239 N.C. App.—No. 2 Pages 135-251

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 12, 2016

MAILING ADDRESS: The Judicial Department
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OF

NORTH CAROLINA

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 3 FEBRUARY 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

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SCHEDULE FOR HEARING APPEALS DURING 2016

NORTH CAROLINA COURT OF APPEALS

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

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

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.

COMBS v. ROBERTSON

[239 N.C. App. 135 (2015)]

MYRA LYNNE COMBS, PLAINTIFF
v.
MICHAEL D. ROBERTSON, COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES, DEFENDANT

No. COA14-709

Filed 3 February 2015

Motor Vehicles—driving while impaired—license revocation—exclusionary rule inapplicable

The trial court erred by reversing the Department of Motor Vehicles' revocation of plaintiff's driver's license. Even though police violated plaintiff's Fourth Amendment rights by initiating a traffic stop without reasonable suspicion, the exclusionary rule does not apply to license revocation proceedings in North Carolina. There was sufficient evidence that the officer had reasonable grounds to believe plaintiff had been driving while impaired.

Appeal by respondent from order entered 4 April 2014 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 5 November 2014.

Randolph & Fischer, by J. Clark Fischer, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for respondent-appellant.

DIETZ, Judge.

This case serves as a reminder that, unless our Supreme Court holds otherwise, the Fourth Amendment's exclusionary rule does not apply in civil proceedings such as driver's license revocation hearings, even if those proceedings could be viewed as quasi-criminal in nature.

In 2013, police violated Petitioner Myra Lynne Combs's Fourth Amendment rights by stopping her car without reasonable suspicion. Combs smelled of alcohol, had bloodshot eyes, and failed a field sobriety test. But she refused to submit to a breath test both at the stop and later at the police station. The State then charged her with driving while impaired.

Because the traffic stop was unconstitutional, all evidence derived from the stop was suppressed in Combs's criminal case, resulting in

dismissal of the charges. But the Division of Motor Vehicles (DMV) pressed ahead, revoking Combs's driver's license for her refusal to submit to a breath test. Combs challenged that revocation, arguing that the officer did not have "reasonable grounds" to believe she was impaired (the standard for license revocation under the implied consent laws). The gist of Combs's argument is that, because the stop was unconstitutional, DMV should not be permitted to rely on evidence gathered from that stop to revoke her driver's license.

Combs's argument poses a fair question: how can law enforcement use evidence that was suppressed because of a Fourth Amendment violation to later revoke her driver's license? The answer, according to several published decisions of this Court, is that the exclusionary rule—a bedrock principle of criminal law—does not apply to license revocation proceedings.

Without the exclusionary rule, we must reverse the trial court and affirm DMV's revocation of Combs's driver's license. During the traffic stop, there was ample evidence from which an officer could find reasonable grounds to believe Combs was driving while impaired. Thus, Combs can prevail on appeal only if this evidence were excluded from consideration and, under our Court's precedent, it is not. Accordingly, we reverse the trial court and affirm the final agency decision revoking Combs's driving privileges.

Facts and Procedural History

On 6 January 2013, Officer David Grubbs of the Mount Airy Police Department received an anonymous report of a possible drunk driver on Highway U.S. 52 North. The caller reported that a blue Ford Explorer had been weaving in the roadway. Officer Grubbs proceeded to the intersection of Rockford Street and U.S. 52 to intercept the vehicle as it exited the highway. At the intersection, Officer Grubbs observed a vehicle matching the description given by the caller. Officer Grubbs and a second officer got behind the suspect vehicle and followed it. While he followed the vehicle, Officer Grubbs did not observe it weaving in the roadway as the anonymous caller had described. But after several turns, Officer Grubbs saw the vehicle make what he believed was a "slight cross of the center" line of the roadway (this side road did not have a painted center line). Officer Grubbs continued to follow the vehicle until it turned into a driveway. At that point, Officer Grubbs initiated a traffic stop.

Officer Grubbs approached the vehicle and spoke to the driver, Petitioner Myra Lynne Combs. There were no other passengers in the

vehicle. Officer Grubbs detected a strong odor of alcohol and observed that Combs's eyes were bloodshot. Officer Grubbs asked Combs if she had been drinking, and she admitted that she had a beer earlier in the evening. He then asked her to step out of her vehicle to perform field sobriety tests. As Combs exited her vehicle, Officer Grubbs noticed that she swayed. The officer conducted several field sobriety tests with Combs and noted that she did not perform to NHTSA standards. During the "horizontal gaze nystagmus" test, Officer Grubbs noted that Combs displayed lack of smooth pursuit, maximum deviation, and onset prior to forty-five degrees with both eyes. During the walk and turn test, Combs stopped walking, missed heel to toe, stepped off the line, and used her arms for balance. And during the one leg stand test, Combs swayed while balancing, used her arms for balance, and put her foot down.

Based on her performance in the field sobriety tests, Officer Grubbs asked Combs to take a portable breath test. She refused. Officer Grubbs then placed Combs under arrest for the implied consent offense of impaired driving and took her to the Mount Airy Police Department. At the Police Department, Officer Evans, a certified chemical analyst, informed Combs of her implied consent rights pursuant to N.C. Gen. Stat. § 20-16.2(a) (2013), and Combs signed an implied consent rights form. Combs advised Officer Evans that she wished to contact a witness or attorney. Officer Evans provided her with a phone book and gave her thirty minutes to make phone calls. Combs was unable to get in contact with anyone. At the end of the thirty minute period, Officer Evans activated the testing instrument to perform a chemical analysis of Combs's breath. Once the instrument was ready, Officer Evans asked Combs to submit a sample of her breath for chemical analysis. Combs refused to do so.

Ultimately, the State charged Combs with driving while impaired. On Combs's motion, the Surry County District Court suppressed all evidence from the traffic stop. The court concluded that Officer Grubbs violated Combs's Fourth Amendment rights because he "lacked a reasonable articulable suspicion to stop defendant's vehicle." As a result, the court ruled that all evidence obtained during the stop was subject to the exclusionary rule. With all evidence from the stop excluded, the State dismissed its case.

DMV then sent Combs a letter notifying her that it was revoking her driving privileges based on her willful refusal to submit to chemical analysis under N.C. Gen. Stat. § 20-16.2. Combs requested an administrative hearing before DMV, which was held on 27 September 2013. There, Combs's counsel argued that DMV was estopped from revoking Combs's

license because the evidence justifying the breath test resulted from an unconstitutional traffic stop. The hearing officer rejected this argument and continued with the hearing. DMV issued its final order on 7 October 2013, affirming the revocation of Combs's driving privilege based on detailed findings of fact and conclusions of law.

On 16 October 2013, Combs filed a Complaint and Petition in Surry County Superior Court seeking review of DMV's order. After hearing arguments, the trial court entered an order on 4 April 2014 reversing DMV's decision. The order contains no analysis, simply stating that "there is insufficient evidence in the record to support the Findings of Fact of Respondent's decision." DMV timely appealed on 21 April 2014.

Analysis

DMV argues that the trial court erred in reversing the final agency decision because the agency record plainly contains sufficient evidence to support the findings of fact. We agree.

In an appeal from a DMV hearing to superior court under N.C. Gen. Stat. § 20-16.2(e), the superior court acts not as the trier of fact, but as "an appellate court." *Johnson v. Robertson*, ___ N.C. App. ___, ___, 742 S.E.2d 603, 607 (2013). The superior court's review "shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20.16-2(e).

Here, the trial court made a general statement that there was "insufficient evidence in the record to support the Findings of Fact," but did not specify which of DMV's forty-six findings of fact was not supported by sufficient evidence. Combs focused her argument on whether the officer had reasonable grounds to believe she had committed an implied consent offense. Combs contended that, because the district court in her criminal case found that the officer lacked reasonable suspicion to stop her and excluded all evidence resulting from the stop, the officer did not have reasonable grounds to believe she had committed an implied consent offense. Although the trial court did not explain which particular agency fact findings were unsupported, we assume it agreed with Combs's argument.

This argument is precluded by our case law. This Court has held that whether an officer had "reasonable and articulable suspicion for the initial stop is not an issue to be reviewed" in a license revocation hearing.

Hartman v. Robertson, 208 N.C. App. 692, 695, 703 S.E.2d 811, 814 (2010). "[T]he only inquiry with respect to the law enforcement officer is the requirement that he ha[ve] reasonable grounds to believe that the person had committed an implied-consent offense." *Id.* (internal quotation marks omitted). "[T]he propriety of the initial stop is not within the statutorily-prescribed purview of a license revocation hearing." *Id.* at 696, 703 S.E.2d at 814.

Thus, the exclusionary rule, which the district court applied in Combs's criminal case, is inapplicable here. Indeed, this Court repeatedly has rejected attempts to invoke the exclusionary rule in a license revocation proceeding. *See Hartman*, 208 N.C. App. at 698, 703 S.E.2d at 816; *Quick v. N.C. Div. of Motor Vehicles*, 125 N.C App. 123, 127, 479 S.E.2d 226, 228 (1997). As this Court explained in *Quick*, "[w]hen determining whether revocation of petitioner's license was proper, we are not concerned with the admissibility or suppression of evidence." 125 N.C. App. at 125-26, 479 S.E.2d at 228 (internal quotation marks omitted). "The question of the legality of his arrest . . . [is] simply not relevant to any issue presented in the hearing to determine whether [the respondent's] license was properly revoked." *Id.* at 126, 479 S.E.2d at 228 (internal quotation marks omitted).

In light of this precedent, this appeal presents only a single, permissible question: whether there is sufficient evidence in the record to support the agency's finding that Officer Grubbs had reasonable grounds to believe an implied consent offense occurred—*i.e.*, whether there were reasonable grounds for the officer to believe Combs had been driving while impaired. We hold that there is ample evidence in the record to support that finding.

Officer Grubbs testified that he smelled a strong odor of alcohol when he approached Combs in her vehicle. He also testified that Combs's eyes were bloodshot. Combs admitted that she had been drinking earlier in the evening. When Combs exited her vehicle to perform a field sobriety test, she swayed noticeably. Finally, Officer Grubbs testified that Combs failed all three parts of the sobriety test. This evidence readily supports the hearing officer's finding that reasonable grounds existed to believe Combs was drunk. On appeal, Combs points to several facts, such as the presence of white-out in certain areas of the officer's initial report, to challenge the credibility of the officer's testimony at the hearing. But neither the superior court nor this Court is permitted to weigh the credibility of witnesses. *See Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 628 (2011). The hearing officer found Officer Grubbs's

testimony credible, and we are bound by that fact finding. As a result, we must reverse the trial court and affirm the final agency decision.

We pause to note that the question of whether the exclusionary rule applies to license revocation proceedings has divided our sister states. *Compare Fishbein v. Kozlowski*, 743 A.2d 1110, 1119 (Conn. 1999) (concluding that due process does not require application of exclusionary rule); *Martin v. Kansas Dep't of Revenue*, 176 P.3d 938, 949-53 (Kan. 2008) (holding that the exclusionary rule should not apply); *Powell v. Sec'y of State*, 614 A.2d 1303, 1306-07 (Me. 1992) (holding that the exclusionary rule should not be applied); *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 334-35 (Mo. 1999) (holding that the exclusionary rule should not be applied); *Holte v. North Dakota State Highway Comm'r*, 436 N.W.2d 250, 252 (N.D. 1989) (refusing to extend the exclusionary rule to civil proceedings); *and Dep't of Trans. v. Wysocki*, 535 A.2d 77, 79 (Pa. 1987) (holding that the exclusionary rule does not apply); *with Olson v. Comm'r of Pub. Safety*, 317 N.W.2d 552, 556 (Minn. 1985) (holding Fourth Amendment protections applied to license revocation proceeding); *Pooler v. Motor Vehicles Div.*, 755 P.2d 701, 703 (Or. 1988) (holding validity of arrest within the scope of administrative license suspension proceeding); *and Vermont v. Lussier*, 757 A.2d 1017, 1025-27 (Vt. 2000) (holding that the exclusionary rule applies in civil license suspension proceedings). All of these cases were decided by the states' highest courts. Our Supreme Court has not yet addressed this issue but, as explained above, this Court has. Because one panel of this Court cannot overturn another, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), if the application of the exclusionary rule to these civil proceedings warrants further consideration, it must be done in our Supreme Court.

Conclusion

For the reasons discussed above, we must reverse the trial court.

REVERSED.

Judges BRYANT and DILLON concur.

FEHRENBACHER v. CITY OF DURHAM

[239 N.C. App. 141 (2015)]

DOLLY FEHRENBACHER, MELVIN FEHRENBACHER, AARON C. CROOM, DOROTHY CROOM, STUART PIMM, JULIA PIMM, LARRY KENSIL AND SUSAN KENSIL, AND GOOD NEIGHBORS OF 751, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

CITY OF DURHAM, A NORTH CAROLINA MUNICIPALITY, AND DURHAM COUNTY, A NORTH CAROLINA COUNTY, PHILIP POST & ASSOCIATES, INC., GREEK ORTHODOX COMMUNITY OF DURHAM, NORTH CAROLINA, INCORPORATED, AND SPRINTCOM, INC., RESPONDENTS

No. COA14-712

Filed 3 February 2015

1. Constitutional Law—due process—missing audio testimony—equipment malfunction

Petitioners were not deprived of their right to due process as established by N.C.G.S. § 160A-388(e2)(2) and § 160A-393(i) and (j) based on the record provided by respondent City of Durham missing testimony before the Board due to an equipment malfunction. The record adequately conveyed the substance of the missing audio testimony. Further, N.C.G.S. § 160A-393(i) provides that the record need only contain an audio recording of the meeting if such a recording was made.

2. Evidence—photographic simulations—monopine tower—not part of record

The trial court did not err when it requested SprintCom to provide photographic simulations of the proposed monopine tower that were submitted with its original application but were not part of the record before the Board of Adjustment. N.C.G.S. § 160A-393(i) provides that the parties may agree, or the court may direct, that matters unnecessary to the court's decision be deleted from the record or that matters other than those specified be included.

3. Cities and Towns—municipal ordinance—concealed wireless communication facility—monopine tower

The trial court did not err by affirming the Board of Adjustment's determination that SprintCom's proposed monopine tower qualified as a concealed wireless communication facility (WCF) as defined by Unified Development Ordinance section 16.3. SprintCom's proposed monopine design served a secondary function that helped camouflage the tower's function as a WCF and was aesthetically compatible with the church property's existing use as a church in a developing rural residential neighborhood, surrounded by houses and trees.

Appeal by Petitioners from order entered 20 March 2014 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Heard in the Court of Appeals 6 November 2014.

The Brough Law Firm, by Robert E. Hornik, Jr., for Petitioners.

Styers & Kemerait, PLLC, by Karen M. Kemerait, for Respondents Philip Post & Associates, Inc.; Greek Orthodox Community of Durham, North Carolina, Inc.; and SprintCom, Inc.

Office of the City Attorney, by Senior Assistant City Attorney Donald T. O'Toole, for Respondent City of Durham.

Durham County Attorney Bryan Wardell for Respondent Durham County.

STEPHENS, Judge.

This is a case about a giant fake pine tree and what it means to conceal the aesthetic externalities of modernizing our State's telecommunications grid. The Petitioners are a group of homeowners who object to the Durham City-County Board of Adjustment's decision to approve construction of a 120-foot-tall cell tower on the property of St. Barbara Greek Orthodox Church, literally across Highway 751 from their backyards. The Respondents include the City of Durham and Durham County, which approved the plans; the Greek Orthodox Community of Durham, which owns the land where the tower will be built; telecommunications conglomerate SprintCom, which will build, own, and operate the tower; and Philip Post & Associates, Inc., which filed the initial application to build the tower on behalf of SprintCom. Petitioners contend that the trial court, which granted *certiorari* to hear their appeal pursuant to N.C. Gen. Stat. §§ 160A-393 and 153-349, erred as a matter of law in affirming the Board of Adjustment's determination that SprintCom's proposed cell tower, which is designed as a "monopine" in order to blend in with a nearby grove of trees, qualifies as a concealed wireless communications facility as defined by Section 16.3 of Durham's Unified Development Ordinance. Petitioners also argue that the trial court erred by requesting and accepting photographic simulations from SprintCom that were not part of the record before the Board of Adjustment, and that the record provided in response to the trial court's grant of *certiorari* was inadequate. After careful review, we hold that the trial court did not err in affirming the Board of Adjustment.

I. Facts and Procedural History

On 5 January 2012, Respondent City of Durham received an application from Philip Post & Associates, Inc., acting on behalf of SprintCom, seeking approval pursuant to Durham's Unified Development Ordinance ("UDO") to construct a 120-foot-tall cell tower on a leased portion of a five-acre lot owned by the Greek Orthodox Community of Durham. The property, which is home to the St. Barbara Greek Orthodox Church of Durham, is located within the City of Durham's corporate limits at 8306 Highway 751, in an area zoned Rural/Residential.

