 332 N.C. 90, 95, 418 S.E.2d 511, 514 (1992) (emphasis in original) (citations omitted). However, the doctrine "has never applied to, and may not be applied to, actions by unemancipated minors to recover for injuries resulting from their parent's willful and malicious acts." *Id.* at 96, 418 S.E.2d at 514. An act is willful "when it is done purposely and deliberately in violation of law or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason." *Yancey v. Lea*, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001) (citation and quotation marks omitted). Moreover, the terms "willful and wanton conduct" and "gross negligence" have been used interchangeably to describe conduct falling between "ordinary negligence and intentional conduct." *Id.* at 52, 550 S.E.2d at 157 (quotation marks omitted). Thus, the doctrine of parent-child immunity clearly does not bar the minor children's claims of gross negligence and IIED.

ii. Forecast of Evidence

[3] Even though the parent-child immunity doctrine does not bar the minor children's claims of gross negligence and IIED, we must also determine whether plaintiff forecast sufficient evidence of each element of these claims. *See Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992).

The tort of IIED requires a showing of: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 256-57, 354 S.E.2d 357, 359 (1987) (citation and quotation marks omitted). The first element requires conduct that "exceeds all bounds usually tolerated by a decent society." *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 213, 552 S.E.2d 686, 693 (2001) (citation and quotation marks omitted). The second element can be satisfied by showing that a defendant "acts recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow[.]" *Dickens v. Puryear*, 302 N.C. 437, 449, 276 S.E.2d 325, 333 (1981) (citations and quotation marks

omitted). Finally, the third element is "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Waddle*, 331 N.C. at 83, 414 S.E.2d at 27 (citation and quotation marks omitted).

Here, in the light most favorable to plaintiff as supported by her affidavit and complaint, defendant entered the residence at 1:25 a.m. through the garage and attic, waking up and startling the minor children. The minor children were in defendant's presence as they observed plaintiff being struck by a ladder and collapsing to the floor "crying out in pain" while defendant "shout[ed] obscenities" at her. Subsequently, the minor children suffered "emotional/psychological injuries, including but not limited to, post-traumatic stress disorder; and the medical records submitted in discovery support the same." Such forecasted evidence is sufficient to raise genuine issues of material fact as to each essential element of the minor children's IIED claim. *See Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*, 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990) (considering "plaintiff's proximity to the . . . act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the . . . act" as factors in determining the viability of an emotional distress claim). Thus, the trial court erred by dismissing the minor children's IIED claim. Consequently, the trial court also erred by dismissing the minor children's claim for punitive damages related to the IIED claim.

[4] With regard to gross negligence, a plaintiff, in addition to pleading the facts on each element of negligence (duty, breach of that duty, proximate cause, and injury), must also forecast sufficient evidence of "wanton conduct[.]" *Clayton v. Branson*, 170 N.C. App. 438, 442-43, 613 S.E.2d 259, 264 (2005) (citation and quotation marks omitted). The "duty" element in an actionable negligence claim "presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955). It is well established that "[p]arents in this State have an affirmative legal duty to protect and provide for their minor children." *State v. Walden*, 306 N.C. 466, 473, 293 S.E.2d 780, 785 (1982).

The minor children's claim for gross negligence in this case properly alleged wanton conduct: "[T]he acts and omissions as set forth above indicate such a reckless indifference to, or conscious disregard for, the

rights and safety of others and, specifically, of [the] Minor Children, sufficient to constitute willful and wanton negligence."

Additionally, the time and nature of defendant's entry into the residence, his conduct towards plaintiff in the presence of the minor children despite her vulnerable physical condition, and the minor children's resulting injuries forecast evidence sufficient to raise genuine issues of material fact as to each essential element of the minor children's gross negligence claim.

Accordingly, the trial court erred by dismissing the minor children's gross negligence claim. In light of our ruling, the trial court also erred by dismissing the minor children's claim for punitive damages stemming from their gross negligence claim.

III. Conclusion

In sum, we affirm the trial court's order granting summary judgment to defendant on the minor children's claims of negligence, premises liability, and negligent infliction of emotional distress. However, we reverse the trial court's dismissal of the minor children's claims for IIED and gross negligence along with the punitive damages related to these remaining claims.

Affirmed, in part; reversed, in part.

Judges STEPHENS and DAVIS concur.

STATE v. BARNETT

[239 N.C. App. 101 (2015)]

STATE OF NORTH CAROLINA
v.
KEITH ANTONIO BARNETT

No. COA14-447

Filed 20 January 2015

Sexual Offenders—registration of address—release from incarceration

Defendant's conviction for failing to register as a sex offender was vacated where there was insufficient evidence to support the charge as alleged in the indictment. The State's evidence at trial showed that defendant registered as a sex offender with the Gaston County Sheriff's Office, was subsequently incarcerated, and never updated his registration to show his address upon his release. Nowhere in the provisions governing release from a penal institution is there a requirement that persons required to register must notify the sheriff in the county where they last registered prior to their incarceration of their address upon release. The State erred by combining the requirements of N.C.G.S. § 14-208.9(a), governing changes in address, with the requirements of N.C.G.S. § § 14-208.7(a), governing registration upon release from a penal institution.

Appeal by defendant from judgment entered 10 December 2013 by Judge F. Donald Bridges in Gaston County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

Guy J. Loranger for defendant.

McCULLOUGH, Judge.

Keith Antonio Barnett ("defendant") appeals from a judgment entered upon his convictions for failure to register as a sex offender and resisting a public officer. For the following reasons, we vacate defendant's conviction for failure to register as a sex offender.

I. Background

The record in this case tends to show that defendant pled guilty to and was convicted of taking indecent liberties with a child in Gaston

County Superior Court in 1997. As a result of said conviction, a reportable offense under N.C. Gen. Stat. § 14-208.6(4)(a), defendant was sentenced to an active term of imprisonment and required to register as a sex offender. *See* N.C. Gen. Stat. § 14-208.7 (2013).

At the time of defendant's conviction, N.C. Gen. Stat. § 14-208.7 required defendant to register for a period of 10 years following his release from prison in 1999. *See* N.C. Gen. Stat. § 14-208.7 (1997). However, the statute has since been amended several times, lengthening defendant's registration requirement to a period of at least 30 years following the date of initial county registration. *See* Jessica Lunsford Act for NC effective Dec. 1, 2008, Sec. 8, 2008 N.C. Sess. Laws 2008-117 (lengthening the registration requirement).

On 6 January 2010, defendant pled guilty to and was convicted of failing to register as a sex offender. Defendant received a probationary sentence as part of a plea arrangement.

On 15 February 2010, defendant registered as a sex offender with the Gaston County Sherriff's Office. At that time, defendant completed an offender acknowledgement whereby defendant represented that he understood the registration requirements. Defendant listed his address as 554 South Boyd St., Gastonia, North Carolina.

Subsequent to defendant's registration, defendant was incarcerated from 17 August 2011 to 14 November 2012.

On 1 February 2013, Luther Hester, a Gaston County Sheriff's Office deputy working in the sex offender registration unit, received a telephone call in reference to defendant's whereabouts. Upon receiving the phone call, Hester researched defendant's records and determined that defendant was no longer incarcerated and had not registered as a sex offender anywhere upon his release from prison.

On 6 February 2013, Hester, accompanied by two other deputies, went to the address where the caller informed Hester defendant could be found, 332 North Mountain St., Gastonia, North Carolina. Upon arrival, Hester saw defendant run from the front yard into the house. When Hester approached the house, a woman, who identified herself as defendant's mother, allowed Hester inside to look for defendant. Hester found defendant on the back porch.

When Hester attempted to arrest defendant, defendant resisted and became combative. Following a warning from Hester to defendant that he would use a Taser if defendant did not comply, Hester used his Taser to gain control over defendant and made the arrest.

On 18 February 2013, a Gaston County Grand Jury indicted defendant in case number 13 CRS 51451 of failing to register as a sex offender and in case number 13 CRS 51461 of resisting a public officer. Defendant entered not guilty pleas on 7 May 2013 and his case came on for jury trial in Gaston County Superior Court on 9 December 2013, the Honorable Forest D. Bridges, Judge presiding.