The plans for the proposed tower utilize a monopine design, which is intended to give the tower the appearance of a tall pine tree, rather than a cell tower, so that it blends in with a grove of actual pine trees already standing on the Church property and qualifies as a concealed wireless communications facility ("WCF") under Durham's UDO. Section 16.3 of the UDO defines a concealed WCF as:

> A [WCF], ancillary structure, or WCF equipment compound that is not readily identifiable as such, and is designed to be aesthetically compatible with existing and proposed uses on a site. A concealed facility may have a secondary function including, but not limited to the following: church steeple, windmill, bell tower, clock tower, cupola, light standard, flagpole with or without a flag, or tree. A non-concealed [WCF] is one that is readily identifiable such as a monopole or lattice tower.

Durham Unified Dev. Ordinance art. 16, § 3 (2006). Section 5.3.3N of the UDO regulates the construction and placement of WCFs and provides that a proposed cell tower that meets the definition of a concealed WCF provided in section 16.3 is subject to an administrative site plan approval process, whereas a tower that does not meet the definition of a concealed WCF can only be approved after obtaining a minor special use permit, which requires a quasi-judicial evidentiary hearing. *Id.* at art. 5, § 3.3N.

On 6 July 2012, the Durham City-County Development Review Board ("DRB") reviewed SprintCom's application and approved it by a vote of eight to one. Petitioners appealed DRB's decision to the Durham City-County Board of Adjustment. The Board of Adjustment heard Petitioners' appeal on 22 October 2012 and remanded the matter back to DRB for further consideration in light of defects and deficiencies in Respondents' application.

On 13 November 2012, SprintCom requested an official interpretation from Durham City-County Planning Director Steven L. Medlin regarding whether or not its proposed monopine tower meets the definition of a concealed WCF provided by the UDO. On 10 January 2013,[1] Planning Director Medlin concluded that SprintCom's proposed monopine tower does, in fact, satisfy UDO section 16.3's definition of a concealed WCF based on the following facts:

> 1) The American Planning Association (APA) is a primary source of defining "best practice" in the field of urban and regional planning. An August, 2011, edition of "Zoning Practice" . . . regarding telecommunications issues states that " . . . in rural and suburban areas, towers are effectively concealed as trees and are nearly indistinguishable from the real thing (apart from being taller than nearby trees)." Based on this standard the monopine tower design clearly mee[t]s the threshold of not being "readily identifiable" as a wireless communications facility.
>
> 2) Since the current wireless communications facility (WCF) review and approval standards were put in place in Durham (in 2004), there have been fifteen (15) new WCF towers constructed in Durham. . . . Thirteen (13) of these have been monopines of equal or lesser design quality to the monopine tower proposed [in the present case]. As such, approval of the proposed design is consistent with over eight years of practice in Durham.

On 6 February 2013, Petitioners filed a timely appeal from Planning Director Medlin's interpretation to the Board of Adjustment.

On 28 May 2013, the Board of Adjustment held a hearing at which several of the Petitioners testified that their opposition to SprintCom's proposed monopine tower was rooted in concerns about public health and safety, given the presence of two high pressure gas transmission lines already running across the Church property, as well as the tower's potential adverse impact on their property values. Petitioners presented photographs of a test they performed by filling balloons with helium and raising them to an altitude of 120 feet to illustrate how the proposed

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1. As the result of an apparent clerical error, Planning Director Medlin's interpretation is dated "5 November 2012," which is impossible given that SprintCom did not ask for his opinion until eight days later. Petitioners and their counsel received copies of Planning Director Medlin's interpretation on or about 10 January 2013.

monopine tower will be twice as high as the surrounding trees on the Church property, the tallest of which currently stands at 60 feet. They also testified that the tower's base will be five times wider than the diameter of the largest trees now present in the area, many of which will need to be cleared before construction can commence. Based on its size and visibility from their homes, Petitioners contended that SprintCom's proposed monopine tower cannot possibly meet the UDO's definition of a concealed WCF. Nevertheless, the Board of Adjustment voted unanimously to uphold Planning Director Medlin's official interpretation.

On 17 July 2013, pursuant to N.C. Gen. Stat. §§ 160A-388 and 153A-349, Petitioners appealed the Board of Adjustment's decision to Durham County Superior Court by a petition for review in the nature of *certiorari*. When their appeal came to be heard on 10 March 2014, Petitioners argued that the Board's decision was arbitrary, capricious, not supported by substantial competent evidence in the record, and affected by errors of law. The crux of their argument was that the Board erred in concluding that SprintCom's proposed monopine tower meets the definition of a concealed WCF provided by section 16.3 of the UDO. Alternatively, due to a recording malfunction that caused the first third of the 28 May 2013 Board of Adjustment hearing to go unrecorded, Petitioners contended that the record before the trial court was inadequate, failed to comply with the requirements of N.C. Gen. Stat. § 160A-393(i) and the Board's own Rules of Procedure, and deprived them of due process of law. Petitioners also objected when the trial court directed SprintCom's counsel to submit additional photographic simulations—which were originally included in its application to the City of Durham—of what the proposed monopine tower would look like.

On 19 March 2014, based on the record, the oral arguments of the parties, and the photographic simulations, the trial court issued an order affirming the Board of Adjustment's decision that SprintCom's proposed monopine tower meets the definition of a concealed WCF provided in section 16.3 of the UDO. The trial court found as facts that SprintCom's proposed monopine tower "is not readily identifiable as a cell tower" and "will be aesthetically compatible with the existing uses on the St. Barbara Greek Orthodox Church Property since it will be located in the middle of a grove of existing pine trees adjoining Highway 751." Thus, the trial court concluded as a matter of law that the Board of Adjustment's decision was not arbitrary, capricious, or erroneous, and dismissed Petitioners' appeal accordingly. Petitioners timely appealed to this Court.

II. Standard of Review

Our Supreme Court has made clear that the task of a court reviewing a decision of a municipal body performing a quasi-judicial function, such as the Board of Adjustment's decision here, includes:

> (1) Reviewing the record for errors [of] law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. Of Comm'rs of the Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). "Where the appealing party contends that the decision was unsupported by the evidence or was arbitrary and capricious, the trial court applies the whole record test." *Welter v. Rowan Cnty Bd. of Comm'rs*, 160 N.C. App. 358, 361, 585 S.E.2d 472, 475 (2003) (citation and internal quotation marks omitted). "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Amanini v. N.C. Dept. of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation and internal quotation marks omitted). "The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

However, if the appealing party contends the decision was based on an error of law, the trial court employs a *de novo* review. *See In re Appeal of Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998). "Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation and internal quotation marks omitted; alterations

in original). "Moreover, [t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 528, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (citation and internal quotation marks omitted; alterations in original).

When this Court reviews the decision of a trial court reviewing a municipal board's decision, we

> examine[] the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Welter, 160 N.C. App. at 362, 585 S.E.2d at 476 (citation and internal quotation marks omitted).

III. Analysis

A. Inadequate Record

[1] Petitioners first argue that the record provided by Respondent City of Durham to the trial court was so inadequate as to deprive them of their right to due process as established by N.C. Gen. Stat. § 160A-388(e2)(2) and § 160A-393(i) and (j). We disagree.

Our General Statutes guarantee that "[e]very quasi-judicial decision [by a municipal board of adjustment] shall be subject to review by the superior court by proceedings in the nature of *certiorari* . . . ." N.C. Gen. Stat. § 160A-388(e2)(2)(2013). Section 160A-393 lays out the process for *certiorari* review of a quasi-judicial decision and provides in relevant part that "[t]he court shall hear and decide all issues raised by the petition by reviewing the record submitted in accordance with subsection [(i)][2] of this section." N.C. Gen. Stat. § 160A-393(j). Subsection (i) provides in relevant part that

> [t]he record shall consist of all documents and exhibits submitted to the decision-making board whose decision is

2. Although the text of N.C. Gen. Stat. § 160A-393(j) actually refers to subsection (h), we note that this appears to be a typographical error, given that subsection (i) addresses the contents of the record, whereas subsection (h) provides the rules governing motions to intervene.

> being appealed, together with the minutes of the meeting or meetings at which the decision being appealed was considered. Upon request of any party, the record shall also contain an audio or videotape of the meeting or meetings at which the decision being appealed was considered if such a recording was made.

N.C. Gen. Stat. § 160A-393(i).

In the present case, Petitioners contend that their ability to present the trial court with an accurate record of the proceedings below was prejudiced due to a combination of Respondent City of Durham's "minimalist approach to minute-keeping" and a recording malfunction that caused the first third of the testimony from the Board of Adjustment's three-hour hearing on 28 May 2013 to go unrecorded. Specifically, Petitioners emphasize that the recording malfunction resulted in the inadvertent exclusion of substantial portions of their own testimony from the record, a problem exacerbated by the fact that the minutes of the Board's meeting do not include any summary of the evidence or arguments they presented. Moreover, Petitioners insist that because subsection (i) provides that "an audio or videotape of the meeting or meetings at which the decision being appealed was considered" shall be included in the record if any party so requests, *see id.*, and because the trial court requested "the complete record . . . including all minutes, audiotapes, videotapes and transcripts of all meetings and hearings regarding the appeal as may exist," they have been deprived of their right to due process and both the trial court and this Court have been deprived of a meaningful opportunity to review their case. As a result, Petitioners contend this Court should reverse the trial court's decision and remand the matter back to the Board of Adjustment for a new, full hearing. In support of their argument, Petitioners rely on this Court's decision in *Welter*.

Petitioners' reliance on *Welter* is misplaced. In *Welter*, we declined to interpret a zoning ordinance provision, and remanded the case back to the trial court, because relevant portions of the ordinance "necessary for a proper interpretation" of the portions at issue were not included in the record on appeal. 160 N.C. App. at 363, 585 S.E.2d at 477. Here, by contrast, Petitioners do not contend that any pertinent portions of the UDO are missing from the record. Although a substantial portion of their testimony before the Board was not recorded due to an equipment malfunction, the record prepared by Respondents did include a copy of Petitioners' appeal to the Board. That appeal included, *inter alia*, an affidavit from Petitioner Dolly Fehrenbacher providing information

about, and photographs of, the trees already standing on the Church property and the balloon test she and her neighbors conducted. Because Petitioners have not specifically identified any other competent or substantial evidence that might be missing from the record as a result of the recording malfunction and which would have prevented the trial court from fully reviewing the merits of their claim, we conclude that the record adequately conveyed the substance of their missing audio testimony. Moreover, because Petitioners' argument that the record fails to comply with the requirements articulated in subsection (i) depends on a selective reading of the statute that ignores its final clause—which makes clear that the record need only contain an audio recording of the meeting "if such a recording was made"—we conclude this argument is without merit. *See* N.C. Gen. Stat. § 160A-393(i).

B. Improperly included photographic simulations

[2] Petitioners next contend that the trial court erred when it requested SprintCom to provide photographic simulations of the proposed monopine tower that were submitted with its original application but were not part of the record before the Board of Adjustment. We disagree.

In support of this argument, Petitioners rely on a narrow reading of the interplay between sections 160A-393(i) and (j). As already discussed, subsection (i) establishes the contents of the record for *certiorari* review, including all materials considered by the decision-making board. Subsection (j), on the other hand, provides the trial court with discretion to supplement the record "with affidavits, testimony of witnesses, or documentary or other evidence" on a limited range of issues including whether the parties have standing, whether conflicts of interest compromised the Board's impartiality, violations of procedural due process rights, and allegations that the Board exceeded its statutory authority. *See* N.C. Gen. Stat. § 160A-393(j). Thus, because SprintCom's photographic simulations were not part of the record before the Board of Adjustment and do not fall within the parameters of subsection (j), Petitioners claim they have been prejudiced by a violation of statutory procedure and request that this Court reverse the trial court's determination and remand the matter back to the Board of Adjustment.

We note that here again, Petitioners rely on a selective reading of subsection (i), one that conveniently ignores its provision that "[t]he parties may agree, or the court may direct, that matters unnecessary to the court's decision be deleted from the record *or that matters other than those specified herein be included*." N.C. Gen. Stat. § 160A-393(i) (emphasis added). In other words, subsection (j) is not the only provision

of the statute that vests discretionary authority in the trial court to supplement the record. Therefore, it was not improper for the trial court to request that SprintCom submit photographic simulations that were included in its original application for the court's *de novo* consideration of whether the Board erred in its determination that the proposed monopine tower qualifies as a concealed WCF. Finding no violation of statutory procedure, we need not address Petitioners' claims of prejudice, and we accordingly conclude that this argument is without merit.

C. Definition of concealed WCF

[3] Finally, Petitioners contend that the trial court erred in affirming the Board of Adjustment because its determination that SprintCom's proposed monopine tower qualifies as a concealed WCF as defined by UDO section 16.3 was both arbitrary and capricious, and erroneous as a matter of law. We disagree.

"Questions involving the interpretation of ordinances are questions of law," and in reviewing the trial court's review of the Board of Adjustment's decision, this Court applies a *de novo* standard and may freely substitute its judgment for that of the trial court. *See Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 530–31, 439 S.E.2d 199, 201, *disc. review denied*, 336 N.C. 71, 445 S.E.2d 28 (1994). When reviewing an interpretation of a municipal ordinance, we apply the general rules of statutory construction. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638 (2001). In doing so, "[t]he basic rule is to ascertain and effectuate the intention of the municipal legislative body." *Id.* at 303-04, 554 S.E.2d at 638 (citation and internal quotation marks omitted). As with statutory construction, where the language of an ordinance is "plain and unambiguous, the court need look no further." *Id.* (citation omitted). Where the language of an ordinance is ambiguous, our well-founded principles of statutory construction dictate that,

> [f]irst, we presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein. . . . Second, words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations. . . . Additionally, we find instructive this Court's use of the long-standing rule of statutory construction: *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another.

Fort v. Cnty. of Cumberland, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355, *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012) (citations and internal quotation marks omitted).

In the present case, turning first to the UDO itself for evidence of the legislative municipal body's intent, we note that when Durham's Planning Department implemented its current WCF review and approval standards in 2004, it sought to balance the goals of "[p]rotect[ing] the unique natural beauty and rural character of the City and County while meeting the needs of its citizens to enjoy the benefits of wireless communication services." Durham Unified Dev. Ordinance art. 5, § 3.3N-7. Thus, Section 16.3 of the UDO incentivizes the construction of concealed WCFs, which it defines as

> [a] [WCF], ancillary structure, or WCF equipment compound that is not readily identifiable as such, and is designed to be aesthetically compatible with existing and proposed uses on a site. A concealed facility may have a secondary function including, but not limited to the following: church steeple, windmill, bell tower, clock tower, cupola, light standard, flagpole with or without a flag, or tree. A non-concealed [WCF] is one that is readily identifiable such as a monopole or lattice tower.

Id. at art. 16, § 3. Here, while acknowledging that SprintCom's proposed monopine design is consistent with the examples of concealed WCF designs enumerated in the ordinance's second sentence, Petitioners insist that the ordinance requires a site-specific determination, and that under such an approach, the monopine fails to meet the definition provided by the first sentence in two related ways. Specifically, Petitioners argue that: (1) because it is undeniably larger than any of the trees already standing on the Church property, the proposed monopine tower will be readily identifiable as a WCF, and (2) because the only recognized "use" of the Church property is as a church, the proposed monopine tower is not aesthetically compatible with any existing or proposed uses on the site. While we agree with Petitioners' general point that the UDO does appear to call for a site-specific determination, given its express requirement that a WCF must be aesthetically compatible with existing uses in order to qualify as concealed, we are not persuaded by Petitioners' specific arguments about this WCF at this site.

(1) Readily identifiable

On the one hand, Petitioners contend the record clearly and unequivocally demonstrates that SprintCom's proposed monopine tower will be

readily identifiable because at a height of 120 feet, it will stand twice as tall as the tallest surrounding trees on the Church property, while its base will be more than five times greater in diameter than that of an average tree. However, Petitioners' premise, which treats "readily identifiable" as a term synonymous with "visible," is undermined by the final sentence of the ordinance, which sheds light on what the UDO means by "readily identifiable" through providing two specific examples of non-concealed WCFs. To wit, "a monopole or lattice tower" would be considered "readily identifiable" as a WCF, which is sensible because no steps would be taken to give it a secondary function that could camouflage its function as a WCF. By contrast, SprintCom's proposed tower will utilize a monopine design that has the secondary function of a tree by featuring authentic looking bark and branches and, as noted in Planning Director Medlin's official interpretation, is recommended by the American Planning Association as "nearly indistinguishable from the real thing (apart from being taller than nearby trees)."

Petitioners counter that simply looking like a pine tree is not sufficient because the monopine will stick out like a sore thumb due to its height, and will thus still be readily identifiable as a WCF. Of course, this argument ignores the photographic simulations that SprintCom provided to the trial court demonstrating that from many vantage points the monopine will not be visible while from others it will have the appearance of an unusually tall tree. We also note that this monopine's proposed height is within the maximum height limitation set by the UDO for Rural/Residential zoning districts, *see* Durham Unified Dev. Ordinance art. 5, § 3.3N-13a(1), while the fact that its base will be five times wider than an average tree's is irrelevant, given that the base will be concealed from sight by actual trees.

Further, Petitioners' argument revolves around a more colloquial construction of the term "readily identifiable" than the UDO provides, one that by ignoring the full text of subsection 16.3, begs the question: *readily identifiable to whom, exactly?* There is no evidence in the record to support the inference implicit in Petitioners' argument that a reasonable person's typical reaction to the sight of an unusually tall pine tree is to conclude that he or she has just spotted a WCF. While we recognize that the record does not include Petitioners' full testimony from the Board of Adjustment hearing due to the aforementioned recording malfunction, we are not convinced that Petitioners' own perceptions of SprintCom's proposed monopine tower would be the proper vantage point from which to judge whether or not the tower is readily identifiable as a WCF. If anything, the way Petitioners use the term "readily identifiable" implies a lack of prior knowledge by the viewer, insofar as

it suggests that an object or its function would be obvious or immediately apparent upon first glance, whereas Petitioners themselves already are and likely always will be acutely aware of the fact that SprintCom's proposed monopine tower is not actually a tree. In any event, the UDO's plain language makes clear that the test here is not whether or how quickly a longtime resident or passing motorist would notice this giant fake pine tree's true nature; rather, the test is whether SprintCom's proposed monopine design serves a secondary function that helps camouflage the tower's function as a WCF. Because we conclude that it does, we hold that SprintCom's proposed monopine tower is not readily identifiable as a WCF.

(2) Aesthetic compatibility

Petitioners argue further that SprintCom's proposed monopine tower is not aesthetically compatible with any existing or proposed uses on the Church property. In support of this argument, Petitioners highlight Planning Director Medlin's testimony that the only current "use" of the Church property is as a church, and they also emphasize that trees are not considered "uses" under the UDO. However, this argument depends on the erroneous presumption that SprintCom's proposed monopine tower is readily identifiable as a WCF. Moreover, while Petitioners may be correct that natural trees are not considered "uses" under the UDO, the second sentence of the definition of a concealed WCF provided in section 16.3 explicitly states that "a concealed [WCF] may have a secondary function including, but not limited to . . . [a] tree." Durham Unified Dev. Ordinance art. 16, § 3. When this Court inquired during oral arguments about the Church property's broader surroundings, the parties explained that the property is located in a developing, rural residential neighborhood, surrounded by houses and trees. In light of the evidence in the record that monopine towers generally resemble tall trees, we conclude that SprintCom's proposed monopine tower's secondary function as a tree is indeed aesthetically compatible with the Church property's existing use as a church in a developing rural residential neighborhood, surrounded by houses and trees. In other words, we believe that by focusing so narrowly on "uses," Petitioners' argument misses the proverbial forest for the literal monopine. Accordingly, we hold that the trial court did not err in affirming the Board of Adjustment's determination that SprintCom's proposed monopine tower qualifies as a concealed WCF as defined by UDO section 16.3.

AFFIRMED.

Judges STEELMAN and DAVIS concur.

GLASS v. ZAFTRIN, LLC

[239 N.C. App. 154 (2015)]

PHILLIP A. GLASS, FIDUCIARY
v.
ZAFTRIN, LLC, UPSET BIDDER

No. COA14-907

Filed 3 February 2015

Mortgages and Deeds of Trust—foreclosure-upset bid—bidder defaulting—costs or resale

Where the highest bidder at a foreclosure sale defaulted on its bid, and the sale price at a subsequent sale exceeded the defaulted bid plus the costs of resale, the defaulting bidder was entitled to a refund of its entire deposit. The language of N.C.G.S. § 45-21.30(d) (2013) is clear: a bidder in default is liable only to the extent that the final sale price is less than his bid plus the costs of resale. As the final sale price in this case clearly exceeded the defaulting bid plus the costs of resale, the trial court erred in holding the defaulting bidder liable for the costs of resale.

Appeal by Zaftrin, LLC, upset bidder from judgment entered 6 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 7 January 2015.

No appellee brief filed.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for appellant.

STEELMAN, Judge.

Where the highest bidder at a foreclosure sale defaulted on its bid, and the sale price at a subsequent sale exceeded the defaulted bid, plus the costs of resale, the defaulting bidder was entitled to a refund of its entire deposit.

I. Factual and Procedural Background

On 28 February 2006, James and Robbin Osborne (the Osbornes) procured a loan from New Century Mortgage Corporation. This loan was secured by a deed of trust on real property located in Caldwell County. On 7 March 2012, the note and deed of trust were assigned to Deutche Bank National Trust Company (DB). DB appointed Phillip A. Glass (Glass) as substitute trustee. Upon the Osbornes' default in payments due under the note, DB directed Glass to commence foreclosure proceedings. On

7 May 2013, the Clerk of Court in Caldwell County ordered foreclosure, and a public sale was held on 4 June 2013. At that foreclosure sale, DB was the highest bidder, in the amount of $220,000.00. After the receipt of upset bids, Glass resold the property at a public sale on 13 August 2013. The highest bidder at that sale was Zaftrin, LLC (Zaftrin), in the amount of $315,000.00. Zaftrin paid a deposit of $15,750.00 into the office of the Clerk of Court.

On 11 September 2013, Zaftrin notified Glass that it was unable to proceed with purchase of the property, thus defaulting on its bid. Glass moved the Court for an order to resell the property. On 19 November 2013, DB was the highest bidder, in the amount of $350,000.00.

After the resale was confirmed, Zaftrin sought a refund of its deposit. On 7 January 2014, Glass moved that the Clerk of Court disburse the deposit to Zaftrin, less the costs of resale, $1,469.80, a net disbursement of $14,280.20. The Clerk of Court granted Glass' motion. On 30 January 2014, Zaftrin filed a response to the motion, asserting that N.C. Gen. Stat. § 45-21.30(d) does not provide for the deduction of the costs of resale where the resale price is higher than the defaulting bid. On 5 March 2014, the Clerk of Court ruled that Zaftrin was entitled to a full refund of its deposit.

On 9 April 2014, Glass appealed the Clerk of Court's ruling to the Superior Court of Caldwell County. On 6 June 2014, the trial court ordered the Clerk of Court to disburse $1,469.80, the costs of resale, to Glass, and the remaining balance of $14,280.20 to Zaftrin.

Zaftrin appeals.

II. 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).

III. Analysis

In its sole argument on appeal, Zaftrin contends that the trial court erred in awarding Glass the costs of resale from its deposit. We agree.

The disposition of a defaulting bidder's deposit is governed by N.C. Gen. Stat. § 45-21.30(d):

> A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable

> *to the extent that the final sale price is less than his bid plus all the costs of the resale.* Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, *if any*, for which the defaulting bidder remains liable under this section.

N.C. Gen. Stat. § 45-21.30(d) (2013) (emphasis added). The language of the statute is clear. A bidder in default is liable only to the extent that the final sale price is less than his bid plus the costs of resale.

In support of its argument, Zaftrin cites to our Supreme Court's decision in *Harris v. American Bank & Trust Co.*, 198 N.C. 605, 152 S.E. 802 (1930). In *Harris*, the plaintiff made the high bid at a foreclosure sale of $6,000.00, and deposited $1,000.00 with the Clerk of Court. Plaintiff subsequently defaulted, and on resale, the property sold for $6,500. Plaintiff brought an action to have his deposit refunded. The trial court ordered the Clerk of Court to refund the deposit. Defendant appealed. The Supreme Court examined the applicable statute,[1] and observed that plaintiff's deposit "was a guarantee that there would be no loss occasioned if he be declared the purchaser at the resale; he was so declared and did not comply, but there was no loss, as the property brought more on resale." *Id.* at 610, 152 S.E. at 804. The Supreme Court held that, due to the fact that the resale price was high enough to exceed both the defaulting bid and the costs of resale, the defendant, "in law or equity, has no claim to the $1,000 [deposit], under the facts and circumstances of this case." *Id.*

In the instant case, the final sale price was $350,000.00. Zaftrin's defaulting bid was $315,000.00, and the costs of resale was $1,469.80. Zaftrin would only be held liable if the sum of these two items, $316,469.80, exceeded the final sale price, $350,000.00. As the final sale price clearly exceeded Zaftrin's defaulting bid plus the costs of resale, the trial court erred in holding Zaftrin liable for the costs of resale. The decision of the trial court is reversed, and this matter is remanded to the trial court for entry of an order directing the Clerk of Superior Court of Caldwell County to return to Zaftrin its entire $15,750.00 deposit.

REVERSED AND REMANDED.

Judges DIETZ and INMAN concur.

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1. We note that *Harris* was decided pursuant to C.S. § 2591, a precursor to N.C. Gen. Stat. § 45-21.30. We hold that the reasoning of *Harris* is applicable to the present case.

IN RE A.B.

[239 N.C. App. 157 (2015)]

IN THE MATTER OF A.B. AND J.B.

No. COA14-541

Filed 3 February 2015

1. Termination of Parental Rights-findings—internally inconsistent

The findings of fact in a termination of parental rights case were internally inconsistent and the case was remanded where the court concluded that "it is in the best interest of the juveniles to have their mother's parental rights terminated in that severing the legal relationship would be emotionally unhealthy and damaging to the children." There were additional concerns because the factor of financial assistance to the potential adoptive parents seemed to outweigh the close emotional bonds between the respondent-mother and children and her efforts to regain custody of the children.

2. Termination of Parental Rights—remand—evidence from subsequent hearing

In a termination of parental rights case remanded for inadequate findings, the trial court could consider the limitation of a subsequent hearing in making its new findings of fact and conclusions of law and could in its discretion consider additional evidence and arguments from the parties. A party cannot seek relief from a non-existent order; DSS's motion for relief was treated according to its substance as a motion to reopen the evidence, instead of a Rule 60 motion.

Appeal by respondent-mother from order entered 27 January 2014 by Judge Elizabeth Trosch in Mecklenburg County District Court. Heard in the Court of Appeals on 25 November 2014.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate Attorney Keith S. Smith, for petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant mother.

Parker Poe Adams & Bernstein LLP, by Deborah L. Edney, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from an order entered 27 January 2014 that terminated her parental rights to her minor children A.B. ("Alexis") and J.B. ("Jacob").[1] Because the trial court's order is internally inconsistent and thus unreviewable by this Court, we reverse the order and remand this matter to the trial court for the entry of a new order.

I. Background

The Mecklenburg County Department of Social Services, Youth and Family Services ("DSS") initiated the underlying juvenile case by filing a petition on 8 September 2010, alleging the juveniles were neglected and dependent. DSS asserted that respondent had an extensive history of taking Jacob to the emergency room for unnecessary treatment and that she was beginning to show a similar pattern with Alexis. DSS further stated that Alexis had recently been hospitalized because she had consumed some of Jacob's seizure medicine, suggesting that respondent had given the medicine to Alexis. Additionally, DSS reported that respondent was overwhelmed and overly stressed from parenting the juveniles, missed numerous appointments to address Jacob's behavioral issues, was unemployed and struggled financially, and had difficulty following doctors' instructions when providing routine treatments to the children at home. DSS took non-secure custody of the juveniles that same day.

On or about 5 November 2010, DSS entered into a mediated agreement with respondent, establishing a case plan for reunification with the juveniles. Respondent's case plan required her to: (1) continue participating in an anger management program and demonstrate the skills learned; (2) complete parenting classes and demonstrate the skills learned; (3) maintain legal and stable employment providing sufficient income to meet the juveniles' basic needs; (4) maintain an appropriate, safe, and stable home for herself and the juveniles; (5) maintain weekly contact with her social worker; (6) cooperate with the guardian ad litem; and (7) attend the juveniles' medical and therapy appointments when able to do so. DSS and respondent also agreed to supervised visitation with the juveniles three times per week and a tentative holiday visitation plan.

After hearings on or about 7 January and 17 February 2011, the trial court entered an adjudication and disposition order holding that Alexis and Jacob were neglected juveniles. The court adopted concurrent goals of reunification and guardianship and set forth a case plan for

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

respondent. The trial court adopted the mediated case plan developed by the parties and specifically directed respondent to undergo a complete psychological evaluation, obtain a domestic violence evaluation, and participate in counseling services or therapy.

DSS worked towards reunification of the juveniles with respondent, but in review and permanency planning orders entered 13 May and 31 August 2011, the trial court found respondent needed to further address her mental health and anger management problems. In a permanency planning order entered 19 January 2012, the court found that respondent had made some positive changes in that she was managing her anger, was "emotionally balanced" around the juveniles, and had realized that she needed "batterer's intervention treatment." But the court found that respondent still needed to complete her parenting capacity evaluation, show she could manage her mental health problems, and complete her domestic violence program. The court further found that there were no likely prospects for guardianship or permanent custody of the juveniles and set the permanent plan for the juveniles as reunification or adoption.

On 25 April 2012, the trial court entered a permanency planning order that ceased further efforts towards reunification of the juveniles with respondent, concluding respondent had failed to alleviate the conditions that caused the juveniles to be placed in the care and custody of DSS. The court directed that a Child Family Team ("CFT") meeting be held within thirty days of the order to develop recommendations for a permanent placement for the juveniles, and that DSS refrain from moving to terminate respondent's parental rights until after the court received the recommendations from the CFT. The trial court entered an order on 27 June 2012, directing DSS to proceed with an action terminating respondent's parental rights to the juveniles.

DSS filed petitions to terminate respondent's parental rights to the juveniles on 25 July 2012. DSS alleged grounds existed to terminate respondent's parental rights based on neglect, abandonment, failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and willful failure to pay a reasonable portion of the cost of care for the juveniles while they were placed outside of her home. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (7) (2013). The trial court heard the petitions on 25 March and 11 April 2013. At the conclusion of the hearing, the court found one ground to terminate respondent's parental rights: failure to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody. However, the court concluded that terminating

respondent's parental rights was not in the best interests of the juveniles and directed respondent's counsel to prepare a proposed order for the court and circulate the order to all parties.

On 23 September 2013, before the trial court had entered an order on the termination petitions, DSS filed a "Motion for Relief from Order and Motion to Consider Additional Evidence" pursuant to North Carolina Rule of Civil Procedure 60. *See id.* § 1A-1, Rule 60 (2013). DSS asked that the trial court reconsider its best interests conclusion based on allegations that respondent had misled the court by providing inaccurate information and testimony at the termination hearing, and that she had failed to comply with her case plan since the termination hearing. The trial court allowed the motion and held an additional hearing on 1 October and 4 November 2013 in which it allowed DSS to present additional dispositional evidence as to the best interests of the juveniles.

By order entered 27 January 2014, the trial court terminated respondent's parental rights to the juveniles. The Court found that respondent had failed to make reasonable progress to correct the conditions that led to the juveniles' removal from her care and custody, and concluded that it was in the juveniles' best interests to terminate her parental rights. Respondent filed timely notice of appeal.

II. Termination Order

A. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 734 (2014); *see also* N.C. Gen. Stat. § 7B-1109(e) (2013). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (quotation marks omitted), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N.*, *X.Z.*,

194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

"If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a)." *D.H.*, ___ N.C. App. at ___, 753 S.E.2d at 734. The trial court's determination of the child's best interests is reviewed only for an abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

[1] Respondent argues that the trial court erred in concluding that she had not made reasonable progress towards correcting the conditions that led to the removal of the juveniles from her care. Respondent contends that the trial court's findings of fact are contradictory and do not support its conclusions of law. Respondent further argues that the trial court's conclusion of law that it is in the juveniles' best interests to terminate respondent's parental rights is internally contradictory. We agree and remand this matter to the trial court for the entry of a new order.

The trial court concluded that respondent willfully left the juveniles in foster care for more than twelve months without showing the court that she made reasonable progress toward correcting the conditions that led to the removal of the juveniles from her home. *See* N.C. Gen. Stat. § 7B-1111(a)(2). In working toward reunification with the juveniles, respondent was directed to: (1) complete a parenting education program and demonstrate the skills learned; (2) complete a domestic violence counseling and batterer's intervention program; (3) obtain a psychological evaluation and fully engage in therapy; (4) maintain appropriate visitations with the juveniles; (5) maintain appropriate and safe housing; (6) maintain employment; and (7) maintain contact with DSS. The court's order is silent regarding respondent's history of contact with DSS during the case and indicates that the court is satisfied with respondent's progress in the area of parenting education, but the court's findings on respondent's progress in the areas of visitation and employment are contradictory. The court identified mental health and domestic violence as its primary concerns regarding respondent's progress towards correcting the conditions that led to the removal of the juveniles from her care,

but it made contradictory findings regarding her progress in those areas as well.

The court made the following findings that support its conclusion that respondent failed to make reasonable progress toward addressing her mental health problems:

> 20. The respondent mother has engaged in therapy; however, the respondent mother's participation in therapy has not been consistent.
>
> . . . .
>
> 26. . . . [That during therapy that started in October 2010, respondent] was not completely forthcoming about the circumstances that brought the children into custody or the issues of violence in her relationships with [Mr. P.] or [Mr. C.] and that [respondent's therapist, Ms. Linda Avery,] concluded that [respondent] had not made discernible progress in achieving goals that they had set for treatment.
>
> 27. . . . That the [respondent] mother voluntarily withdrew herself from services with Ms. Linda Avery contrary to clinical recommendations.