Defendant moved to dismiss the charge of failure to register as a sex offender at the close of the State's evidence and at the close of all the evidence. The trial court denied those motions.

On 10 December 2013, the jury returned verdicts finding defendant guilty of failing to register as a sex offender and resisting a public officer. The trial court consolidated the offenses for judgment and sentenced defendant in the presumptive range to a term of 25 to 39 months imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant contends the trial court erred by denying his motion to dismiss the charge of failing to register as a sex offender. Specifically, defendant contends there was no evidence to support the charge as alleged in the indictment and there is a fatal variance between the indictment and the proof submitted to the jury.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"A fatal variance between the allegations of the indictment and the proof is properly raised by a motion to dismiss. Not every variance, however, is sufficient to require a motion to dismiss." *State v. Tyndall*, 55 N.C. App. 57, 61-62, 284 S.E.2d 575, 577 (1981) (citations omitted). "In order for a variance to warrant reversal, the variance must be material. A variance will not result where the allegations and proof, although variant, are of the same legal significance. If a variance in an indictment is

immaterial, it is not fatal." *State v. Roman*, 203 N.C. App. 730, 733-34, 692 S.E.2d 431, 434 (2010) (quotation marks and citations omitted).

North Carolina's sex offender and public protection registration programs are codified in Chapter 14, Article 27A of the General Statutes. As stated in the Article,

> the purpose of [the] Article [is] to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2013). To that end, "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." N.C. Gen. Stat. § 14-208.7(a).

Within the Article, separate provisions govern when a person is required to register or when a person required to register must update their registry. Pertinent to this case, N.C. Gen. Stat. § 14-208.7(a) provides that "[i]f the person [required to register] is a current resident of North Carolina, the person shall register . . . within three business days of release from a penal institution or arrival in a county to live outside a penal institution[.]" On the other hand, N.C. Gen. Stat. § 14-208.9(a) (2013) provides that

> [i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address.

In either case, a person who willfully fails to register in accordance with N.C. Gen. Stat. § 14-208.7(a) or fails to update their registry in accordance with N.C. Gen. Stat. § 14-208.9(a) is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11(a)(1) and (2) (2013).

In this case, defendant was indicted for failing to register as a sex offender on the ground that defendant

> unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the General Statutes to register as a sexual offender, knowingly and with the intent to violate the provisions of that Article fail to register as a sexual offender, in that the defendant did fail to notify the Gaston County Sheriff's Office, within three business days of his change of address.

The indictment cited N.C. Gen. Stat. § 14-208.11.

As this Court recognized in a previous appeal by defendant, "[t]he three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9 are: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. Barnett*, _ N.C. App. _, _, 733 S.E.2d 95, 98 (2012); *see also State v. Worley*, 198 N.C. App. 329, 334, 679 S.E.2d 857, 861 (2009). Both below and now on appeal, defendant contends there was no evidence he changed his address.

As shown by the evidence produced by the State at trial, defendant registered as a sex offender with the Gaston County Sherriff's Office on 15 February 2010. At that time, defendant listed his address as 554 South Boyd St. Subsequently, defendant was incarcerated from 17 August 2011 to 14 November 2012. Upon his release from incarceration, defendant never updated his registry to list a different address.

Defendant does not dispute the above, but argues there was no evidence that he ever registered an address other than 554 South Boyd St., or that, upon his release from incarceration, he ever resided at a different address. Out of candor to this Court, defendant notes that, in an opinion by this Court in a prior appeal by defendant, this Court indicated that defendant notified the Gaston County Sheriff's Office of several address changes subsequent to his registration on 15 February 2010. *See Barnett*, _ N.C. App. at _, 733 S.E.2d at 97. Defendant, however, points out that evidence of defendant's prior address changes was never introduced at trial in the current case. Defendant claims the only evidence at trial regarding an address different from 554 South Boyd St. was a change of address form completed at the sheriff's office following his arrest on 6 February 2013 that identified defendant's address as the location where he was arrested on 6 February 2013. Yet, defendant refused to sign the form changing his address from the address where he was arrested to

the jail. Furthermore, the evidence tends to indicate that, to Hester's knowledge, no one attempted to verify that defendant was living at the residence where he was arrested on 6 February 2013. Hester only knew defendant was present at the residence.

Instead of providing evidence that defendant changed addresses, defendant contends the State prosecuted him on the theory that he failed to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution[,]" as required by N.C. Gen. Stat. § 14-208.7(a). Defendant contends this factual basis was not alleged in the indictment and his conviction must be overturned.

Upon review of the record, we agree with defendant that there was insufficient evidence presented in the present case to show that defendant no longer resided at 554 South Boyd St. Furthermore, it is evident to this Court from a review of the evidence presented by the State and the jury instructions issued by the trial court, which corresponded with N.C. Gen. Stat. § 14-208.7(a), that defendant's conviction for failing to register as a sex offender was based on his failure to register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution." The issues we must now decide are whether such evidence was necessary and whether there existed a fatal variance between the charge alleged in the indictment and the proof at trial.

In response to defendant's arguments, the State contends that there was sufficient evidence to support the charge alleged in the indictment absent evidence of where defendant lived upon his release from incarceration on 14 November 2012. To support its contention, the State points to testimony elicited at trial tending to show that when a person registered as a sex offender is subsequently incarcerated during the period in which they are required to be registered, their address in the sex offender registry is changed to the address of the penal institution where the person is incarcerated. Thus, the State argues that, unavoidably, defendant's address changed when he was released from incarceration on 14 November 2012, triggering the change of address requirements in N.C. Gen. Stat. § 14-208.9(a).

Although defendant's last registered address would have been the penal institution where defendant was incarcerated, the State contends that pursuant to the language of N.C. Gen. Stat. § 14-208.9(a), defendant was still required upon release to "report in person and provide written notice of [his] new address not later than the third business day after the change to the sheriff of the county with whom [defendant] had last registered [prior to his incarceration;]" in this case, Gaston County. Because

the evidence shows that defendant never took steps to update his registration information with the Gaston County Sheriff's Office upon his release from incarceration on 14 November 2012, the State claims there was sufficient evidence to support the charge alleged in the indictment.

We disagree with the State's interpretation of the statutes in Chapter 14, Article 27A, and hold the State errs in combining the requirements of N.C. Gen. Stat. § 14-208.9(a) governing changes in address with the requirements of N.C. Gen. Stat. § 14-208.7(a) governing registration upon release from a penal institution.

It is clear from the language of N.C. Gen. Stat. § 14-208.7(a) that it governs registration upon release from penal institutions. In addition to the requirement in N.C. Gen. Stat. § 14-208.7(a) that the person required to register must register "within three business days of release from a penal institution or arrival in a county to live outside a penal institution[,]" N.C. Gen. Stat. § 14-208.8 (2013), which was not addressed in this case, provides for prerelease notification of the registration requirements to those persons incarcerated who are required to register. N.C. Gen. Stat. § 14-208.8 also requires an official of the penal institution to obtain registration information from a person required to register prior to their release and to forward that information to the sheriff of the county where the person expects to reside. Furthermore, N.C. Gen. Stat. § 14-208.11 provides that "[b]efore a person convicted of a violation of [the registration requirements] is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3)." N.C. Gen. Stat. § 14-208.11(b).

Nowhere in the provisions governing release from a penal institution is there a requirement that persons required to register must notify the sheriff in the county where they last registered prior to their incarceration of their address upon release from the penal institution. The notification requirement in N.C. Gen. Stat. § 14-208.9(a) is better suited to serve the purposes of the registration program in the circumstance where a person required to register changes from one address outside of a penal institution to another address outside a penal institution, as that statute has customarily been applied; not in the circumstance in the present case where defendant was released from a penal institution.

In this case, the State's evidence tended to show that defendant failed to update his registration information upon release from a penal institution. Because defendant was indicted on an allegation that he failed to register as a sex offender in that he failed to notify the Gaston County

Sheriff's Office within three business days of his change of address in accordance with the requirements of N.C. Gen. Stat. § 14-208.9, we hold the trial court erred in denying defendant's motion to dismiss. There was insufficient evidence to support such a charge alleged in the indictment.