However, the court also made findings of fact contradicting those above:

> 26. That [respondent] has cooperated and began outpatient psycho-therapy with Linda Avery on October 21, 2010; acknowledging that she needed to work on anger issues, understanding her diagnosis of mood disorder and that she wanted to regain custody of her children. . . .
>
> 27. That from the time that [respondent] began seeking mental health services, even with Ms. Avery, she acknowledged that her anger was having a negative impact on her relationships, her ability to parent her children and her life. That she could recognize that she had difficult relationships and that she externalized the blame for the difficulties in those relationships, but had expressed a desire to gain control of her emotions so that she could better parent her children. . . .
>
> 28. That the mother did appropriately seek out outpatient therapy with James McQuiston in May[] 2012 and has

consistently participated in sessions with him since May 16, [2012]. Mr. McQuiston and [respondent] developed goals of reducing destructive use of anger by building skills to communicate and engaging in more constructive relationships. Mr. McQuiston testified that [respondent] has attended ten (10) sessions and that she has participated consistently with his recommendations for services and that he has observed her make progress in improving trust and recognizing the need to change. She has developed a practice of using specific tools to change her pattern of destructive decisions and has demonstrated the ability to recognize problems[,] choosing to discuss and confront them, examine them and engage in constructive processes to resolve the conflict.

29. That [respondent] has since May 2012 cooperated with medication management for her mental health.

30. That [respondent] did voluntarily participate in a psychological evaluation with Dr. Lisa Bridgewater. That Dr. Bridgewater reviewed relevant history from records of the Department of Social Services, Carolina Medical Center for both [Jacob] and [Alexis], Youth and Family Services, Family Legacy, Carolina Parenting Solutions, FIRST screening, BHC-CMC Randolph, as well as interviewed collateral contacts GAL, Amy Cole and GAL attorney, Melissa Livesay.

31. That Dr. Bridgewater then conducted a clinical interview with [respondent] and performed assessment tests including the Minnesota Multiphasic Personality inventory, Millon Clinical Multiaxial Inventory and the Child Abuse Potential Inventory. Lastly Dr. Bridgewater interviewed and observed [respondent] interacting with her children.

32. That ultimately, Dr. Bridgewater concluded that [respondent's] tests did not reveal a significant pathology and her responses indicated social avoidance as well as [a] good deal of self-doubt. That [respondent's] responses indicate chronic depression as well as periods of anxiety and reached a diagnostic impression that [respondent] suffered from a mood disorder and a tendency to be aggressive and overly reactive when she feels threatened.

> Dr. Bridgewater attributed these tendencies to her childhood history including coercive abuse and inconsistent parenting and concluded that [respondent's] symptoms could be alleviated by consistent engagement of ongoing therapy to address issues from her childhood which continue to impact her mood and ability to cope with relationships with others.
>
> 33. That Dr. Bridgewater also concluded that it is possible that the repeated hospital visits that [respondent] made for [Jacob] may have presented due to her becoming overwhelmed and that under stress she may have panicked over [Jacob's] symptoms or exaggerated them in an attempt to obtain help and respite.
>
> 34. That [respondent] during the termination [of] parental rights proceedings by her testimony had demonstrated thoughtful insight into her mental health and recognizes the self-defeating cycles her aggressive coping styles have created in her life and accepts responsibility for her failure to provide a safe and nurturing environment for [Jacob] and [Alexis] in the Summer and Fall of 2010.
>
> . . . .
>
> 42. That [respondent] has[,] for a substantial period of time and [at] least since the filing of the termination of parental rights petition[,] been able to manage her medical condition with the assistance of her physicians to a degree that she has been able to maintain employment, academic study and participate in therapeutic services with Mr. James McQuiston.

Similarly, the court made the following findings regarding respondent's lack of progress in addressing her domestic violence issues:

> 21. The respondent mother has been enrolled in a domestic violence batterer's program on two occasions since the Court ordered her engagement and compliance. The respondent mother has not completed the domestic violence batterer's program.
>
> . . . .
>
> 36. That the mother began [New Options for Violent Actions ("NOVA")] treatment on three (3) separate

> occasions prior to November 2012 and that she was unsuccessfully discharged and terminated in January 2012, May 2012 and September 2012 due to excessive absences.

But again, the court made substantial findings contradictory to its ultimate conclusion:

> 25. That the mother . . . did accept a referral to anger management, attended group sessions and successfully completed the program.
>
> . . . .
>
> 35. Initially, [respondent] was not forthcoming about issues of Domestic Violence. However, she ultimately acknowledged instances of domestic violence in 2010 with [Mr. P.] and instances in 2010, July 2011, and August with [Mr. C]. After [respondent] had been properly assessed and screened for the issues of domestic violence, she was found to be a predominant aggressor who was not appropriate for victim services, but could benefit from [batterer's] intervention treatment program and was referred to NOVA, a state certified [batterer's] intervention program in Mecklenburg County.
>
> . . . .
>
> 37. Mr. Tim Bradley of NOVA testified that accountability for the acts of domestic violence is critical to change the pattern of violent behavior and that [respondent] has demonstrated that she takes responsibility for her role in the violence in her relationship with [Mr. C.] and other people with whom she has had violent encounters.
>
> 38. That [respondent] understands the signs of an abusive or coercive relationship. That she demonstrates thoughtful insight into the impact of her children and understands that abusive and violent relationships impact children regardless of their direct proximity [to] the conflict.
>
> . . . .
>
> 41. That [respondent] has suffered from medical issues including Lupus, broken wrists and blood clots over the period of time that the children have been in custody as well as a pregnancy with [another child,] conditions

> [which] have at times interfered with her progress and services coordinated for the purposes of assisting her in alleviating the conditions that [led to] the children coming into Department of Social Services' custody.
>
> . . . .
>
> 47. That [respondent] has demonstrated for well over a year the ability to manage her mood and communicates to resolve conflict in a peaceful constructive manner and has made significant improvement in her parenting style.
>
> . . . .
>
> 51. That Tim Bradley of NOVA is not providing direct counseling to [respondent] or [Mr. C.] but has had interactions with both of them in his capacity as case manager. In Mr. Bradley's opinion [respondent] has not developed enough relationship skills to be in an intimate partner relationship with [Mr. C]. That she has insights about it on some occasions and needs to develop a better ability to recognize [it] in healthy conversations early on to avoid later conflict or to remove herself to prevent altercations. That the observations of Mr. Bradley are not inconsistent with the Court['s] findings that [respondent] has exercised caution in intimacy; instead obtaining a non-intimate relationship[,] thereby limiting the risk of violence between herself and [Mr. C.,] has substantially ameliorated this risk of domestic violence as evidenced by the fact that there is no evidence of aggressive or violent encounters between them since 2011.

It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings of fact regarding a parent's efforts to be reunited with a child, and the trial court then weighs all the findings of fact and makes a conclusion of law based upon the findings to which it gives the most weight and importance. But here, the trial court's ultimate conclusion of law concerning the best interests of the juveniles is also internally inconsistent. The court concluded that "it is in the best interest of the juveniles to have their mother's parental rights terminated in that severing the legal relationship would be emotionally unhealthy and damaging to the children." Certainly, the trial court did not terminate respondent's parental rights under a belief that doing so would harm the juveniles and that emotional harm would be in their best interests.

Petitioner seeks to explain this illogical conclusion of law in its brief as follows:

> The petitioner drafted in error Matter of Law #3 "That it is in the best interest of the juveniles to have their mother's parental rights terminated *in that severing the legal relationship would be emotionally unhealthy and damaging to the children.*" . . . The trial court ordered the petitioner to draft the termination order and amend the prior order prepared by [respondent's] trial counsel. The petitioner failed to edit the Matter of Law #3 to read as ordered by the trial court.

While we appreciate the candor of petitioner's counsel in attempting to take responsibility for this clearly improper conclusion of law, this argument cannot remedy the problem. First, the order is the responsibility of the trial court, no matter who physically prepares the draft of the order. *See In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008) (holding that, in an abuse, neglect, or dependency proceeding, a trial court has a legal duty to enter a timely written order); N.C. Gen. Stat. § 1A-1, Rule 58 (2013) (requiring a judge's signature on judgments). Second, counsel's representations regarding the preparation of the order are not matters of record, because a brief is not a source of evidence which this Court can consider. *See Builders Mut. v. Meeting Street Builders*, ___ N.C. App. ___, ___, 736 S.E.2d 197, 200 (2012) ("[M]atters discussed in a brief but not found in the record will not be considered by this Court."). We also understand that the initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. Unfortunately, in North Carolina, the majority of District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation. Considering the lack of adequate staff to address the increasing number of cases heard by our District Courts, some mistakes are inevitable.

If the only problem in the order was one poorly worded conclusion of law, we might be able to determine that this conclusion of law contains a clerical error that could be remedied by a direction to correct it on remand. But the internal inconsistencies of the order go far beyond one sentence. As noted above, there are contradictory findings as to respondent's mental health care and her domestic violence issues. In contradiction to its ultimate conclusions regarding grounds for termination and the juveniles' best interests, the court found:

> 44. . . . [T]he Court has not been presented with sufficient evidence to find the substantial probability of the repetition of neglect to reach that ground [i.e., neglect]. There was no evidence presented during the termination of parental rights proceedings that there is a substantial likelihood of repetition of neglect.
>
> . . . .
>
> 48. . . . [T]hat the safety risks and the conditions that led to the children's removal have been ameliorated to the point that the benefits of allowing an ongoing legal relationship with [respondent] outweigh the risks to the children's safety. For this reason, the Court does not find it appropriate to sever their legal relationships with her.

Since neglect was the only ground for adjudication of the children,[2] and the respondent's problems that caused her to neglect the children were the very conditions that led to the children's removal from respondent, it is difficult to understand why the trial court would find that there was "no evidence" of a substantial likelihood of repetition of neglect while also finding that respondent had not made progress in eliminating the conditions that led to the removal of the children.

Another troubling aspect of the order is the extent of its apparent reliance upon the financial benefits conferred upon the Bryants, the potential adoptive parents, by adoption instead of guardianship. The trial court found as follows:

> 82. [I]f the Bryant[s] were appointed as guardians or court-appointed custodians of the juveniles, they would not be eligible for any kind of support or assistance except for anything [for which] they would qualify based on income. They would possibly be eligible for TANF benefits and they might be able to seek child support from the respondent-mother and respondent fathers.
>
> . . . .
>
> 84. The vendor payments of $2400 per year along with the adoption stipend of $400 to $600 per month per child would provide substantial financial assistance that would

2. In the termination order, the trial court found that, on 17 February 2011, the children were adjudicated neglected and dependent. But, on 17 February 2011, the trial court found only neglect.

> ensure and provide additional stability for the home of the juveniles and the Bryant[s]. Adoption would support the permanent arrangement with the Bryant[s].

N.C. Gen. Stat. § 7B-1110 sets forth the factors that the trial court should consider in determining if termination is in the best interest of the children:

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2013).

In its findings regarding best interests, the main addition to the evidence presented at the 1 October and 4 November 2013 hearing, which was not presented at the first hearing, was the information regarding the financial assistance available to the Bryants if they adopted the children. In fact, the trial court found that

> *[P]reviously there was no evidence concerning the availability of financial assistance* for the Bryant[s] or the extent that such assistance would ensure safe, stable and permanence [(sic)] for [Jacob] and [Alexis] in their care. The department has provided evidence of the availability and the extent that such assistance would assist the Bryant[s].

(Emphasis added.)

Thus, perhaps because of the inconsistencies in the other findings as addressed above, this finding regarding the availability of additional financial assistance due to adoption *seems* to be the factor that tipped

the "best interest" scales in favor of termination of parental rights, despite its prior conclusion that termination would *not* be in the best interests of the children.[3] We have been unable to find any case where the financial benefits conferred upon the potential adoptive parents based solely upon adoption, as opposed to an award of guardianship or custody, constituted a "relevant consideration" in determining the best interests of the children under N.C. Gen. Stat. § 7B-1110(a)(6). We note that N.C. Gen. Stat. § 7B-1111(a)(2), which is the ground upon which the trial court terminated respondent's rights, does not permit the trial court to terminate the parental rights of a parent "for the sole reason that the parents are unable to care for the juvenile on account of their poverty." *Id.* § 7B-1111(a)(2). It is true that the trial court did not terminate based upon respondent's poverty, but instead it terminated at least in part based upon the financial benefits that would accrue to the potential adoptive parents arising from termination and adoption. We do not mean to imply that the financial circumstances of the potential adoptive parents are irrelevant, since subsection (2) directs the trial court to consider the "likelihood of adoption" and the financial capability of the potential adoptive parents may be a factor in making this determination. We understand that ultimately the financial assistance to the potential adoptive parents may help them complete the adoption and will benefit the children. But in this particular order, where the factor of financial assistance to the potential adoptive parents seems to outweigh the close emotional bonds between the respondent-mother and children and her efforts, although imperfect, to regain custody of the children, these findings raise additional concerns about the internal consistency of the order.

III. Rule 60 Motion

[2] On 23 September 2013, DSS filed a "Motion for Relief from Order and Motion to Consider Additional Evidence" pursuant to North Carolina Rule of Civil Procedure 60, which is entitled "Relief from judgment or order." *See id.* § 1A-1, Rule 60. Although respondent did not appeal from the trial court's order allowing DSS's Rule 60 motion, she argues that some of the trial court's findings in the order on appeal were based upon evidence taken at the hearing which was held as a result of the order allowing this motion and that the evidence and findings from this hearing went beyond the scope of the trial court's order.

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3. We realize that may not have been the trial court's intent, considering the inconsistencies, but we are addressing the order as it now stands.

We first note that the order was not properly based upon Rule 60. On 23 September 2013, the trial court had not yet entered a judgment or order as it had not yet reduced its findings and conclusions to writing. *See id.* § 1A-1, Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Because a party cannot seek relief from a non-existent order, we treat DSS's motion according to its substance as a motion to reopen the evidence, instead of a Rule 60 motion. *See Lee v. Jenkins*, 57 N.C. App. 522, 524, 291 S.E.2d 797, 798 (1982) (treating a motion as to its substance, rather than form).

It is within the discretion of the trial judge to reopen a case and to admit additional evidence after both parties have rested. *State v. Shutt*, 279 N.C. 689, 695, 185 S.E.2d 206, 210 (1971), *cert. denied*, 406 U.S. 928, 32 L. Ed. 2d 130 (1972). Respondent did not object to DSS's motion and has not argued on appeal that the order should not have been entered. The trial court allowed DSS's motion to reopen the evidence but expressly limited the 1 October and 4 November 2013 hearing to dispositional evidence regarding the best interests of the juveniles. In addition, in response to an objection to hearsay during the hearing, the trial court noted that it "only granted the motion to reopen evidence on best interest, not grounds, and so all of this evidence [was] only being considered for that portion of the proceedings[.]"

Respondent argues that, at the 1 October and 4 November 2013 hearing, the trial court also considered adjudicatory evidence and made additional findings as to respondent's compliance with her case plan, which was beyond the scope of the trial court's order allowing additional evidence as to best interests. It does appear that the evidence at this hearing went beyond the scope of the trial court's order. But respondent did not object to the presentation of any specific evidence as being beyond the scope of the order, so she has waived any arguments on appeal in this regard. *See* N.C.R. App. P. 10(a)(1). Because of the internal inconsistencies in the order on appeal, we cannot discern which portions of the evidence the trial court relied upon in making its findings and conclusions. Since we must reverse and remand to the trial court for entry of a new order addressing both adjudication and disposition, the trial court should consider the limitation of the 1 October and 4 November hearing in making its new findings of fact and conclusions of law and may in its discretion consider additional evidence and arguments from the parties. *See In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3, *disc. rev. denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

IV. Conclusion

The contradictory nature of the trial court's findings of fact and conclusions of law prohibit this Court from adequately determining if they support the court's conclusions of law that (1) respondent failed to make reasonable progress toward correcting the conditions that led to the removal of the juveniles from her care and custody, and (2) terminating respondent's parental rights is in the juveniles' best interests. Accordingly, we reverse the termination order and remand to the trial court for entry of a new order clarifying its findings of fact and conclusions of law.

Because we must reverse and remand this matter to the trial court, we do not address respondent's remaining arguments on appeal. The trial court may receive additional evidence on remand, within its sound discretion. *Id.*, 652 S.E.2d at 3.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.

IN THE MATTER OF I.D.

No. COA14-759

Filed 3 February 2015

Child Abuse, Dependency, and Neglect—adjudication on the pleadings—inappropriate

The Henderson County District Court erred by entering an adjudication order finding a child to be an abused and neglected juvenile without taking evidence. The court's adjudication was based solely upon the Department of Social Services' verified petition. Respondent's failure to object is immaterial because the trial court's adjudication order amounts to a judgment on the pleadings, which is inappropriate in a proceeding to determine whether a juvenile is abused, neglected, or dependent.