III. Conclusion

For the reasons discussed above, we vacate defendant's conviction for failing to register as a sex offender.

Vacated.

Judges CALABRIA and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
VAN LAMAR McKNIGHT

No. COA14-752

Filed 20 January 2015

1. Search and Seizure—investigatory stop of vehicle—reasonable suspicion—motion to suppress

The trial court did not commit plain error by denying defendant's motion to suppress the marijuana found in his vehicle. Even though the trial court's reasoning for denying the motion was incorrect, the ruling was supported by the evidence. Just before stopping defendant's vehicle, officers had seen defendant receive two large boxes from a man for whom they had a warrant to search for evidence of marijuana trafficking.

2. Evidence—irrelevant evidence—plain error review

The trial court erred but did not commit plain error by admitting into evidence contraband found at a residence for which defendant possessed a key and to which he drove his vehicle with boxes containing marijuana. While the contraband was not relevant, there was no plain error because there was sufficient other evidence from which the jury could conclude defendant was trafficking in marijuana.

STATE v. McKNIGHT

[239 N.C. App. 108 (2015)]

Appeal by Defendant from judgment entered 6 December 2013 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 6 November 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for Defendant.

STEPHENS, Judge.

Defendant Van Lamar McKnight was convicted in Wake County Superior Court of one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transportation. Defendant now appeals from the trial court's denial of his motion to suppress evidence that he alleges was obtained in violation of his Fourth Amendment rights. Defendant also contends that the trial court committed plain error by denying his motion *in limine* to exclude evidence that was both irrelevant and prejudicial. After careful review, we hold the trial court did not err in denying Defendant's motion to suppress, nor did it commit plain error by admitting the evidence Defendant challenges.

I. Facts and procedural history

On 5 August 2013, Defendant was indicted by a Wake County grand jury on one count of trafficking in marijuana by possession and one count of trafficking in marijuana by transportation. Those charges arose from Defendant's arrest on 14 February 2013 after officers from the Raleigh Police Department ("RPD") stopped and searched his vehicle and discovered more than ten pounds of marijuana concealed in two packages during their ongoing investigation of Defendant's friend, Travion Stokes.

The evidence introduced at Defendant's trial tended to show that in November 2012, the RPD learned from a confidential informant that Stokes, who at the time was on probation for a federal cocaine trafficking conviction, was trafficking in large amounts of marijuana. On 12 February 2013, after conducting several weeks of undercover surveillance and a controlled buy using the confidential informant, RPD Detective James Battle searched a trash can left by the curb at Stokes' residence at 601 Sawmill Road in Raleigh and found a plastic baggie containing less than one-tenth of a gram of marijuana residue. Based on this information, Detective Battle obtained a search warrant for Stokes and his residence.

On the morning of 14 February 2013, Detective Battle and RPD Detective Sarah Goree stationed themselves in unmarked police vehicles near Stokes' residence to conduct pre-raid surveillance prior to executing the search warrant, while RPD Officer Keith Pickens parked his marked patrol car farther away at a nearby intersection as back-up. The officers did not have access to a S.W.A.T. team that day, so their plan was to stop Stokes in his automobile after he left his home and then execute the search warrant for his residence. Around 8:30 a.m., Stokes drove a pickup truck into his driveway, parked at the rear of the house, and went inside. Around 8:45 a.m., Defendant—whom RPD officers had not previously seen during the course of their investigation—arrived at Stokes' home driving a GMC Acadia sport utility vehicle, which he parked in the front. Stokes then came out of the house and the two men removed two large white boxes from Stokes' pickup truck, carried them around to the front of the house, and placed them in the back of Defendant's vehicle. The boxes were sealed shut and did not appear very heavy.

When Defendant got back in his Acadia and drove away, Detective Goree and Sergeant Charles Lynch, another officer in an unmarked vehicle, followed him, as did Officer Pickens at a distance to avoid being seen in his patrol car. The officers followed Defendant for roughly ten to fifteen minutes, during which they did not observe any traffic violations, until Defendant unexpectedly backed his Acadia into a residential driveway at 7202 Shellburne Drive. Detective Goree continued past the driveway and lost visual contact with Defendant. Sergeant Lynch continued past the driveway as well and saw Defendant pull back out into the road without getting out of his car. Officer Pickens, who had not yet reached the driveway, heard over the radio that his colleagues were unable to continue following Defendant, and thereupon activated his patrol car's lights and pulled Defendant over.

Officer Pickens, who later testified that he noticed Defendant seemed slightly nervous but was otherwise acting normally, ordered Defendant out of the Acadia and had him sit on the curb until RPD Detective Kenneth Barber joined them a few minutes later. Detective Barber later testified that upon his arrival, he smelled burnt marijuana through the Acadia's open window and decided to conduct a search. No burnt marijuana was found during the search of Defendant's vehicle, but when the officers inspected the two boxes Defendant had taken from Stokes' house, they discovered that inside each box was another, smaller box containing a shrink-wrapped orange plastic bucket. These buckets, in turn, contained 5.8 and 4.9 pounds of marijuana in sealed plastic bags.

Defendant was arrested and taken to a police station for interrogation, during which Detective Battle found a key among the contents of Defendant's pockets. Detective Battle subsequently discovered the key fit the lock on the front door of the residence at 7202 Shellburne Drive, where he smelled marijuana through the doorframe. After obtaining a search warrant, RPD officers returned to that residence and found 91 grams of marijuana hidden above a kitchen cabinet. They also found paraphernalia including two digital scales, Ziploc bags, and a vacuum food saver machine in the kitchen. In the attic of the home, the officers found a freezer-sealed bag of marijuana, a black trash bag with sealed marijuana inside, and a small orange-red bucket. The officers also searched for documents to show who owned the house and found bank records in the name of Revaune Moe, who had two prior drug arrests, as well as a uniform citation for a man named Cory Robinson and letters addressed to him and a man named Andre Turner. They found no evidence linking Defendant to the house, and he was not charged with possession of any of the drugs recovered there.

When Defendant's trial in Wake County Superior Court began on 2 December 2013, his primary defense was that he did not know there was marijuana in the boxes he received from Stokes. Defendant first moved to suppress the marijuana found in his Acadia, arguing that it was the product of an unconstitutional seizure because the RPD officers lacked reasonable suspicion to stop his vehicle. Defendant's *voir dire* examination of the officers involved in his arrest showed that: (1) prior to arriving at Stokes' home on 14 February 2013, Defendant had not previously been a target of the investigation and was not listed on the search warrant for Stokes' residence; (2) no money changed hands when Defendant accepted the boxes from Stokes; and (3) Defendant had not been driving erratically or committed any traffic violations before being stopped by Officer Pickens. The State opposed the motion to suppress, arguing that: (1) the RPD officers did not initiate a search of Defendant while he was still on Stokes' property due to safety concerns given the lack of a S.W.A.T. team but were still justified in stopping Defendant after he left under a theory that he was taking evidence from a crime scene; and (2) Defendant's backing into the driveway at 7202 Shellburne Drive and then leaving without getting out of his vehicle constituted evasive action sufficient to support a reasonable suspicion that criminal activity was afoot. The trial court denied Defendant's motion, concluding, *inter alia*, that:

> 2. The officers possessed probable cause to search the residence and person of Travion Stokes for

> controlled substances, as evidenced by a lawfully issued search warrant.
>
> 3. The officers determined that their manpower did not permit the safe execution of the search warrant while [D]efendant was on the premises with Travion Stokes, and the observation of the officers of the transfer of two large packages into [D]efendant's vehicle, [D]efendant's evasive action of pulling into a residence momentarily, when viewed in light of the totality of the circumstances, support a finding of a reasonable, articulable suspicion justifying the officers in stopping the [D]efendant's vehicle.

Defendant failed to object when this evidence was introduced at trial.

Defendant also filed both a motion to suppress the evidence found at 7202 Shellburne Drive and a motion in *limine* to exclude it after the State gave notice that it planned to introduce that evidence for the purpose of proving Defendant's knowledge of the contents of the boxes he received from Stokes, given the fact that he "was taking [the boxes] from one residence where [police] found marijuana directly to another residence where they found marijuana," as well as the similarities in packaging between the marijuana found in the Acadia and the marijuana found in the attic. The trial court denied Defendant's motion to suppress because, apart from possessing a key to 7202 Shellburne Drive, Defendant could not establish any basis that would give him a legitimate expectation of privacy at that residence. In his motion in *limine*, Defendant argued that the evidence was irrelevant, prejudicial, and would confuse the issues for the jury because he had not been charged with any crime involving 7202 Shellburne Drive. Defendant also highlighted dissimilarities between the evidence seized from his car and the evidence seized from the attic, including differences in the grade of marijuana, the types of bags containing it, and the colors of the buckets found nearby. The trial court denied Defendant's motion, and Defendant failed to timely object when the evidence was admitted at trial to preserve the issue for review.

Defendant chose to testify at his trial, and although he acknowledged to having pled guilty to possession of marijuana with intent to sell and deliver in 2009, he insisted that he had no knowledge that the boxes he received from Stokes on 14 February 2013 contained marijuana. Instead, he testified that Stokes had called him that morning and said he was running late for a doctor's appointment, asked him to drop off the boxes at 7202 Shellburne Drive as a favor, and given him a key to the residence. Defendant testified that he had known Stokes for about a year and that

the two men had become friends through their shared enthusiasm for motorcycles. Defendant admitted that he had been aware that Stokes was on federal probation for drug charges, but assumed that this actually provided a strong incentive for Stokes to avoid further illegal activity. In any event, Defendant explained, the boxes were already sealed before he received them, Defendant never asked what they contained, and he did not have an opportunity to learn their contents before the RPD pulled him over. Defendant testified that he was unaware that he was being followed when he backed into 7202 Shellburne Drive, and that the reason he left so quickly was that he received a cellphone call from his wife—who was upset because she needed her son's car seat from the back of the Acadia to give to a babysitter so the couple could enjoy a date together—and that even though he was already at his destination and did not want to make another trip, he decided to drive back across town and then return again to 7202 Shellburne Drive to deliver the boxes because it was Valentine's Day.

On 6 December 2013, the jury returned a verdict finding Defendant guilty of both charges against him. The trial court consolidated the counts into a single judgment and sentenced Defendant to a term of 25 to 39 months in prison. Defendant gave oral notice of appeal in open court.

II. Defendant's motion to suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress the marijuana found in the boxes he received from Stokes because the RPD officers who stopped and searched his vehicle lacked reasonable suspicion to do so and thus violated his Fourth Amendment rights. We disagree.

Typically, this Court's review of a denial of a motion to suppress "is strictly limited to determining whether the trial [court's] underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the [court's] ultimate conclusions of law," which are then subject to *de novo* review. *State v. Mello*, 200 N.C. App. 437, 439, 684 S.E.2d 483, 486 (2009) (citation and internal quotation marks omitted), *affirmed per curiam*, 364 N.C. 421, 700 S.E.2d 224 (2010). However, Defendant acknowledges that because he failed to preserve this issue for appellate review by timely objecting when the evidence was admitted at trial, the standard of review is plain error. Under a plain error analysis, Defendant is entitled to a new trial only if he can demonstrate that the trial court committed an error "so fundamental as to

amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Brunson*, 187 N.C. App. 472, 477, 653 S.E.2d 552, 555 (2007) (citation omitted).

The Fourth Amendment protects the "right of the people . . . against unreasonable searches and seizures," U.S. Const. amend. IV, and is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). It applies to seizures of the person, including brief investigatory detentions such as those involved in stopping a vehicle. *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980). It is well established that in order to conduct an investigatory stop, police must have a reasonable suspicion that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968).

As our Supreme Court has explained, "[a]n investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation and internal quotation marks omitted). In reviewing whether a reasonable suspicion to make an investigatory stop exists, this Court "must consider the totality of the circumstances—the whole picture" to determine if the stop was "based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautions officer, guided by his experience and training." *Id.* (citations and internal quotation marks omitted).

In the present case, Defendant argues that the trial court plainly erred in its finding of fact and conclusion of law that his act of turning around in the driveway at 7202 Shellburne Drive constituted evasive action sufficient to support a reasonable suspicion for an investigatory stop of his vehicle. Specifically, Defendant argues that the trial court's findings and conclusions were unsupported by competent evidence, given that neither of the two RPD officers who followed him in unmarked vehicles testified that his conduct provided any indication that he was aware they were following him, let alone that he was driving evasively. In support of his argument, Defendant cites this Court's holding in *State v. White*, 214 N.C. App. 471, 712 S.E.2d 921 (2011), that to support a finding of evasive action, the State must "establish a nexus between [a d]efendant's flight and the police officers' presence." *Id.* at 480, 712 S.E.2d at 928. Since the State failed to establish such a nexus here, Defendant argues that the trial court plainly erred by improperly admitting the only physical evidence that he possessed and transported marijuana.

It is well established under state and federal law that although mere presence in a high crime area is not sufficient to support a reasonable suspicion that an individual is involved in criminal activity, an individual's presence in a suspected drug area coupled with evasive action may provide an adequate basis for the reasonable suspicion necessary for an investigatory stop. *See Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000); *State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722-23 (1992). However, as we explained in *White*, in order for an action to be considered evasive, the State must "establish a nexus between [a d]efendant's flight and the police officers' presence." 214 N.C. App. at 480, 712 S.E.2d at 928. Prior decisions by this Court and our Supreme Court make clear that a defendant cannot be found to have acted evasively unless there is some evidence that he was aware he was being followed by, or in the presence of, a police officer. *See*, *e.g.*, *Butler*, 331 N.C. at 233, 415 S.E.2d at 722 (finding evasive action where "upon making eye contact with the uniformed officers, [the] defendant immediately moved away, behavior that is evidence of flight"); *State v. Willis*, 125 N.C. App. 537, 539, 481 S.E.2d 407, 409 (1997) (finding evasive action where a defendant behaved nervously and cut across a parking lot on foot after it became "apparent to [him]" that he was being followed).

Here, Defendant's argument about evasive action has some merit. Neither of the two RPD officers who followed him in unmarked cars testified that he acted evasively or that his conduct indicated his awareness of the fact he was being followed. Indeed, as Defendant notes, during the suppression hearing the only testimony indicating evasive driving came from Officer Pickens, who was following the two unmarked police cars at a distance and did not directly observe Defendant until after Defendant had already pulled out of the driveway. When asked about Defendant's driving, Officer Pickens testified:

> Q: Do you remember anything significant about your approach to the vehicle?
>
> A: No. I mean, some of the radio traffic that was being relayed to me, that the [D]efendant was being evasive in the way that he was operating his vehicle. Again, I believe he had maybe realiz[ed] that he was being followed.
>
> [Defendant's counsel]: Objection to that, [Y]our Honor; move to strike.
>
> THE COURT: Sustained.

> A: The information that I was hearing was that the operation of his vehicle was such that he would not be followed any longer by one of the detectives [who] was in one of the unmarked vehicles.

Officer Pickens further testified that he did not personally observe anything unusual about how Defendant operated his vehicle before pulling him over. Thus, we conclude that there is no competent evidence in the record that indicates Defendant was aware that his Acadia was being followed by police. Therefore, because Defendant's act of turning around in the driveway at 7202 Shellburne Drive cannot properly be considered evasive, we hold that the trial court erred in its finding of fact and conclusion of law that Defendant acted evasively.

However, that does not end our inquiry, as our Supreme Court had made clear that "[a] correct decision of a lower court [on a motion to suppress] will not be disturbed on review simply because an insufficient or superfluous reason is assigned." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Even where the trial court's reasoning for denying a defendant's motion to suppress is incorrect, "we are not required on this basis alone to determine that the ruling was erroneous," because "[t]he crucial inquiry for [this Court] is admissibility and whether the ultimate ruling was supported by the evidence." *Id.* (citations and internal quotation marks omitted).