Appeal by respondent-mother from orders entered on 5 December 2013 and on or about 1 May 2014 by Judges Athena Brooks and Ward Scott in Henderson and Buncombe County District Courts. Heard in the Court of Appeals on 9 December 2014.

Buncombe County Department of Social Services by Matthew J. Putnam, for petitioner-appellee.

Appellate Defender Staples Hughes by Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant mother.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from adjudication and disposition orders in which the trial court concluded that her minor child, I.D. ("Irene"), is an abused and neglected juvenile.[1] Because the trial court failed to conduct a proper adjudication hearing to determine the allegations in the juvenile petition, we reverse and remand.

I. Background

On 16 September 2013, the Henderson County Department of Social Services ("HCDSS") filed a petition alleging that Irene was an abused and neglected juvenile. Irene was placed with her father, who was separated from respondent. After a brief hearing on 7 November 2013, the Henderson County District Court entered an adjudication order on 5 December 2013, concluding that Irene was an abused and neglected juvenile. The court then transferred this case to Buncombe County, in which both parents and the juvenile resided, and ordered that the Buncombe County Department of Social Services ("BCDSS") replace HCDSS as the petitioner in this case.

After a hearing on 28 January 2014, the Buncombe County District Court entered a disposition order on or about 1 May 2014. The court adopted the recommendations of BCDSS and ordered that respondent-mother complete a parenting program, undergo a parenting capacity evaluation, and complete a comprehensive clinical assessment focusing on mental health. The court also ordered that the "the respondent mother shall have no contact with [Irene], but the respondent mother shall contact [Irene's] therapist to determine when visitation would be appropriate." Respondent filed a timely notice of appeal.

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

II. Adjudication Order

Respondent contends that the Henderson County District Court erred in entering its adjudication order solely upon the allegations in the petition and without taking any evidence. We agree.

Section 7B-802 of the North Carolina General Statutes provides: "The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802 (2013). This Court has held that "[a]s the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002) (quoting *Thrift v. Buncombe County DSS*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 396 (2000)). Accordingly, "[j]ust as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect." *Thrift*, 137 N.C. App. at 563, 528 S.E.2d at 396.

Here, HCDSS put on no evidence at the adjudicatory hearing; instead, after informing the court that the parents did not consent to any findings of fact, HCDSS merely asked that the court accept its verified petition as its evidence. The court then adjudicated Irene to be an abused and neglected juvenile, basing its ruling solely upon HCDSS's verified petition.

Irene's guardian ad litem contends that respondent invited this error, and BCDSS asserts that respondent stipulated that the petition's allegations were true. But respondent neither invited this error nor stipulated that the petition's allegations were true; rather, respondent failed to object to the trial court's consideration of the verified petition as evidence. Respondent's failure to object is immaterial, because the trial court's adjudication order amounts to a judgment on the pleadings, which is inappropriate in a proceeding to determine whether a juvenile is abused, neglected, or dependent. *See id.*, 528 S.E.2d at 396.

III. Conclusion

For the foregoing reasons, we reverse the court's adjudication order and remand this matter for further proceedings. Because we reverse the court's adjudication order, we must also reverse the disposition order. *See In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011).

In light of our holding, we need not address the additional arguments raised by respondent on appeal. *See id.*, 718 S.E.2d at 713.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.

GILBERT E. SILVA, EMPLOYEE-PLAINTIFF
v.
LOWES HOME IMPROVEMENT, EMPLOYER, SELF-INSURED, SEDGWICK CLAIMS MANAGEMENT SERVICES, SERVICER, DEFENDANT

No. COA14-662

Filed 3 February 2015

1. Workers' Compensation—penalty for late payment—expiration of time for appeal

The Industrial Commission did not err in a workers' compensation action by ruling that plaintiff was not entitled to a penalty for untimely payment of disability benefits. There is a statutory fee for late payment, with a provision for appeal, but appeal is not defined. Under N.C.G.S. § 97-18(e), "appeal" includes the period during which a party may seek discretionary review by the Supreme Court of an opinion from this Court. The Commission properly determined here that the time for appeal expired fifteen days after the mandate issued and the time to file for a petition for discretionary review ended.

2. Workers' Compensation—education expenses—independent action by plaintiff

The Industrial Commission did not abuse its discretion in a Worker's Compensation case by denying reimbursement of plaintiff's educational expenses where plaintiff admitted that he was not referred but was just trying to do something about his situation and there was no additional evidence regarding the reasonableness of these expenses.

3. Workers' Compensation—accounting fees—not part of life plan

The Industrial Commission did not err by denying reimbursement of plaintiff's accounting fees where plaintiff testified that he

asked his accountant to prepare a compilation of amounts allegedly owed to him in connection with his workers' compensation claim, including medical expenses, travel expenditures, and temporary total disability payments. There was no evidence that the accounting fees were part of any life care plan nor was there testimony or evidence from a medical or rehabilitative specialist stating that this expense was medically necessary because of plaintiff's specific injuries.

4. Workers' Compensation—attorney fees—reasonable grounds to defend

The Industrial Commission did not err by failing to make an award of attorney's fee pursuant to N.C.G.S. § 97-88.1 where it appeared that defendant had reasonable grounds to defend plaintiff's claims.

Appeal by Plaintiff from opinion and award entered 3 March 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 November 2014.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for Plaintiff-appellant.

Moore & Van Allen PLLC, by Anthony T. Lathrop and E. Taylor Stukes, for Defendant-appellee.

DILLON, Judge.

Gilbert E. Silva ("Plaintiff") appeals from the North Carolina Industrial Commission's ("the Commission") opinion and award. For the following reasons, we affirm.

I. Background

This present appeal represents the third appeal to this Court on this matter.

On 26 May 2001, Plaintiff sustained a compensable work injury while employed with Lowes Home Improvement ("Defendant"). Plaintiff returned to work following his injury. In 2002, however, he was terminated from his employment, and Defendant ceased paying him workers' compensation benefits.

Thereafter, Plaintiff filed a Form 33 requesting a hearing to reinstate his workers' compensation benefits; however, Defendant denied liability

on the basis that Plaintiff's employment was terminated for reasons unrelated to his work injury.

On 28 September 2004, the Commission ordered Defendant to pay ongoing disability compensation at the rate of $459.14 per week from 16 April 2002 to the present and all medical expenses related to his compensable injury. Following appeal by Defendant, this Court remanded to the Commission for further findings as to Plaintiff's continued disability. *See Silva v. Lowe's Home Improvement*, 176 N.C. App. 229, 625 S.E.2d 613 (2006).

On remand, the Commission again ordered Defendant to pay ongoing disability compensation at the rate of $459.14 per week from 16 April 2002 to the present, all medical expenses related to his compensable injury, and attorney's fees. Defendant again appealed, and this Court affirmed the Commission's award. *See Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604 (2009).

On 7 July 2009, Defendant paid Plaintiff a lump sum payment in the amount of $221,158.84 for the temporary total disability benefits that had accrued since 16 April 2002; and since 7 July 2009, Defendant has made payments to Plaintiff in the amount of $459.14 per week to the present.

On 6 July 2012, Plaintiff filed a motion for additional relief, contending, *inter alia*, that he was entitled to (1) a 10% penalty for Defendant's late payment of the lump sum amount following the second appeal to this Court; (2) reimbursement for certain other expenses; and (3) recovery of attorney's fees. Following a hearing on the matter, a deputy commissioner filed his opinion and award, denying Plaintiff's motion. On 3 March 2014, the Commission affirmed the deputy commissioner's opinion and award with minor modifications. Plaintiff filed timely notice of appeal from the Commission's opinion and award.

II. Analysis

On appeal, Plaintiff contends that the Commission erred (1) in concluding that he was not entitled to a 10% penalty due to Defendant's untimely payment of disability benefits following the second appeal to this Court; (2) in not awarding reimbursement for certain expenses; and (3) in not awarding attorney's fees to Plaintiff. We address each argument below.

A. 10% Late Penalty

[1] A 10% penalty is imposed under N.C. Gen. Stat. § 97-18(e) (2013) if compensation is not paid within 14 days of it becoming due. Specifically, under G.S. 97-18(e), where an appeal has been taken, compensation

"shall become due 10 days from the day following expiration of **the time for appeal** from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. . . ." *Id.* (emphasis added). Further, G.S. 97-18(g) provides, in pertinent part, that if an installment is "not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof[.]" *Id.*

Here, the mandate from this Court's opinion from the second appeal awarding Plaintiff benefits issued on 8 June 2009. Defendant paid the benefits on 7 July 2009. Plaintiff argues that the benefits were due on 18 June 2009, ten days after this Court's mandate; that Defendant was required to pay the benefits by 2 July 2009, within 14 days of when the payment was due, to avoid the 10% late penalty; and that since Defendant did not pay the benefits until 7 July 2009, Plaintiff was entitled to the 10% penalty.

Defendant argues that "the time for appeal" under G.S. 97-18 did not expire until the time to petition the Supreme Court for discretionary review of this Court's opinion had expired, which would have been 23 June 2009, fifteen days after the mandate pursuant to N.C.R. App. P. 15(b).

Questions of statutory interpretation are questions of law and are reviewed *de novo* by an appellate court. *Applewood Props., LLC v. New South Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* (citation omitted).

In interpreting G.S. 97-18(e), this Court has stated that "[i]t follows that when an employer has been ordered to pay compensation pursuant to an award, but maintains an appeal, payment will not become due until the party waives the right to appeal or all appeals have been exhausted." *Norman v. Food Lion, LLC*, 213 N.C. App. 587, 591, 713 S.E.2d 507, 510 (2011). The question before us is whether the "appeal[,]" as used in G.S. 97-18, includes only an appeal of right or whether it also includes petitions for discretionary review. We note that the Workers' Compensation Act does not define "appeal[.]"

Black's Law Dictionary supports the broader interpretation. Specifically, this source includes in the definition of "appeal" two different subcategories, "appeal by application[,]" which is "[a]n appeal for which permission must first be obtained from the reviewing court[,]" and "appeal by right[,]" which is "[a]n appeal to a higher court from

which permission need not be first obtained." Black's Law Dictionary, 94 (7th ed. 1999).

Our relevant statutes support the proposition that an "appeal by application" such as a petition for discretionary review would be considered an appeal pursuant to G.S. 97-18(e).

Turning to our statutes, N.C. Gen. Stat. § 7A-31 (2013) provides for discretionary review from the Industrial Commission and states in subsections (b) and (c) that this review is an "appeal[.]" Therefore, we hold that "appeal" under G.S. 97-18(e) includes the period during which a party may seek discretionary review by the Supreme Court of an opinion from this Court.

As applied to the present case, the mandate for *Silva v. Lowe's Home Improvement*, 197 N.C. App. 142, 676 S.E.2d 604 (2009) was issued on 8 June 2009, pursuant to N.C.R. App. P. 32(b). The Commission properly determined that the time for appeal expired 23 June 2009, fifteen days after the mandate issued and the time to file for a petition for discretionary review ended, pursuant to N.C. Gen. Stat. § 7A-31 and N.C.R. App. P. 15; the first installment was due 3 July 2009, 10 days following the expiration of the time for appeal, pursuant to G.S. 97-18(e); to avoid the penalty, payment had to be made by 17 July 2009, fourteen days after payment became due, pursuant to G.S. 97-18(g); and Defendant avoided the penalty by making payment on 7 July 2009. As Defendant's payment was not untimely, the Commission did not err in failing to provide a 10% late penalty pursuant to G.S. 97-18(g). Plaintiff's argument is overruled.

B. Compensation for expenses

Plaintiff next contends that the trial court erred in not compensating him for educational expenses and accountant's fees. "[W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 183, 639 S.E.2d 429, 432 (2007) (citation, brackets, ellipsis, and quotation marks omitted). Unchallenged findings of fact, however, "are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Markets, Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

1. Educational Expenses

[2] Plaintiff argues that the Commission erred in not reimbursing him for educational expenses. Defendant responds that Plaintiff failed to

carry his burden by producing sufficient evidence to show that his educational expenses were incurred to improve his chances of employment and there was no evidence that these educational expenses were recommended by a rehabilitation or medical professional as part of an individualized rehabilitation plan.

The North Carolina Workers' Compensation Act requires employers to provide medical compensation to workers "who suffer disability by accident arising out of and in the course of their employment." *Henry v. Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). Additionally, "the Industrial Commission may order necessary treatment." N.C. Gen. Stat. § 97-25 (c).

The Worker's Compensation Act's definition of "medical compensation" includes "vocational rehabilitation . . . and other treatment . . . as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability . . . ." N.C. Gen. Stat. § 97-2(19) (emphasis added). "In construing N.C.G.S. §§ 97-25 and 97-2(19), it appears that the Commission has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability." *Foster v. U.S. Airways Inc.*, 149 N.C. App. 913, 923, 563 S.E.2d 235, 242, *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).

Here, the trial court found that Plaintiff was seeking reimbursement for $513.31 in educational expenses from classes taken at Vance-Granville Community College and for a North Carolina Process Tech Certification Fee. However, it found that Plaintiff took these classes "in an effort to regain some kind of employment that [he] could accomplish with his injuries[,]" and "admitted that he was not referred but 'just was trying to do something about his situation.' " No additional evidence, including testimony from any rehabilitation professional or medical provider was submitted regarding the reasonableness of these expenses nor of the expenses for the North Carolina Process Tech Fee. For instance, there are not findings or evidence in the record showing that any medical or rehabilitative professional recommended Plaintiff's educational pursuits as part of a rehabilitation plan or that those educational pursuits were reasonably necessary to effect a cure, give relief, or will lessen a claimant's period of disability. Accordingly, we conclude that the Commission did not abuse its discretion in denying reimbursement of Plaintiff's educational expenses.

2. Accountant's fees

[3] Plaintiff argues that the Commission erred in denying reimbursement of his accounting fees because our Courts have recognized a

broad definition of the term "medical compensation" in N.C. Gen. Stat. §§ 97-2(19) and 97-25. Though accounting fees are not expressly included in the definition of "medical compensation" in N.C. Gen. Stat. § 97-2(19), Plaintiff contends that such fees are analogous to a "life care plan" in which calculations of future expenditures are made and were found to be compensable in *Timmons, v. North Carolina Depart. Of Transp.*, 351 N.C. 177, 182, 522 S.E.2d 62, 65 (1999) and *Scarboro v. Emery Worldwide Freight Corp.*, 192 N.C. App. 488, 495, 665 S.E.2d 781, 786-87 (2008).

In *Timmons*, the Court concluded that there was sufficient evidence presented "to support a finding by the Commission that preparation of a life care plan was a rehabilitative service necessary to give relief to the paraplegic claimant within the meaning of N.C.G.S. § 97-25." 351 N.C. at 182, 522 S.E.2d at 65. This evidence included testimony from a rehabilitation specialist that "strongly recommended the development of a life care plan to evaluate plaintiff's present and future needs" as her "spinal cord injuries require[d] constant monitoring of bowel/bladder, skin, orthopedic issues, neurological issues, and respiratory issues, as well as physical therapy and occupational therapy" but she had not been consistently receiving the care that she needed on a regular basis. *Id.*

In *Scarboro*, a life care plan was prepared for the plaintiff by a nurse and certified life care planner which recommended that he be provided with lawn care services because of his disability and his neurologist agreed that these recommendations were reasonably and medically necessary. 148 N.C. App. at 489-90, 665 S.E.2d at 783. The Commission "denied plaintiff compensation for lawn care services and ordered defendants to reimburse plaintiff for the costs associated with preparing his life care plan[,]" concluding that even though "[e]xtraordinary and ususual expenses" are compensable as "other treatment" in G.S. 97-25, lawn care expenses recommended by the life care plan are ordinary expenses of life and not "[e]xtraordinary and ususual expenses" incurred as a result of his work-related injury. *Id.* at 490-91, 665 S.E.2d at 784. We affirmed, holding that evidence presented by the defendant supported the conclusion that lawn care expenses were ordinary expenses. *Id.* at 492-94, 665 S.E.2d at 784-85. This conclusion also supported the Commission's other conclusion that lawn care expenses did not rise to the level of being "other treatment" in G.S. 97-25, stating that "just because the life care plan was determined to be a reasonable medical expense, defendants are not necessarily required to pay for each item mentioned in the plan." *Id.* at 493-94, 665 S.E.2d at 785-86.

In the present case, the Commission made the following finding regarding the accounting fees:

> 9. With respect to the $2,860.00 sought by Plaintiff for the services of Mitchell and Nemitz, CPA, Plaintiff testified that he asked his accountant to prepare a compilation of amounts allegedly owed to him in connection with his workers' compensation claim, including medical expenses, travel expenditures, and temporary total disability payments. No additional evidence was submitted regarding the reasonableness of these expenses.