Here, Defendant contends that absent the finding of evasive action, the RPD officers' personal observations of him at Stokes' residence provided no other basis for reasonable suspicion to stop his vehicle. Specifically, Defendant contends that the trial court erred in concluding that the search warrant for Stokes' residence was a factor supporting reasonable suspicion against him because "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 586. Moreover, Defendant contends that the transfer of boxes from Stokes' truck to Defendant's Acadia was also insufficient to support a reasonable suspicion that a drug transaction had occurred, given that the officers never observed any money changing hands that morning and never in their months-long surveillance of Stokes witnessed him sell any marijuana from his home, utilize large boxes to transport it, or interact with Defendant in any way.

We find Defendant's argument unpersuasive. While it is true that an individual's mere presence in an area of expected criminal activity does not by itself give rise to reasonable suspicion, the record before us indicates that Defendant was more than merely present at Stokes' home, insofar as he accepted two large boxes from Stokes, carried them to his Acadia, put them inside, and drove away. Further, Defendant's argument that there was nothing inherently suspicious about those two large boxes ignores the fact that RPD officers had already obtained a warrant to search Stokes and his residence for evidence of marijuana trafficking, which implicitly authorized them to search any container capable of carrying marijuana, including the boxes. *See, e.g.*, *State v. Bryant*, 196 N.C. App. 154, 674 S.E.2d 753, *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135 (2009) (holding that officers executing a search warrant may legally seize any object encompassed within its description of items to be searched).

In his brief, Defendant suggests that the scope of the search warrant did not include Stokes' car; however, the warrant was not included in the record on appeal and Defendant does not specifically challenge its validity, nor would he have standing to do so, given the absence of evidence that he either owned or held a possessory interest in Stokes' residence or maintained a reasonable expectation of privacy there. *See, e.g.*, *State v. Rodelo*, __ N.C. App. __, 752 S.E.2d 766, *disc. review denied*, __ N.C. __, 762 S.E.2d 204 (2014) (holding that a defendant who cannot show evidence of either his ownership or possessory interest or a reasonable expectation of privacy lacks standing to challenge an alleged Fourth Amendment violation). But even assuming *arguendo* Defendant was correct in this assertion, the scope of the warrant still included Stokes himself, which means the officers would have had probable cause to search the boxes once they saw Stokes and Defendant take them out of the pickup truck. While the officers chose not to search at that time, due to the unavailability of a S.W.A.T. team and concerns about safety, the mere fact that the boxes were then placed inside Defendant's Acadia did not automatically immunize them from future searches once the vehicle left the property simply because the vehicle was not listed in the warrant. If anything, in light of the totality of the circumstances, given the fact that Stokes was under investigation for marijuana trafficking—which is an offense that by definition involves moving narcotics from one location to another, *see* N.C. Gen. Stat. § 90-95(h)(1) (2013)—Defendant's act of putting two boxes large enough to contain marijuana into his vehicle and then driving away immediately thereafter was more than sufficient to support a reasonable suspicion that he was involved in

criminal activity.[1] That being the case, the officers did not need to wait until Defendant committed a traffic violation or acted evasively to conduct an investigatory stop. Thus, although the trial court's conclusion that Defendant acted evasively was erroneous, we conclude it was also unnecessary to support a finding of reasonable suspicion to conduct an investigatory stop in this case. Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress or plainly err in admitting this evidence at trial.

III. Defendant's motion in limine

[2] Defendant also argues that the trial court committed plain error by admitting into evidence the marijuana and other contraband found at 7202 Shellburne Drive for the purpose of showing his knowledge that the boxes he received from Stokes contained marijuana. Specifically, Defendant contends that this evidence was irrelevant, inadmissible, and prejudicial under Rules 401, 402, and 404(b) of our Rules of Evidence because there was no evidence that he had ever been inside 7202 Shellburne Drive, knew its owner, or possessed or was even aware of the drugs hidden therein. While Defendant's argument has some merit with regards to relevance and admissibility, we do not agree that admission of this evidence was so prejudicial as to constitute an error "so fundamental as to amount to a miscarriage of justice" or "which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Brunson*, 187 N.C. App. at 477, 653 S.E.2d at 555.

Rule 401 of our Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of

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1. In support of his argument to the contrary, Defendant cites this Court's unpublished decision in *State v. Majett*, __ N.C. App. __, 675 S.E.2d 719 (2009) (unpublished), *available at* 2009 WL 1192726. We note first that Rule 30(e)(3) of our Rules of Appellate Procedure provides that this Court's unpublished decisions do not constitute controlling legal authority. Moreover, despite superficial similarities, the present facts are easily distinguishable from those in *Majett*, where police received a tip from an anonymous informant that the defendant was distributing cocaine from his residence, then found crack cocaine on three men whom they saw entering and leaving the defendant's residence. Although the police in *Majett* may well have been able to obtain a warrant to search the defendant's residence, they instead chose to stop the defendant's vehicle immediately, arrest him, and search for drugs, which they subsequently found. In reversing his conviction, this Court held that the stop amounted to an unreasonable seizure because the police lacked probable cause to effectuate a warrantless arrest given the absence of any evidence connecting the defendant's suspected illegal conduct to his vehicle, which had not broken any traffic laws prior to the stop. In the present case, by contrast, the RPD officers properly obtained a search warrant for Stokes' residence, where they directly observed the transfer of boxes to Defendant's Acadia, which provided a sufficient basis for reasonable suspicion for an investigatory stop of his vehicle.

consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). By contrast, irrelevant evidence has no tendency to prove a fact at issue and must be excluded. *See* N.C. Gen. Stat. § 8C-1, Rule 402. However, irrelevant evidence is typically considered harmless "unless [the] defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded." *State v. Moctezuma*, 141 N.C. App. 90, 93-94, 539 S.E.2d 52, 55 (2000).

The issue here, then, is whether the evidence found at 7202 Shellburne Drive increased the probability that Defendant knew that the boxes he received from Stokes contained marijuana. The State argues that this evidence was properly admitted to show Defendant's knowledge under Rule 404(b), which provides that

> [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.

N.C. Gen. Stat. § 8C-1, Rule 404(b). Defendant counters that because there was no evidence that he actually or constructively possessed the drugs and other contraband found at 7202 Shellburne Drive, it was improper to admit the evidence as evidence of his knowledge under Rule 404(b). In support of his argument, he cites this Court's holding in *State v. Moctezuma*, *supra*.

In *Moctezuma*, we held that the trial court erred in admitting evidence under Rule 404(b) for the purpose of showing a defendant's knowledge where there was no evidence connecting the evidence to any crime, wrong, or act by the defendant. 141 N.C. App. at 95, 539 S.E.2d at 56. There, a confidential informant told police that three men in a white van with Tennessee license plates would drive to a residence where a large quantity of cocaine was located and then conduct a cocaine deal in a grocery store parking lot. *Id.* at 91, 539 S.E.2d at 54. Pursuant to that tip, police conducted surveillance and followed the van to a trailer where the defendant and another man lived; watched the defendant and two other men exit the van, enter the trailer, and reemerge shortly thereafter; and followed the van to the grocery store before surrounding it and arresting its occupants. *Id.* During the arrest, an officer noticed the defendant, who had been driving the van, place something wrapped in

white tissue to the right of his seat. *Id.* Upon inspection, police found over 136 grams of cocaine in a plastic bag wrapped in white tissue to the right of the drivers' seat. *Id.* When police returned to the trailer, they found two kilos of cocaine and other paraphernalia in a bathroom. *Id.* At trial, the defendant claimed he was not aware there was cocaine in the van or in the trailer. *Id.* at 92, 539 S.E.2d at 54. Over his objections, the State introduced evidence of the cocaine found in the trailer to show the defendant's awareness that there had been cocaine inside the van. *Id.*

On appeal to this Court, we held that the trial court erred in admitting the cocaine from the trailer under Rule 404(b), reasoning that because there was no evidence that the defendant was aware of the cocaine in the trailer that he shared with another man, that evidence could not constitute proof of his awareness of cocaine in the van, thus rendering it irrelevant and inadmissible. As we explained,

> Rule 404(b) speaks of "[e]vidence of other crimes, wrongs, or acts." Here, there are no crimes, wrongs, or acts with which [the] defendant is connected. There was no evidence introduced at trial to directly link [the] defendant to the drugs seized at the trailer in which he occupied a bedroom. [The d]efendant was not charged with any offense in connection with the drugs seized at the trailer, and [the] defendant consistently denied any knowledge of such drugs.
>
> Further, the circumstantial evidence presented at trial—the fact that drugs belonging to other people were discovered at the trailer [the] defendant shared with others—was too weak to support an inference of knowledge on his part. . . . Under these circumstances, we find that there was insufficient evidence to show that [the] defendant knew about the drugs seized at the trailer.

Id. at 94-95, 539 S.E.2d at 56.

In the present case, with regards to the issues of relevance and admissibility, we find strong parallels between the marijuana and other contraband found at 7202 Shellburne Drive and the cocaine found in the trailer in *Moctezuma*. Although the State contends that the contraband found at 7202 Shellburne Drive should be admissible to prove Defendant's knowledge because of its similarity to the marijuana found in the boxes Defendant received from Stokes, as we explained in *Moctezuma*, "Rule 404(b) speaks of evidence of other crimes, wrongs, or acts," but here, "there are no crimes, wrongs, or acts" to connect that

contraband with Defendant. *See id.* (internal quotation marks omitted). Here, as in *Moctezuma*, Defendant was not charged with any offense in connection with the contraband found at 7202 Shellburne Drive, nor is there any evidence that Defendant actually or constructively possessed that contraband or even knew of its existence. Indeed, there is no evidence Defendant had ever previously visited 7202 Shellburne Drive, and when police searched the residence, they found no evidence that connected Defendant to it. Moreover, as Defendant repeatedly emphasized at trial, the contraband found at 7202 Shellburne Drive was notably dissimilar from the contraband found in his vehicle insofar as the marijuana was of a different grade and the buckets were a different color. Under these circumstances, we find insufficient evidence to show that Defendant knew about the drugs found at 7202 Shellburne Drive. Consequently, we do not believe that evidence was either relevant or admissible to show Defendant's knowledge of the contents of the boxes he received from Stokes, and we therefore hold that the trial court erred in denying Defendant's motion *in limine* to exclude it.

Defendant further contends that the erroneous admission of this evidence was so prejudicial to him as to constitute plain error, thus warranting a new trial. Defendant again relies on *Moctezuma* to support his argument. There, in reversing the defendant's conviction, we held the erroneous admission of irrelevant evidence to be prejudicial because "the jury could have easily concluded, given the value and quantity of the seized drugs, as well as the time spent at trial examining such, that [the] defendant was a high level drug trafficker." *Id.* at 95, 539 S.E.2d at 56. Defendant argues that the same logic should apply here, and further supports his argument by citing prior cases in which this Court has found that irrelevant evidence that leads to the spurious conclusion that the accused is linked to a huge drug trafficking operation can be prejudicial. *See, e.g.*, *State v. Cuevas*, 121 N.C. App. 553, 557-58, 468 S.E.2d 425, 428, *disc. review denied*, 343 N.C. 309, 471 S.E.2d 77 (1996) (holding that the trial court erred by admitting irrelevant evidence that the defendant who was charged with cocaine trafficking had a stamp on his passport indicating that he had visited Colombia approximately two months before his arrest, as it tended to mislead the jury as to the level of his involvement in drug trafficking, but nevertheless affirming his conviction because the properly admitted evidence against him was sufficiently overwhelming to make it "unlikely that a different result would have occurred at trial but for the introduction of the passport."). However, given the record before us, we do not agree that the trial court's error was "so fundamental as to amount to a miscarriage of justice" or that it "probably resulted in the jury reaching a different

verdict than it otherwise would have reached." *Brunson*, 187 N.C. App. at 477, 653 S.E.2d at 555.

Defendant's argument ignores a critical distinction between the facts here and what made the erroneous admission of irrelevant evidence so prejudicial in *Moctezuma*—specifically, the radical disparity between the quantity of narcotics found when Moctezuma was arrested and the quantity found elsewhere that was erroneously admitted into evidence under Rule 404(b). In *Moctezuma*, the defendant was arrested driving a vehicle that contained roughly 136 grams—or, about four ounces—of cocaine, but the trial court subsequently admitted evidence that police had recovered over four *pounds* of cocaine from his trailer. 141 N.C. App. at 95, 539 S.E.2d at 56. The erroneously admitted contraband taken from the defendant's shared home was prejudicial because it magnified the amount of cocaine purportedly associated with him by a factor of roughly 16, thus leaving the jury to draw the inference that he was some kind of drug kingpin. *Id.* By contrast, there is no such prejudicial disparity in the present case, given that Defendant was arrested with over ten pounds of marijuana in his vehicle, while the police found far less marijuana in their search of 7202 Shellburne Drive. In other words, even without the erroneously admitted evidence, the jury could still have concluded that Defendant was a high level drug trafficker or otherwise involved in a large drug trafficking operation based on the relevant and properly admitted evidence before it.

Defendant nevertheless insists that he was prejudiced by the trial court's error, emphasizing that the only contested issue at his trial was his knowledge that the boxes he received from Stokes contained marijuana and that, apart from the contraband found at 7202 Shellburne Drive, the State's evidence on this point was weak at best. However, this Court has previously recognized that in narcotics prosecutions, "[i]n the absence of a confession by [the] defendant that [he knew the boxes contained marijuana], the State's proof of [the knowledge] element must of necessity be circumstantial." *State v. Nunez*, 204 N.C. App. 164, 168, 693 S.E.2d 223, 226 (2010). Moreover, "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433 (2005) (citation and internal quotation marks omitted).

In the present case, when Defendant took the stand to deny any knowledge of what was in those boxes, he testified that he knew Stokes was on federal probation for drug trafficking but agreed to do him a favor by transporting two large boxes without inquiring about their contents to an address he had never previously visited. He also admitted to having

pled guilty to possession of marijuana with intent to sell and deliver in 2009. Whether or not Defendant knew that the boxes contained marijuana was a credibility determination for the jury, and although these facts do not by themselves prove his guilt, they certainly provided sufficient grounds for the jury to infer that Defendant *should* have known what he was getting himself into.

We therefore conclude that the trial court's erroneous decision to admit irrelevant evidence was not "so fundamental as to amount to a miscarriage of justice" and did not "probably result[] in the jury reaching a different verdict than it otherwise would have reached." *Brunson*, 187 N.C. App. at 477, 653 S.E.2d at 555. Accordingly, we hold that the trial court did not commit plain error in denying Defendant's motion to exclude the evidence found at 7202 Shellburne Drive.

NO ERROR.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
JASON KEITH WILLIFORD

No. COA14-50

Filed 6 January 2015

1. Search and Seizure—motion to suppress DNA evidence—discarded cigarette butt—shared parking lot

The trial court did not err in a first-degree murder, first-degree rape, and misdemeanor breaking or entering case by denying defendant's motion to suppress DNA evidence obtained from a discarded cigarette butt found in a shared parking lot located in front of defendant's four-unit apartment building. The parking lot was not part of the curtilage of defendant's apartment and thus he did not have a reasonable expectation of privacy. After defendant voluntarily abandoned the cigarette butt, its subsequent collection and analysis by law enforcement did not implicate defendant's constitutional rights.

2. Judgments—clerical error—remand unnecessary

It was unnecessary to have a first-degree murder, first-degree rape, and misdemeanor breaking or entering case remanded to

correct a clerical error when the judgment already indicated twice that defendant was sentenced to life imprisonment based upon a conviction for a Class A felony.

Appeal by defendant from judgments entered 7 June 2012 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 13 August 2014.

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

Law Offices of John R. Mills NPC, by John R. Mills, for defendant-appellant.

CALABRIA, Judge.

Jason Keith Williford ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first degree murder, first degree rape, and misdemeanor breaking and entering. We find no error.

I. Background

Late in the evening on 5 March 2010, defendant broke into the home of John Geil ("Geil") in Raleigh, North Carolina. On that date, Kathy Taft ("Taft") and her sister, Dina Holton ("Holton"), were staying in Geil's home while Taft recovered from a recent surgery. Geil was out of town, and so the two women were in his home alone.