Based on this finding, the Commission concluded that "[i]nsufficient evidence exists to determine that Plaintiff's incurred accounting expenses constitute a necessary medical or rehabilitative service; therefore, Plaintiff is not entitled to have Defendant reimburse him for his accounting expenses. N.C. Gen. Stat. §§ 97-2(19) and 97-25."

We conclude that the Commission did not err in its conclusion. We note that unlike either *Timmons* or *Scarboro*, there was no evidence presented here that the accounting fees were part of any life care plan nor was there testimony or evidence from a medical or rehabilitative specialist stating that this expense is medically necessary because of Plaintiff's specific injuries. Accordingly, Plaintiff's argument is overruled.

C. Attorney's fees

[4] Lastly, Plaintiff argues that the Commission erred in not awarding him attorney's fees.

"If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2013). We have further stated that "[w]hether a defendant had reasonable ground to bring a hearing is a matter reviewable by this Court *de novo*. . . . The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Ruggery v. N.C. Dep't. of Correction*, 135 N.C. App. 270, 273-74, 520 S.E.2d 77, 80-81 (1999).

In his motion, Plaintiff made several claims against Defendant. Defendant responded and disputed on multiple grounds Plaintiff's contentions and included supporting documents, including letters showing their attempts to respond to Plaintiff's requests and Plaintiff's need to provide further documentation for payment. At the hearing before the deputy commissioner and, shortly thereafter, the parties were able to resolve the majority of their differences; and the only remaining

issues to resolve were (1) how much Plaintiff was owed for reimbursement expenses; (2) sanctions against Defendant for late payment of the lump sum payment; (3) attorney's fees award; and (4) sanctions against Defendant for defending its claims without reasonable grounds. Therefore, it appears that Defendant had reasonable grounds to defend Plaintiff's claims. Accordingly, we overrule Plaintiff's argument that the Commission erred in failing to make an award of attorney's fee pursuant to G.S. 97-88.1.

III. Conclusion

For the foregoing reasons, we affirm the Commission's opinion and award.

AFFIRMED.

Judge BRYANT and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
DENNIS HOWARD NEWSON

No. COA14-302

Filed 3 February 2015

1. Constitutional Law—competency to stand trial—disruptive behavior did not raise bona fide doubt

The trial court did not err in an assault with a deadly weapon on a government official and communicating threats case by finding that defendant was competent to proceed to trial or by relying on a doctor's report finding defendant competent to proceed. The mere fact that defendant's disruptive behavior continued throughout trial did not necessarily raise a bona fide doubt about his competence.

2. Constitutional Law—right to counsel—waiver—self-representation

The trial court did not err in an assault with a deadly weapon on a government official and communicating threats case by determining that defendant knowingly and voluntarily waived his right to counsel and by not making any further inquiry under *Edwards*, 554 U.S. 164 (2008).

3. Criminal Law—motion for mistrial—alleged jury prejudice—defendant's voluntary misconduct

The trial court did not err in an assault with a deadly weapon on a government official and communicating threats case by denying defendant's motion for a mistrial on the ground that the jury was allegedly prejudiced against him. However, where a defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain.

Appeal by Defendant from judgments entered 30 May 2012 by Judge Tanya T. Wallace in Superior Court, Cumberland County. Heard in the Court of Appeals 6 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Mary Cook and Assistant Appellate Defender Anne M. Gomez, for Defendant.

McGEE, Chief Judge.

Dennis Howard Newson ("Defendant") appeals his conviction of assault with a deadly weapon on a government official and two counts of communicating threats. Defendant contends he was not competent to stand trial or represent himself *pro se* and asks for a new trial. We disagree.

I. Background

Defendant had a personal confrontation with Hoke County Sheriff Hubert Peterkin ("Sheriff Peterkin") and other law enforcement officers at the Fayetteville Western Sizzlin restaurant on 10 March 2010. The details of that confrontation are set out in *State v. Newson*, __ N.C. App. __, 753 S.E.2d 399 (2013) (unpublished). Two weeks later, on 23 March 2010, Defendant was indicted for (1) assault with a firearm or other deadly weapon on a Government officer or employee; (2) assault with a deadly weapon with intent to kill; and (3) two counts of communicating threats. Subsequently, Defendant's competency to stand trial was questioned.

Dr. Nicole Wolfe ("Dr. Wolfe"), a forensic psychiatrist at Dorothea Dix Hospital, completed a competency evaluation with Defendant on an inpatient basis in June and July of 2010. Dr. Wolfe diagnosed Defendant

as having a personality disorder, not otherwise specified, with narcissistic and obsessive features. During a subsequent competency hearing in August 2010, Defendant often rambled and interrupted the trial court. Nonetheless, based on Dr. Wolfe's report, the trial court found Defendant competent to stand trial.

The trial court held a second competency hearing in April 2011. During that hearing, Defendant was combative, disruptive, and went off on tangents. The trial court again reviewed Dr. Wolfe's report and noted that:

> [Defendant] is well-versed in legal matters; he had no difficulty readily and thoroughly identifying the roles of various players in the courtroom; he understands plea-bargaining and jury matters; [Defendant] is viewed as comprehending his situation in reference to these proceedings and understanding the nature and object of the proceedings; he has the ability to assist in his defense in a rational and a reasonable manner if he so chooses; he is viewed as capable of proceeding to trial. I would agree with and further note that he has the ability to represent himself [even though] he has exhibited – well, what I would characterize as deliberately obstreperous and, perhaps, mendacious behavior[.]

The trial court held a third competency hearing in June 2011. Pursuant to N.C. Gen. Stat. § 15A-1242, the trial court conducted a full colloquy with Defendant and determined that Defendant was not only competent to stand trial but that he knowingly and voluntarily waived his right to counsel at trial. During the remainder of the hearing, Defendant made a number of "nonsensical and irrelevant" motions and was combative.

Several months later, Defendant's competency was brought into question again. At a hearing in September 2011, Defendant stated his name was "Noble Dennis Ali" and that he was from South Africa. Defendant also declared himself a "national citizen" and claimed that the trial court lacked jurisdiction over him. Defendant also argued he was entitled to "consulate" and that "consulars" in South Africa were waiting to be called to intervene in the case. At the conclusion of this hearing, the trial court ordered Defendant to be examined at Central Regional Hospital to determine his capacity to proceed.

In November and December of 2011, Dr. Mark Hazelrigg ("Dr. Hazelrigg"), a forensic psychologist at Central Regional Hospital, completed a second competency evaluation on Defendant. Dr. Hazelrigg

diagnosed Defendant as having "a mental disorder, which is manifested in loud, fast speech, which is poorly organized, culminating in illogical/nonsensical statements, as well as apparent delusions." Dr. Hazelrigg advised the trial court that Defendant was incompetent to proceed. The trial court held another competency hearing in February 2012, and adjudicated Defendant incompetent to proceed.

Defendant was then transferred to the Adult Admissions Unit at Cherry Hospital. During Defendant's month-long inpatient stay at Cherry Hospital, he refused to take medications or otherwise participate in therapy of any kind. Nonetheless, Defendant's treating physician, Dr. Paul Kartheiser ("Dr. Kartheiser"), reported that "there was a lack of significant symptomology which [might] represent [an] Axis I [psychiatric] disorder and that the difficulties that the patient demonstrated were more attributable to characterological factors and a volitional unwillingness to participate more fully in the diagnostic evaluation or in all likelihood his legal situation." Dr. Kartheiser sought a second opinion from Cherry Hospital's clinical director, Dr. Jim Mayo, who reported that "no clear Axis I [psychiatric disorder] is present and that [Defendant's] current behaviors reflect [a] severe Axis II [personality disorder], primarily narcissistic with obsessional and antisocial features".

Dr. Steven D. Peters ("Dr. Peters"), a forensic psychologist at Cherry Hospital, conducted a third competency evaluation with Defendant in March 2012. After interviewing Defendant, reviewing Defendant's medical records, and consulting with Dr. Kartheiser, Dr. Peters compiled a forensic report on Defendant ("Dr. Peters' report"). Dr. Peters' report states: "It is the consensus of the psychiatric staff [at Cherry Hospital] that [Defendant] is invested in manipulating the legal system and that he has volitional control over his actions." Dr. Peters' report goes on to refer to Defendant's behavior as "malingering" and further states that:

> [Defendant] currently is psychiatrically stable, demonstrates sufficient knowledge and comprehension of the court system[.] [I]t is my professional opinion that he is Competent to Proceed. [Defendant] has a significant history of dramatization and acting out for effect, but is able to function adequately at this time. For the most part[,] his unusual or bizarre behavior is under conscious control and is in the service of manipulation. Whether [Defendant] will choose to proceed appears to be a relevant question, more so than if he has the capacity to proceed. He appears to be less motivated to proceed and is more invested [in] prolonging his engagement with the legal system. It is felt

> that he could proceed, if he was so interested. He can be held to the same standards of conduct as any other individual and can benefit from having consequences to his actions as anyone else. Mr. Newson will require clear and firm limits when it comes to his court room behavior, with significant consequences for his on-going efforts to play the system or otherwise manipulate the process.

A final competency hearing was held by the trial court on 7 May 2012. Although Defendant was able to participate in court proceedings and examine witnesses throughout that hearing, he was combative, disruptive, and went off on tangents. After Defendant cross-examined Dr. Peters *pro se*, at length and often through repetitive or irrelevant questioning, the trial court stopped Defendant's cross-examination of Dr. Peters. By order dated 8 May 2012, and based upon Dr. Peters' report and testimony, the trial court found Defendant competent to stand trial.

Defendant's trial began 21 May 2012. The first day of trial was largely spent reviewing a number of Defendant's *pro se* pretrial motions. Defendant's brief states that Defendant was "rude, rambled, [and] talked over the trial court" during that time. After the trial court denied several of Defendant's motions, Defendant made a request for counsel. The next day, the trial court noted that Defendant "has repeatedly hired and fired [his] attorneys . . . and that the only reasons whereby [Defendant] told the [c]ourt yesterday that he desired to have an attorney was because many of his motions were denied after being heard by the [c]ourt." Nonetheless, the trial court appointed standby counsel for Defendant ("Standby Counsel").

Sheriff Peterkin was on the witness stand for the majority of the third day of trial. During Sheriff Peterkin's direct examination by the State, Defendant was able to make timely objections, and one of Defendant's objections was sustained by the trial court. Defendant's cross-examination of Sheriff Peterkin progressed logically, although Defendant's lines of questioning focused mostly on matters that were not entirely relevant to Defendant's case, such as other disputes Defendant had with Sheriff Peterkin. Defendant also was able to argue against numerous objections made by the State during cross-examination, and Defendant's arguments were frequently successful. However, as the day progressed, Defendant interrupted the trial court with increasing frequency and became more combative.

Before continuing the following day with Sheriff Peterkin's testimony, the trial court noted that

> [t]his morning as the jury gathered, the jury addressed the bailiff and said, We need to talk to the Judge. And the bailiff answered, as he should have, What's the matter? Is there something wrong? And there [was] – the reply of one of the jurors was that, We have jobs. How long is this going to take? And he's rambling. The bailiff, as he should have, cut everything off. I cannot talk to the jury, but I need to inform you what was said, and I don't know who they were talking about when they said, "he's rambling," but I felt like everybody needed to have notice of that.

Nonetheless, Defendant continued his lengthy cross-examination of Sherriff Peterkin, and the trial court repeatedly warned Defendant about continuing to ask already-answered or irrelevant questions. Eventually, the trial court exercised its discretion under Rule 611 of the North Carolina Rules of Evidence and cut off Defendant's cross-examination of Sherriff Peterkin. *See* N.C. Gen. Stat. § 8C-1, Rule 611 (2013) ("The [trial] court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time[] and [] protect witnesses from harassment or undue embarrassment.").

This pattern continued into the fifth day of trial. Defendant interrupted the proceedings, argued with witnesses, and repeatedly asked irrelevant questions. The trial court also stopped Defendant's direct and redirect examinations of Chief Deputy Gary Hammond ("Chief Hammond"), one of the law enforcement officers present at the Western Sizzlin on 10 March 2010.

On the sixth day of trial, near the end of the trial court's morning break, Defendant notified the trial court that he needed to use the facilities and that he also had hemorrhoids, which needed treatment. Although Defendant had previously been warned about delaying the proceedings by waiting to use the facilities until the end of breaks, the trial court granted Defendant's request and allowed Defendant extra time to seek medical attention. However, Defendant did not return to the courtroom when instructed, and the trial court found that Defendant was "making efforts to delay and obstruct this hearing from occurring." After an hour and a half, of what was supposed to be a fifteen-minute break, Defendant did return to the courtroom, but only after Standby Counsel informed Defendant that the trial court would close his case if he did not return to the courtroom.

Defendant next called Sheriff Peterkin to the stand for a second time, and the trial court again cut off Defendant's examination due to his asking irrelevant or already-answered questions. Defendant then called Chief Hammond to testify for a second time. Defendant's disruptive behavior continued. At one point during Chief Hammond's testimony, Juror Ten stood up in the jury box, and the trial court excused the jury from the courtroom. Defendant then began a "tirade" directed at the trial court. Although the trial court asked Defendant whether he had anything relevant to ask Chief Hammond, it received no direct response from Defendant. The trial court again stopped Defendant's examination of Chief Hammond.

The trial court then received a note from the jury and the following transpired:

> THE COURT: This is what the jury has asked[:] How much longer must we continue to hear the same questions? Juror number ten got up because he thought we were about to be asked to leave. All right. He's just had it. All right. Did you hear what the jury had to say, Mr. Defendant? How much longer must we continue to hear the same questions? And juror ten got up because he thought we were about to be asked to leave. Did you hear that, Mr. Newson? Mr. Newson, did you hear that?
>
> DEFENDANT: (No response.)
>
> THE COURT: Let the record reflect the defendant refuses to answer the questions of the [c]ourt. Let's have the jury come back into the court.

On the seventh day of trial, Defendant called numerous people to the stand who were not in the courtroom. At one point, Juror Two stood up and began waving his hand in the air. Defendant then decided to testify on his own behalf. However, the process of being sworn took an inordinate amount of time. Defendant wanted to consult Standby Counsel beforehand; he then insisted on placing numerous items on the evidence table while also ignoring the trial court's direction to proceed with being sworn; he refused to place his left hand on a Bible; and he would not raise his right hand to affirm that he would testify truthfully. At that time, both Juror Two and Juror Ten stood up and began waving their hands. The State pointed this out to the trial court and Juror Two began to speak. The trial court replied: "All Right. That's fine[,]" and the proceedings continued.

Defendant's actual testimony on direct examination focused largely on what Defendant saw as a tumultuous relationship between himself and Sheriff Peterkin, and the events at the Western Sizzlin on 10 March 2010. Although Defendant's testimony was rambling and often irrelevant, it followed a generally logical progression and lasted for more than an hour. The trial court had instructed Defendant to organize his testimony into a question-answer format, with Defendant asking a question and then answering it. Defendant maintained this format throughout his own direct examination, until his testimony was cut off by the trial court.

During the State's cross-examination of Defendant, Juror Two and Juror Ten stood up and raised their hands, indicating the jury needed a break, and the jury was excused from the courtroom. The jury then sent a note to the judge, who read the following out loud:

> I am tired of constant interruptions of the – [pause] – oh, okay – of the [c]ourt for his amusement and his allowance to continue with commentary after told to shut up; I feel it is a mockery of the judicial system at the expense of all of – times and means to make a living; I am not amused; I think the courtroom should be controlled by the judge and not let the dialogue continue; if the defendant is incapable of following the order of the [c]ourt, as other attorneys, then he should not be allowed to represent himself; I will not sit through another name-calling session to show blatant disrespect to you or other – something – serving as law abiding citizens.

In response, Defendant moved for "a mistrial for bias and prejudice" by the jurors. The trial court denied Defendant's motion. The jury returned to the courtroom. The State's cross-examination of Defendant resumed but deteriorated rapidly. Juror Two again stood up. The trial court ordered Defendant from the courtroom and noted that Defendant was "a malingerer, someone who acts out for dramatic effect[.]" Defendant had to be forcibly removed from the courtroom. The trial court rested Defendant's case in his absence.

Defendant was allowed to return to the courtroom for the charge conference. During the charge conference, Defendant did not interrupt the trial court and made a logical — albeit somewhat misinformed — argument regarding the jury instructions he preferred, and he was able to cite both case law and a relevant North Carolina statute in support of his position. Defendant also expressed his view that the trial court was trying to "railroad" him.

Closing arguments followed and were unrecorded. However, the court reporter noted the following:

> The defendant made an argument to the jurors. Following several objections which were sustained by the [c]ourt and during the playing of a video, the following transpired: Juror Number 2 . . . stood and demonstrated frustration.

Defendant continued to make his closing arguments and eventually had to be cut off by the trial court. Defendant then asked for a glass of water.