Defendant entered Taft's bedroom and struck her in the head with a blunt object multiple times. He then removed her clothing and raped her before exiting the home. Holton heard noises in the house during the night, but did not discover what had happened to Taft until the next morning.

In the morning on 6 March 2010, Holton went to the bedroom where she had last seen Taft, and she discovered Taft completely nude and bleeding from the head. Holton called 911, and emergency medical services transported Taft to the hospital. At the hospital, a nurse noticed signs of trauma around Taft's vagina and blood on her anus. As a result, hospital personnel collected a rape kit in order to obtain DNA samples. Taft underwent emergency neurosurgery, but ultimately died from her head wounds on 9 March 2010.

The DNA samples from the rape kit were tested and determined to contain male DNA. As a result, law enforcement officers from the

Raleigh Police Department ("RPD") canvassed the area around Geil's home and attempted to obtain DNA samples from male residents. When RPD Detective Zeke Morris ("Det. Morris") reached the home of defendant, who lived nearby, defendant did not invite Det. Morris inside, as all of his neighbors had done, but only spoke briefly with him. Det. Morris returned later to seek a sample of defendant's DNA, and defendant refused to provide the sample.

After defendant's refusal, members of the RPD Fugitive Unit began conducting surveillance on him in an attempt to obtain his DNA. On 15 April 2010, RPD Officer Gary L. Davis ("Officer Davis") parked his unmarked vehicle in a parking lot directly adjacent to defendant's multi-unit apartment building while defendant was shopping at a nearby grocery store. When defendant returned, Officer Davis observed defendant smoking a cigarette as he exited his vehicle. Defendant then finished the cigarette and dropped the butt onto the ground in the parking lot. Shortly thereafter, RPD Officer Paul Dorsey ("Officer Dorsey") entered the parking lot. Officer Dorsey approached defendant and spoke to him in order to distract him while Officer Davis retrieved the cigarette butt. After securing the butt, the officers left the apartment building.

Subsequent DNA testing revealed that defendant's DNA was a match for the DNA collected from the rape kit and from the crime scene. Consequently, defendant was arrested and indicted for first degree murder, first degree rape and first degree burglary. On 16 December 2010, the State notified defendant that it intended to rely upon evidence of aggravating circumstances and seek a sentence of death for the charge of first degree murder.

On 26 August 2011, defendant filed a motion to suppress the DNA evidence which was collected from the cigarette butt recovered from the parking lot. In his motion, defendant contended that the cigarette butt was discarded in an area which constituted the curtilage of his apartment and that defendant never surrendered his privacy interest in the cigarette butt. Defendant argued that under these circumstances, Officer Davis's retrieval and subsequent analysis of the cigarette butt without a warrant violated his constitutional rights.

Defendant's motion was heard on 20 February 2012. On 9 March 2012, the trial court entered an order denying the motion to suppress. The court concluded that the parking lot where Officer Davis recovered the cigarette butt was outside the curtilage of defendant's apartment and that defendant had voluntarily discarded it.

Defendant was tried by a jury beginning 16 May 2012 in Wake County Superior Court. On 1 June 2012, the jury returned verdicts finding defendant guilty of first degree murder, first degree rape, and the lesser-included offense of misdemeanor breaking and entering. On 7 June 2012, the jury recommended that defendant be sentenced to life imprisonment without the possibility of parole. Based upon this recommendation, the trial court sentenced defendant to life without parole for the first degree murder charge. Defendant also received a consecutive sentence of a minimum of 276 months to a maximum of 341 months for the first degree rape charge and a concurrent sentence of 45 days for the misdemeanor breaking and entering charge. Defendant appeals.

II. Motion to Suppress

[1] Defendant argues that the trial court erred by denying his motion to suppress the DNA evidence obtained from the discarded cigarette butt. Specifically, defendant contends: (1) that the cigarette butt was discarded in the curtilage of his dwelling; (2) that he never abandoned his possessory interest in the cigarette butt; and (3) that the DNA on the cigarette butt was improperly tested without a warrant. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Since defendant does not challenge any of the trial court's findings, "our review is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005).

A. Curtilage

Defendant first argues that Officer Davis's seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment. "Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). "Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is 'afforded the most stringent Fourth Amendment protection.'" *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 49 L. Ed. 2d 1116, 1130, 96 S. Ct. 3074, 3084 (1976)).

"The United States Supreme Court has . . . defined the curtilage of a private house as 'a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.' " *State v. Washington*, 134 N.C. App. 479, 483, 518 S.E.2d 14, 16 (1999) (quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 90 L. Ed. 2d 226, 235, 106 S. Ct. 1819, 1825 (1986)). The United States Supreme Court has further established that the "curtilage question should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334-35, 107 S. Ct. 1134, 1139 (1987).

Although this Court has previously utilized the *Dunn* factors to determine whether certain areas are located within a property's curtilage, *see, e.g.*, *State v. Washington*, 86 N.C. App. 235, 240-42, 357 S.E.2d 419, 423-24 (1987), we have never done so in the specific context of multi-unit dwellings. A federal appeals court which considered this issue in that context noted that "[i]n a modern urban multi-family apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control." *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976). This is because "none of the occupants can have a reasonable expectation of privacy in areas that are also used by other occupants." *State v. Johnson*, 793 A.2d 619, 629 (N.J. 2002) (internal quotation and citation omitted).

Thus, in *United States v. Stanley*, the United States Court of Appeals for the Fourth Circuit held that "the common area parking lot on which [the defendant]'s automobile was parked was not within the curtilage of his mobile home." 597 F.2d 866, 870 (4th Cir. 1979). In reaching this conclusion, the *Stanley* Court relied upon the following factors: (1) that "[t]he parking lot was used by three other tenants of the mobile home park;" (2) that the parking lot "contained parking spaces for six or seven cars. No particular space was assigned to any tenant;" and (3) that "[a]lthough on the day of the search the Cadillac was parked in a space close to [the defendant]'s home, that space was not annexed to his home or within the general enclosure surrounding his home." *Id.* Other courts have also reached the same conclusion based upon similar facts. *See, e.g.*, *Cruz Pagan*, 537 F.2d at 558 ("In sum, we hold that the agents' entry into the underground parking garage of El Girasol Condominium did not violate the fourth amendment. . . ."); *United States v. Soliz*, 129 F.3d 499, 503 (9th Cir. 1997) (Common parking area in an apartment

complex which "was a shared area used by the residents and guests for the mundane, open and notorious activity of parking" was not curtilage.), *overruled on other grounds by United States v. Johnson*, 256 F.3d 895, 913 n.4 (9th Cir. 2001) (en banc); *Commonwealth v. McCarthy*, 705 N.E.2d 1110, 1114 (Mass. 1999) ("Because the defendant had no reasonable expectation of privacy in the visitor's parking space, the space was not within the curtilage of the defendant's apartment."); and *State v. Coburne*, 518 P.2d 747, 757 (Wash. Ct. App. 1973) ("The vehicle was parked in an alley parking lot available to all users of the apartments. The area where the car was parked is not a 'curtilage' protected by the Fourth Amendment."). *But see Joyner v. State*, 303 So.2d 60, 64 (Fla. Dist. Ct. App. 1974) (holding that "parking areas usually and customarily used in common by occupants of apartment houses, condominiums and other such complexes with other occupants thereof constitute a part of the curtilage of a specifically described apartment or condominium or other living unit thereof").

In the instant case, the trial court's unchallenged findings indicate that the shared parking lot where defendant discarded the cigarette butt was located directly in front of defendant's four-unit apartment building, that the lot was uncovered, that it included five to seven parking spaces used by the four units, and that the spaces were not assigned to particular units. The court further found that the area between the road and the parking lot was heavily wooded, but that there was no gate restricting access to the lot and there were no signs which suggested either that access to the parking lot was restricted or that the lot was private. Applying the *Dunn* factors to these findings, we conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept." *Washington*, 134 N.C. App. at 483, 518 S.E.2d at 16 (internal quotation and citation omitted). Thus, defendant's constitutional rights were not violated when Officer Davis seized the discarded cigarette butt from the parking lot without a warrant. This argument is overruled.

B. Possessory Interest

Defendant next contends that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a

third party. However, it is well established that "[w]here the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure." *State v. Cromartie*, 55 N.C. App. 221, 224, 284 S.E.2d 728, 730 (1981) (internal quotations, citation, and brackets omitted). Moreover, "[w]hen one abandons property, '[t]here can be nothing unlawful in the Government's appropriation of such abandoned property.' " *Id.* at 225, 284 S.E.2d at 730. (quoting *Abel v. United States*, 362 U.S. 217, 241, 4 L. Ed. 2d 668, 687, 80 S. Ct. 683, 698 (1960)). In the instant case, we have already determined that defendant had no reasonable expectation of privacy in the parking lot, and thus, by dropping the cigarette butt in the lot, he is deemed to have abandoned any interest in it. This argument is overruled.

C. DNA Testing

Finally, defendant argues that even if law enforcement lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing the butt for his DNA because defendant had a legitimate expectation of privacy in his DNA. Defendant cites *Maryland v. King*, ___ U.S. ___, 186 L. Ed. 2d 1, 133 S. Ct. 1958 (2013) in support of his argument. In *King*, the United States Supreme Court considered whether the warrantless, compulsory collection and analysis of a DNA sample from individuals who had been arrested for felony offenses violated the Fourth Amendment. *Id.* at ___, 186 L. Ed. 2d at 17, 133 S. Ct. at 1966. The Court held that this warrantless search was reasonable because of the state's significant interest in accurately identifying the arrestee. *Id.* at ___, 186 L. Ed. 2d at 32, 133 S. Ct. at 1980.

King is inapplicable to the instant case. In *King*, the defendant's DNA sample had been directly obtained by law enforcement in a compulsory seizure that was indisputably a Fourth Amendment search. The *King* Court only decided whether that search was reasonable. In contrast, in this case, defendant had abandoned his interest in the cigarette butt, without any compulsion from law enforcement, and thus, we must first determine whether the extraction of defendant's DNA from the abandoned butt constituted a search at all. This Court has specifically held that "[t]he protection of the Fourth Amendment against unreasonable searches and seizures does not extend to abandoned property." *State v. Eaton*, 210 N.C. App. 142, 148, 707 S.E.2d 642, 647 (2011). While we have not yet applied this general principle to the retrieval of DNA from abandoned property, courts in other jurisdictions have relied upon

it to conclude that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment. *See*, *e.g.*, *People v. Gallego*, 117 Cal. Rptr. 3d 907, 913 (Cal. Ct. App. 2010) ("By voluntarily discarding his cigarette butt on the public sidewalk, defendant actively demonstrated an intent to abandon the item and, necessarily, any of his DNA that may have been contained thereon. ... On these facts, we conclude that a reasonable expectation of privacy did not arise in the DNA test of the cigarette butt, and consequently neither did a search for Fourth Amendment purposes."); *Raynor v. State*, 99 A.3d 753, 767 (Md. 2014) ("[W]e hold that DNA testing of . . . genetic material, not obtained by means of a physical intrusion into the person's body, is no more a search for purposes of the Fourth Amendment, than is the testing of fingerprints, or the observation of any other identifying feature revealed to the public—visage, apparent age, body type, skin color."); and *State v. Athan*, 158 P.3d 27, 37 (Wash. 2007) (en banc) ("There is no subjective expectation of privacy in discarded genetic material just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place. ... The analysis of DNA obtained without forcible compulsion and analyzed by the government for comparison to evidence found at a crime scene is not a search under the Fourth Amendment."). We find these cases persuasive, and thus, we hold that once defendant voluntarily abandoned the cigarette butt in a public place, he could no longer assert any constitutional privacy interest in it. Accordingly, the extraction of his DNA from the butt did not constitute a search for purposes of the Fourth Amendment. This argument is overruled.

III. Judgment

[2] Defendant argues that his judgment includes a clerical error, in that the trial court failed to check the "Class A Felony" box in the portion of the judgment that explains why defendant was sentenced to life imprisonment without parole. However, the judgment indicates that defendant was sentenced for a Class A felony in two other locations. Thus, we find it unnecessary to remand this case for the judgment to indicate, for a third time, that defendant was sentenced to life imprisonment based upon a conviction for a Class A felony.

IV. Conclusion

Pursuant to the factors in *Dunn*, the shared parking lot located in front of defendant's four-unit apartment building was not part of the curtilage of defendant's apartment. Since defendant did not have a reasonable expectation of privacy in the parking lot, he abandoned his cigarette butt by discarding it there. After defendant voluntarily abandoned

the cigarette butt, its subsequent collection and analysis by law enforcement did not implicate defendant's constitutional rights. Defendant received a fair trial, free from error.

No error.

Judges ELMORE and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 JANUARY 2015)

IN RE A.B. No. 14-901	Cumberland (12JA311)	Affirmed
PATTISON OUTDOOR ADVER., LP v. ELEVATOR CHANNEL, INC. No. 14-580	Mecklenburg (13CVS17582)	Affirmed
POWELL v. CHRISTOPHERSON No. 14-659	Wake (12CVS16552)	No Error
REARDON v. BROWN No. 14-488	Gaston (01CVD2484)	Affirmed
RUTLAND v. SMITH No. 14-849	Guilford (13CVS7526)	Affirmed
STATE v. NORRIS No. 14-361	Cleveland (12CRS50344) (12CRS50425)	No error; remand for reconsideration of restitution.
STATE v. REESE No. 14-593	Guilford (03CRS96775-88)	No Error
STATE v. SEWELL No. 14-269	Durham (12CRS61669)	Affirmed in part, reversed in part.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 JANUARY 2015)

GOODWIN v. CAGC INS. CO. No. 14-445	Wake (12CVS1270)	Reversed and Remanded
IN RE C.M. No. 14-900	Onslow (12JA112-113)	Affirmed
IN RE D.C. No. 14-739	Wake (09JB533)	Affirmed in part, Reversed and Remanded in Part
IN RE D.H.T. No. 14-792	Iredell (11JT5) (11JT6)	Affirmed
IN RE K.G.T. No. 14-654	Wake (13SPC6864)	Vacated and Remanded
IN RE R.L.W. No. 14-899	Wake (12JT183)	Affirmed
IN RE S.B. No. 14-898	Cumberland (10JT558-559)	Affirmed
IN RE Z.K.M. No. 14-801	Randolph (11JT75-77)	Affirmed
ROSE v. POTTS No. 14-611	Cumberland (11CVS8966)	Reversed
SMOKY MOUNTAIN SANCTUARY PROPS. OWNERS ASS'N, INC. v. SHELTON No. 14-112-2	Haywood (10CVS1452)	Dismissed
STATE v. CHANDLER No. 14-1045	Durham (11CRS3668)	Reversed and Remanded
STATE v. CLARK No. 14-691	Mecklenburg (11CRS205286)	Vacated and Remanded
STATE v. CREDLE No. 14-794	Forsyth (12CRS55206) (13CRS1773)	No Error
STATE v. HEAVNER No. 14-514	Lincoln (12CRS53308-09)	No Error

STATE v. HERBIN No. 14-607	Guilford (13CRS24624) (13CRS82953)	No Error
STATE v. LOWERY No. 14-777	Gaston (13CRS62066)	No Error
STATE v. MOORE No. 14-620	Guilford (11CRS82467-69) (11CRS82722-28) (11CRS86304) (11CRS86306) (11CRS88574)	No Error
STATE v. MORRIS No. 14-619	Cabarrus (12CRS54772) (13CRS1190)	No Error
STATE v. MORRISON No. 14-247	Mecklenburg (10CRS253344-45) (10CRS253347-48)	No Error
STATE v. POOLE No. 14-689	Person (12CRS51878)	No Error
STATE v. RUNYON No. 14-817	Brunswick (12CRS53763)	Dismissed
STATE v. SMITH No. 14-888	Guilford (11CRS33240) (11CRS72307) (11CRS72308-09)	No Error
STATE v. THOMAS No. 14-841	Johnston (14CRS372-373)	Affirmed

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