During the State's closing arguments, Defendant interrupted by protesting about the amount of water he was given. Defendant was again removed from the courtroom, but not before throwing his cup of water on the floor. After the State completed its closing argument, the trial court excused the jury and instructed Standby Counsel to confer with Defendant as to whether Defendant wished to be present – and silent – in the courtroom for the jury instructions. Standby Counsel left the courtroom, conferred with Defendant, returned, and indicated that Defendant did wish to be present for the jury instructions, although "as an officer of the Court, [Standby Counsel did] not believe it would be proper to relay [Defendant's] specific message to" the trial court.

Defendant was present during the trial court's lengthy instructions to the jury and remained silent. Defendant then made timely objections to the jury instructions, which were denied.

The jury found Defendant guilty of assault with a deadly weapon on a government official, assault with a deadly weapon, and two counts of communicating threats. The trial court arrested judgment on the charge of assault with a deadly weapon, noting that the elements of assault with a deadly weapon fit within the elements of assault with a deadly weapon on a government official, and entered judgments on 30 May 2012. Defendant filed a *pro se* petition for a writ of certiorari with this Court on 3 June 2013 to review his conviction, which this Court granted.

II. Defendant's Competence to Stand Trial

[1] Defendant first challenges the trial court's finding that he was competent to proceed to trial and argues that the trial court could not have properly relied on Dr. Peters' report by finding him competent to proceed. Defendant argues that Dr. Hazelrigg's findings should have been determinative. We note that this argument was abandoned by Defendant's appellate counsel during oral arguments. Regardless, in spite of Dr. Hazelrigg's earlier medical opinion that Defendant experienced some

kind of delusional disorder, Defendant has not presented this Court with any authority indicating that Dr. Hazelrigg's lone medical opinion was conclusive of Defendant's competence, especially in light of the medical opinions of numerous other doctors that Defendant was malingering. At the very least, the trial court's determination that Defendant was competent to proceed was not, as Defendant argues, entirely "unsupported by the evidence." In light of Defendant's lack of a meaningful argument on this point, and his abandonment on appeal, the trial court's finding of competence receives deference from this Court. *See State v. Chukwu*, __ N.C. App. __, __, 749 S.E.2d 910, 917 (2013).

Alternatively, Defendant contends that the trial court should have instituted, *sua sponte*, another competency hearing in light of Defendant's behavior at trial. Defendant did not affirmatively raise this issue with the trial court during trial. Thus, Defendant has failed to preserve this argument for review. *See* N.C.R. App. P. 10(a)(1). However, this Court previously has invoked Rule 2 of the North Carolina Rules of Appellate Procedure to review the unpreserved issue of whether a *pro se* defendant was competent to stand trial. *See State v. Robertson*, 161 N.C. App. 288, 290–91, 587 S.E.2d 902, 904 (2003). As such, we elect to address Defendant's arguments in the exercise of our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure.

This Court held the following in *Chukwu*:

> Trial courts have a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent. On review, this Court must carefully evaluate the facts in each case in determining whether to reverse a trial judge for failure to conduct *sua sponte* a competency hearing where the discretion of the trial judge, as to the conduct of the hearing and as to the ultimate ruling on the issue, is manifest. Further:
>
> Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide doubt inquiry*. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

> While the trial court's finding of competency receives deference, other findings and expressions of concern about the temporal nature of [a] defendant's competency may raise a bona fide doubt as to a defendant's competency. We thus review the record to determine (i) whether there is a bona fide doubt as to Defendant's competency and (ii) whether Defendant's competency was temporal in nature.

__ N.C. App. at __, 749 S.E.2d at 917 (internal quotation marks and citations omitted).

Defendant argues that his generally disruptive and "obstreperous" behavior at trial raises a bona fide doubt about his competence at trial. Specifically, Defendant argues that, because similar behavior led Dr. Hazelrigg to conclude that Defendant suffered from an incapacitating mental illness, the trial court necessarily was required to institute, *sua sponte*, a competency hearing when faced with his behavior at trial.

As a preliminary matter, Defendant's behavior at trial generally did not deviate greatly from his conduct at the competency hearings in August 2010, April 2011, June 2011, and May 2012, wherein Defendant was found competent to proceed or represent himself. Moreover, Dr. Hazelrigg's prior medical opinion finding Defendant incompetent to stand trial may be "relevant" to a bona fide doubt inquiry into Defendant's competence, *see id.*, but his opinion alone is not necessarily conclusive. The trial court also had access to the medical opinions of four other doctors who believed Defendant's generally disruptive behavior was volitional. In fact, it was the consensus of the clinical staff at Cherry Hospital that Defendant was a malingerer who was "invested in manipulating the legal system[.]" Thus, the mere fact that Defendant's disruptive behavior continued throughout trial also does not necessarily raise a bona fide doubt about Defendant's competence. In spite of Defendant's behavior, Defendant still made motions and objections, examined witnesses, introduced evidence, and made arguments on his own behalf throughout most of the proceedings.

Perhaps most illuminating was Defendant's conduct near the end of trial. Indeed, Defendant's behavior during that time — which twice necessitated his being forcibly removed from the courtroom — was the most extreme behavior Defendant exhibited that appears in the record. And yet, immediately after exhibiting such behavior, Defendant was sufficiently in control of his faculties to participate in the charge conference and then later sit silently through eleven recorded pages of

trial transcript as the trial court instructed the jury. Following both the charge conference and jury instructions, Defendant was able to make logical — albeit somewhat misinformed — arguments to the trial court regarding his objections to the jury instructions that were given.

At the very least, there is no meaningful evidence in the record to suggest Defendant was experiencing a mental illness that manifested in such an acutely temporal fashion as to explain Defendant's outbursts near the end of trial, which were then followed by Defendant sitting quietly in court and participating in the proceedings only minutes later. As such, Defendant's continuously disruptive and "obstreperous" behavior at trial did not raise a bona fide doubt about his competence, *see id.*, and we find that the trial court did not manifestly abuse its discretion by not instituting, *sua sponte*, additional competency proceedings at trial.

III. Defendant's Competence to Proceed *Pro Se*

[2] Defendant further contends that, even if he was competent to stand trial, the trial court erred by allowing him to waive counsel and represent himself. In support of this position, Defendant relies primarily on *Indiana v. Edwards*, 554 U.S. 164, 174, 171 L.Ed.2d 345, 355 (2008), which held that "the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial — on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." Specifically, Defendant notes that the trial court did not make an express inquiry under *Edwards* at trial.

Our Supreme Court held in *State v. Lane*, 365 N.C. 7, 22, 707 S.E.2d 210, 119 (2011), that where a defendant,

> after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel . . .; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards*. . . . [Only then will the trial court] make findings of fact to support its determination that the defendant is unable to carry out the basic tasks needed

> to present his own defense without the help of counsel [pursuant to *Edwards*].

(citations and internal quotation marks omitted). Thus, in the present case, because the trial court *granted* Defendant's motion to proceed *pro se*, *Edwards* is inapplicable, and we need only examine whether "the trial court properly conducted a thorough inquiry and determined that [D]efendant's waiver of his constitutional right to counsel was knowing and voluntary." *Id.* at 23, 707 S.E.2d at 220.

Defendant acknowledges that the trial court conducted a full counsel-waiver colloquy with him during the June 2011 competency hearing and determined that Defendant knowingly and voluntarily waived his right to counsel at trial. *See* N.C. Gen. Stat. § 15A-1242 (2013). However, Defendant further argues in his brief that the trial court should have conducted an additional counsel-waiver colloquy with him at trial. In support of this contention, Defendant also relies primarily on *Edwards*, which we have already determined is inapplicable in the present case. Otherwise, Defendant presents this Court with a plethora of authority, from North Carolina and elsewhere, wherein appellate Courts remanded similar cases – that were decided before *Edwards* – so that the trial courts could make findings as to whether they would have denied the defendants' motions to proceed *pro se* if they had known at the time that the Constitution permitted them to do so. However, the present case was decided *after Edwards* and the trial court is presumed to know the law as it existed when it granted Defendant's motion to proceed *pro se*. *See Moore v. W O O W, Inc.*, 253 N.C. 1, 6, 116 S.E.2d 186, 189 (1960) ("The law arises upon the facts alleged, and the [trial] court is presumed to know the law." (citations omitted)). Therefore, we find that the trial court did not err in its determination that Defendant knowingly and voluntarily waived his right to counsel, nor did the trial court err by not making any further inquiry under *Edwards*.

IV. Juror Bias

[3] Defendant contends that the trial court erred by denying his motion for a mistrial on the ground that the jury was prejudiced against him. Members of the jury did seem to be frustrated with Defendant, as demonstrated through their notes to the trial court and the fact that some members stood up several times in apparent exasperation during the proceedings. However, where a defendant was "prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." *State v. Marino*, 96 N.C. App. 506, 507, 386 S.E.2d 72, 73 (1989). Because we find that Defendant was competent at trial, any possible bias by the jury

would have arisen from Defendant's volitional conduct.[1] Therefore, the trial court did not err when it denied Defendant's motion for a mistrial.

No error.

Judges STEPHENS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
THOMAS LEE ROYSTER

No. COA14-736

Filed 3 February 2015

Penalties, Fines, and Forfeitures—drug money—writ of certiorari denied—appeal dismissed

Defendant's petition for writ of certiorari was denied and his appeal from the forfeiture of $400 was dismissed in a felonious possession of marijuana case. Defendant acknowledged that he failed to give timely notice of appeal, and further, he had no right to appeal the issue of forfeiture.

Appeal by defendant from judgment entered on 8 November 2013 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 November 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney Generals Michael E. Bulleri and Kimberly N. Callahan, for the State.

Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

STROUD, Judge.

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1. We note that the jury asked to review, and did review, specific pieces of evidence before rendering its verdict. Moreover, on the charge of assault with a deadly weapon with intent to kill, the jury only found Defendant guilty of the lesser-included offense of assault with a deadly weapon. If anything, these facts suggest that the jury actually was impartial and deliberate while rendering its verdict, even if some of its members were frustrated with Defendant.

Thomas Lee Royster ("defendant") appeals from a judgment entered upon a plea agreement in which he pled guilty to felonious possession of marijuana. Defendant argues that the trial court erred in ordering him to forfeit $400. We dismiss the appeal.

I. Background

Around 3:00 p.m. on 23 July 2012, while in a marked police car, Officers Shawn Soloman and Justin Coleman observed defendant driving in the parking lot of a Charlotte hotel. Officer Soloman observed that defendant had a rigid posture, avoided making eye contact with him, and appeared to be pretending to use a cell phone. Officer Soloman checked the North Carolina Division of Motor Vehicle's records and discovered that defendant's vehicle had an inspection violation and that its tag had expired. After defendant exited his vehicle, Officer Soloman approached him on foot and asked him for his driver's license. Defendant responded that his driver's license was in his vehicle and walked back to his vehicle.

Defendant searched for his driver's license with the driver's side door open. After defendant presented his driver's license, Officer Soloman detected a slight odor of marijuana but could not localize it at that point. Officer Soloman returned to the police car with defendant's driver's license, and Officer Coleman walked over to the driver's side door of defendant's vehicle. A breeze began blowing and then Officer Coleman noticed a strong odor of unburned marijuana coming from defendant's vehicle. After Officer Coleman informed Officer Soloman of the odor, Officer Soloman asked defendant for consent to search his vehicle, and defendant consented. During the search, behind the glove box Officer Coleman discovered a bag of fresh, green marijuana and a digital scale with a green leafy substance on it. When they searched defendant, the officers also discovered and seized $400 in cash. Officer Soloman arrested defendant.

On or about 10 December 2012, a grand jury indicted defendant for possession of a controlled substance, possession of drug paraphernalia, and possession with intent to sell or deliver a controlled substance. *See* N.C. Gen. Stat. §§ 90-95(a)(1), (d)(4), -113.22 (2011). On 11 April 2013, defendant moved to suppress the evidence of marijuana. After a hearing on 25 July 2013, the trial court orally denied the motion. At a hearing on 8 November 2013, defendant pled guilty of felony possession of marijuana pursuant to a plea agreement. *See id.* § 90-95(d)(4). In the plea agreement, the State dismissed the remaining charges, and defendant reserved his right to appeal the trial court's order denying his motion to suppress. On 8 November 2013, pursuant to the plea agreement, the

trial court sentenced defendant to four to fourteen months' imprisonment but suspended the sentence and placed defendant on twenty-four months' supervised probation.

At the 8 November hearing, the prosecutor requested that defendant forfeit the $400 in cash that the officers had seized. Although the record is unclear, it appears that the trial court ordered that defendant forfeit the $400 pursuant to N.C. Gen. Stat. § 90-112(a)(2) (2013).

At the 8 November hearing, defendant's counsel stated that he "strongly believe[s] on the face of the law that [defendant] will prevail on appeal." The trial court also noted at the hearing that defendant had reserved his right to appeal the court's order denying his motion to suppress. But defendant never gave notice of appeal.

At a hearing on 23 January 2014, defendant's counsel mistakenly stated that he had already given notice of appeal. The State did not contradict defendant's counsel's statement. The trial court then appointed a public defender to represent defendant on appeal.

II. Jurisdiction

Defendant acknowledges that he failed to give timely notice of appeal but urges that we grant his petition for writ of *certiorari*, because he lost his right to appeal due to "failure to take timely action[.]" *See* N.C.R. App. P. 21(a)(1). Defendant does not argue another basis for granting his petition.

In criminal cases, a party entitled to appeal a judgment must take appeal by either (1) giving oral notice of appeal at trial; or (2) filing written notice of appeal with the clerk of superior court and, within fourteen days, serving copies of that notice on all adverse parties. N.C.R. App. P. 4(a); *State v. Gardner*, ___ N.C. App. ___, ___, 736 S.E.2d 826, 829 (2013). But when a party loses his right to appeal due to "failure to take timely action," we may issue, in our discretion, a writ of *certiorari* to permit review "in appropriate circumstances[.]" N.C.R. App. P. 21(a)(1); *see also Gardner*, ___ N.C. App. at ___, 736 S.E.2d at 829.

Defendant's sole argument on appeal is that the trial court erred in ordering him to forfeit $400, in contravention of N.C. Gen. Stat. § 90-112(a)(2) (discussing forfeitures under the North Carolina Controlled Substances Act). Defendant argues that his appeal is taken pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b), 15A-1444, and 15A-1446(d)(18) (2013). But N.C. Gen. Stat. § 7A-27(b) does not provide a route for appeals from guilty pleas, and N.C. Gen. Stat. § 15A-979(b), which grants a defendant who pleads guilty the right to appeal an order

denying his motion to suppress, is inapplicable here because defendant does not appeal the trial court's denial of his motion to suppress. *See* N.C. Gen. Stat. §§ 7A-27(b), 15A-979(b); *State v. Mungo*, 213 N.C. App. 400, 401, 713 S.E.2d 542, 543 (2011). N.C. Gen. Stat. § 15A-1444, defendant's next basis for appeal, provides in pertinent part:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.
>
> (a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:
>
> (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
>
> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.
>
> . . . .
>
> (d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.
>
> . . . .
>
> (g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

N.C. Gen. Stat. § 15A-1444. Defendant does not challenge on appeal the trial court's determination that his sentence falls within the presumptive range. Defendant thus has no right to appeal under N.C. Gen. Stat. § 15A-1444(a1). *Id.* § 15A-1444(a1); *Mungo*, 213 N.C. App. at 403, 713 S.E.2d at 544. Additionally, defendant has no right to appeal under N.C. Gen. Stat. § 15A-1444(a2), because defendant's sole argument on appeal does not concern any of the three issues listed in subsection (a2). *See* N.C. Gen. Stat. § 15A-1444(a2). Defendant does not contend that the trial court violated N.C. Gen. Stat. §§ 15A-1340.14, -1340.17, -1340.21, or -1340.23; rather, defendant argues that the trial court violated N.C. Gen. Stat. § 90-112(a)(2) of the Controlled Substances Act. *See id.* §§ 15A-1340.14, -1340.17, -1340.21, -1340.23, 90-112(a)(2) (2013). Accordingly, we hold that defendant has no right to appeal this issue of forfeiture. *See* N.C. Gen. Stat. § 15A-1444(e); *Mungo*, 213 N.C. App. at 404, 713 S.E.2d at 545; *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003); *State v. Nance*, 155 N.C. App. 773, 774-75, 574 S.E.2d 692, 693-94 (2003).

Defendant's reliance on *State v. Davis* is misplaced. 206 N.C. App. 545, 551, 696 S.E.2d 917, 921 (2010). There, the defendant's sentence fell outside of the presumptive range, thus satisfying N.C. Gen. Stat. § 15A-1444(a1). *Id.* at 548, 696 S.E.2d at 919-20. In contrast, here, defendant's sentence falls within the presumptive range.

Defendant finally contends that N.C. Gen. Stat. § 15A-1446(d)(18) provides a right to appeal this issue of forfeiture. N.C. Gen. Stat. § 15A-1446, which is entitled "Requisites for preserving the right to appellate review" provides in pertinent part:

> (a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.
>
> . . . .
>
> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.
>
> . . . .
>
> (18) The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446. We hold that subsection (d) does not create a right of appeal; rather, it lists various issues which may be preserved for appellate review absent an objection. *See id.* § 15A-1446(d); *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010) (discussing subsection (d)(18)). In other words, although defendant has not waived the issue of forfeiture, he has no right to appeal it under section 15A-1446(d)(18). Having reviewed all of defendant's bases for appeal, we hold that defendant never had a right to appeal the issue of forfeiture.

Because defendant never had a right to appeal the issue of forfeiture, we hold that he did not lose his right to appeal due to "failure to take timely action[.]" *See* N.C.R. App. P. 21(a)(1). Because defendant did not lose his right to appeal due to "failure to take timely action," we deny defendant's petition for writ of *certiorari*. *See id.*; N.C. Gen. Stat. § 15A-1444(e); *Mungo*, 213 N.C. App. at 404, 713 S.E.2d at 545; *Jamerson*, 161 N.C. App. at 529-30, 588 S.E.2d at 547; *Nance*, 155 N.C. App. at 775, 574 S.E.2d at 693-94.

III. Conclusion

For the foregoing reasons, we deny defendant's petition for writ of *certiorari* and dismiss defendant's appeal.

DISMISSED.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
MARCUS WADDELL

No. COA14-528

Filed 3 February 2015

Evidence—prior crimes or bad acts—exposing self in public—intent—plan—absence of mistake

The trial court did not err in a felony indecent exposure case by allowing testimony from two adult women at trial who described previous instances where defendant allegedly exposed himself in public. N.C.G.S. § 8C-1, Rule 404(b) testimony was admissible to show evidence of intent, plan, or absence of mistake because defendant had shown a pattern of exposing himself to adult females in the courthouse area in downtown Fayetteville. Further, the trial court's decision to not exclude the testimony under Rule 403 was not manifestly unsupported by reason.

Appeal by Defendant from judgment entered 18 September 2013 by Judge James F. Ammons, Jr. in Superior Court, Cumberland County. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for Defendant.

McGEE, Chief Judge.

Marcus Waddell ("Defendant") appeals his conviction of felony indecent exposure, which involved Defendant publically exposing himself in the presence of a fourteen-month-old male child. Defendant contends that the trial court impermissibly allowed testimony of two adult women at trial who described previous instances where Defendant allegedly exposed himself in public. We disagree.

I. Background

At the time the following events occurred, Victoria Hardin ("Ms. Hardin"), an adult woman, worked at a law firm on Dick Street in downtown Fayetteville, located several blocks from the Cumberland County

courthouse ("the courthouse"). Ms. Hardin left work on 25 July 2012 at approximately 4:30 in the afternoon, accompanied by her mother and fourteen-month-old son. While they made their way to Ms. Hardin's car, a man, identified at trial as Defendant, approached Ms. Hardin with his pants down, called out to get her attention, and began shaking his penis at her and moving his hand "up and down." Ms. Hardin and her mother quickly entered Ms. Hardin's car, along with Ms. Hardin's son. As Ms. Hardin attempted to put her car in reverse, Defendant moved behind the car and began doing jumping jacks. Defendant then walked down Dick Street and was apprehended by the police shortly thereafter.

At trial, the State presented testimony from two adult women who reported other instances of Defendant exposing himself in public. The trial court allowed this testimony under N.C. Gen. Stat. § 8C-1, Rule 404(b) to show intent, plan, or absence of mistake by Defendant ("the 404(b) testimony"). The jury found Defendant guilty of felony indecent exposure. Defendant appeals.

II. Analysis

The elements of felony indecent exposure are that an adult willfully expose the adult's "private parts" (1) in a public place, (2) "in the presence of" a person less than sixteen years old, and (3) "for the purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-190.9(a1) (2013). On appeal, Defendant requests a new trial on the grounds that the trial court erred by admitting the 404(b) testimony.

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b) of the North Carolina Rules of Evidence." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158–59 (2012). Under Rule 404(b), evidence of other crimes, wrongs, or acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment[,] or accident" by a defendant, although such evidence "is not admissible to prove the character of [the defendant] in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). The rule also is "constrained by the requirements of similarity and temporal proximity" between the earlier acts and the offense with which the defendant is charged.[1] *State v. Al-Bayyinah*, 356 N.C. 150, 154–55, 567 S.E.2d 120, 123 (2002) (citation omitted). In order to satisfy the similarity

1. Defendant's arguments on appeal apply only to the similarity prong of 404(b), and we will limit our analysis accordingly. N.C. R. App. P. Rule 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

prong of Rule 404(b), "the similarities need not be unique and bizarre." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citation and quotation marks omitted). A prior incident is sufficiently similar if there are "some unusual facts present in both crimes[.]" *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007) (citation and quotation marks omitted). Testimony offered pursuant to Rule 404(b) may be inadmissible if the details it will reveal are entirely "generic to the act" it describes. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

Defendant first challenges the 404(b) testimony on the grounds that this testimony provided only "generic features of the charge of indecent exposure." In support of this contention, Defendant relies on *Al-Bayyinah*. In *Al-Bayyinah*, the defendant was charged with attempted robbery of a particular grocery store. *Id.* at 151–52, 567 S.E.2d at 121. The trial court allowed 404(b) testimony of previous robberies of the same store, but that testimony revealed only that the culprit in the previous robberies "wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it." *Id.* at 155, 567 S.E.2d at 123. On appeal from the defendant's conviction for the robbery, our Supreme Court found that this 404(b) testimony merely described facts "generic to the act of robbery," noted that the earlier robberies were factually dissimilar from the one being tried, and held that this 404(b) testimony was therefore admitted in error. *Id.* at 155–57, 567 S.E.2d at 123–24.

However, our Court has allowed 404(b) testimony that describes "common locations, victims, [and] type of crime," between previous and present instances of unlawful conduct. *State v. Gordon*, __ N.C. App. __, __, 745 S.E.2d 361, 364, *disc. review denied*, __ N.C. __, 749 S.E.2d 859 (2013). For instance, in *Gordon*, which involved a robbery in a Wal-Mart parking lot, previous instances of the *Gordon* defendant committing similar robberies was held admissible under Rule 404(b) where

> [e]ach of these incidents occurred in or in the vicinity of a Wal–Mart parking lot; that each of the victims in this matter were female and alone; that each of the incidents involved a common law robbery, the purse snatching, a grab and dash type of crime; that these incidents occurred within six weeks of one another, one in Statesville, one in Mooresville, which are approximately [twenty] miles apart; and in each incident, the alleged perpetrator of the crime . . . was a black male.

Id. Similarly, in the present case, the 404(b) testimony indicated that (1) Defendant exposed himself to adult women, who were either alone or in pairs, (2) he did so in or in the vicinity of businesses near the courthouse in downtown Fayetteville, and (3) each instance involved Defendant exposing his genitals with his hand on or under his penis. Just as in *Gordon*, this 404(b) testimony revealed numerous unique details of "common locations, victims, [and] type of crime" that rose above facts "generic to the act" of public exposure. Defendant's argument is without merit.

Defendant also contends that the incidents described in the 404(b) testimony are fundamentally dissimilar to Defendant's public exposure on 25 July 2012 because the 404(b) testimony came from adult women, whereas the purported "victim" in the present case is a fourteen-month-old male child. In support of this position, Defendant relies on *State v. Dunston*, 161 N.C. App. 468, 588 S.E.2d 540 (2003). In *Dunston*, the defendant was accused of having anal sex with a twelve-year-old child. *Id.* at 469, 588 S.E.2d at 542. However, the trial court erred by allowing 404(b) testimony from the defendant's wife that the couple regularly had anal sex. *Id.* at 473–74, 588 S.E.2d at 544–45. This Court held that "the fact defendant engaged in and liked consensual anal sex with an adult, whom he married, is not by itself sufficiently similar to engaging in anal sex with an underage victim . . . to be admissible under Rule 404(b)." *Id.* In the present case, Defendant maintains that, because the 404(b) testimony came from adult women, "[n]othing about [the 404(b) testimony] would shed light on why [Defendant] would expose himself to a [male] child." (emphasis added).

We disagree not only with Defendant's conclusion, but we also disagree with his assumption that whether Defendant exposed himself "to" a child is relevant to our analysis. N.C.G.S. § 14-190.9(a1) requires only that Defendant expose himself "in the presence of" someone under sixteen. North Carolina's appellate Courts consistently have interpreted the phrase "in the presence of" in N.C.G.S. § 14-190.9 by its plain meaning. In order to convict a defendant of indecent exposure in public, the exposure need only be in the *presence* of another person; it need not be seen by, let alone directed at, another person. *See State v. Fly*, 348 N.C. 556, 561, 501 S.E.2d 656, 659 (1998) ("[The statute] does not require that private parts be exposed to [a person] before the crime is committed, but rather that they be exposed '*in the presence of*' [another person]."); *State v. Fusco*, 136 N.C. App. 268, 270, 523 S.E.2d 741, 742 (1999) ("Indecent exposure involves exposing one's self 'in the presence

of' [another] person . . . . The victim need not actually see what is being exposed." (citation omitted)).[2]

In the present case, Defendant acknowledges in his own brief that he exposed himself to Ms. Hardin outside of a business near the courthouse in downtown Fayetteville, that he had his hand on his penis when he did so, and that he "shook" his penis at her. That this particular public exposure also happened to take place in the *presence* of a child is not dispositive of the other similarities between this event and those described in the 404(b) testimony. Therefore, *Dunston* is distinguishable from the present case, and we are unpersuaded by Defendant's argument.

Defendant attempts to further distinguish the 404(b) testimony from his exposure to Ms. Hardin by noting that Ms. Hardin expressly described Defendant's conduct as "masturbating," while the 404(b) witnesses did not. However, nothing in our caselaw indicates that the previous acts described in 404(b) testimony must be completely identical to the acts charged in order to be admissible; there need only be "some unusual facts present in both" the past and present instances of conduct to make them sufficiently similar. *See Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110. As already discussed, there are numerous unique similarities between Defendant's conduct described in the 404(b) testimony and in Ms. Hardin's account, which we find satisfies the similarity prong of Rule 404(b). Defendant's distinction, to the extent that there is one, is not dispositive of these similarities. Therefore, Defendant's argument is without merit.

Defendant further contends that the 404(b) testimony nonetheless was unduly prejudicial and should have been excluded under Rule 403 of the North Carolina Rules of Evidence. Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" to a defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Whether to exclude evidence under Rule 403 is a matter of

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2. Although the present case involves Defendant's conviction of felony indecent exposure under N.C.G.S. § 14-190.9(a1), *Fly* and *Fusco* interpreted an older version of North Carolina's misdemeanor indecent exposure statute, N.C.G.S. § 14-190.9(a). Before 2005, in order to convict for misdemeanor indecent exposure under N.C.G.S. § 14-190.9(a), the State had to prove not only that a defendant's exposure occurred in public and in the presence of another person, but it also had to prove that this exposure occurred in the presence of a member "of the opposite sex." *See* 2005 N.C. Sess. Laws ch. 226, § 1. As such, the analyses in *Fly* and *Fusco* are still applicable in the present case, at least to the extent they inform this Court how to interpret the phrase "in the presence of" as it applies to Defendant exposing himself "in the presence of" a member of a particular class of people, presently a child under the age of sixteen.

discretion of the trial court and that decision will be reversed "only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Lakey*, 183 N.C. App. 652, 654, 645 S.E.2d 159, 160–61 (2007) (citation and quotation marks omitted). Moreover, we generally will not overturn a trial court's decision to admit evidence under Rule 403 where "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [the] defendant and was careful to give a proper limiting instruction to the jury." *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160 (citation and quotation marks omitted).

In the present case, the trial court held *voir dire* examinations of the State's 404(b) witnesses, and it even excluded a possible third 404(b) witness because she could not state in open court that Defendant was the same man who had exposed himself to her in the past. The trial court found that the 404(b) testimony was admissible to show "some evidence of intent, plan, or absence of mistake in this case" because Defendant "has shown a pattern of exposing himself to [adult] females in the courthouse area" in downtown Fayetteville. Moreover, the trial court expressly instructed the jury that it could only consider the 404(b) evidence for these limited purposes. As such, our review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to Defendant by allowing the 404(b) testimony and that it gave a proper limiting instruction to the jury in response. At the very least, in light of our above analysis, and in spite of Defendant's contention that the introduction of the 404(b) testimony "allowed the State to change the focus of the case from the credibility of Ms. Hardin's account of the incident to the character of [Defendant]," we find that the trial court's decision to not exclude the 404(b) testimony under Rule 403 was not manifestly unsupported by reason.

No error.

Judges STEPHENS and DIETZ concur.

BENJAMIN SUPPLEE AND MEBRITT THOMAS, PLAINTIFFS
v.
MILLER-MOTTE BUSINESS COLLEGE, INC. AND DELTA CAREER EDUCATION CORPORATION, DEFENDANTS

No. COA14-670

Filed 3 February 2015

1. Contracts—school enrollment agreement—failure to perform background check

In an action by a student alleging breach of contract by a technical college, the trial court did not err by denying the school's motion for directed verdict and judgment notwithstanding the verdict. The school failed to abide by its enrollment agreement and conduct a background check before the student's admission, and as a result the student enrolled but was not permitted to complete his program when his past criminal charges were discovered.

2. Evidence—contract claim—income before and after breach

In an action by a student alleging breach of contract by a technical college, the trial court did not abuse its discretion by admitting evidence of plaintiff's income before and after his enrollment in the college. This evidence was relevant to determination of his consequential damages.

3. Pleadings—summary judgment—affidavits materially altering prior testimony

In an action by a student alleging breach of contract by a technical college, the trial court did not abuse its discretion by striking portions of plaintiff's affidavit. The struck portions contained conclusory statements that materially altered plaintiff's prior deposition testimony. Even assuming that the trial court abused its discretion, plaintiff failed to show prejudice.

4. Fraud—lack of intent to carry out promise

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's fraud claim. Plaintiff failed to present any evidence that at the time of the contract formation defendants had no intention of carrying out their promise.

5. Unfair Trade Practices—simple breach of contract

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's unfair trade practices claim. Plaintiff failed to present any evidence or fraud or inequitable assertion of power. Simple breach of contract, without more, does not amount to an unfair or deceptive trade practice.

6. Negligence—"negligent admission" claim not recognized

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's negligence claim. The Court of Appeals declined to recognize a claim for "negligent admission" to an educational program.

7. Fraud—duty arising solely from contract

In an action by a student alleging breach of contract by a technical college, the trial court did not err by granting defendants' motion for summary judgment on plaintiff's negligent misrepresentation claim. Defendants' duty to conduct a criminal background check arose from their contract with plaintiff, not by operation of law independent of the contract.

8. Attorneys—sanctions—statements to news outlet

The trial court abused its discretion by granting a motion for sanctions against plaintiffs' attorney based on statements he made to a local news station after the first plaintiff's trial and before the second plaintiff's trial on related claims. The attorney did not violate Rules of Professional Conduct 3.3 and 3.6. His statements regarding the first plaintiff's claims and damages were matters of public record. Nothing in the record supported the trial court's finding that defendants settled with the second plaintiff as a result of the attorney's statements. Finally, the attorney did not contradict an earlier statement he made to the trial court.

Appeal by defendants from order entered 20 December 2013 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Cross-appeal by plaintiff Benjamin Supplee from order entered 31 July 2013 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Cross-appeal by Kyle J. Nutt from order entered 27 January 2014 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 22 October 2014.

Shipman & Wright, LLP, by Kyle J. Nutt, for plaintiff-appellee and cross-appellants.

Vandeventer Black LLP, by David P. Ferrell and Kevin A. Rust, for defendant-appellants and cross-appellee.

McCULLOUGH, Judge.

Defendants Miller-Motte Business College, Inc. and Delta Career Education appeal the order of the trial court denying their motions for directed verdict and judgment notwithstanding the verdict; Plaintiff Benjamin Supplee cross-appeals from the order of the trial court granting defendants' summary judgment motion, in part; Plaintiff Benjamin Supplee's attorney, Mr. Kyle Nutt, appeals the trial court's order granting defendants' motion for sanctions. Based on the reasons stated herein, we affirm in part and reverse in part.

I. Background

On 21 August 2012, plaintiffs Benjamin Supplee ("Supplee") and Mebritt Thomas ("Thomas") filed a complaint against defendants Miller-Motte Business College, Inc. ("MMC") and Delta Career Education Corporation ("DCEC"). Plaintiffs alleged the following claims: fraud/fraud in the inducement; unfair and deceptive trade practices; negligent misrepresentation; breach of contract by MMC; and negligence.

On 29 May 2013, defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

On 31 July 2013, the trial court entered an order, granting defendants' motion for summary judgment in part, and denying it in part. The trial court found that there were no genuine issues of material fact on plaintiffs' claims for fraud, unfair and deceptive trade practices, negligence, and negligent misrepresentation. Defendants' motion for summary judgment on plaintiffs' breach of contract claim was denied.

Plaintiffs' trials were separated with Supplee's trial occurring first, at the 28 October 2013 civil session of New Hanover County Superior Court, Judge W. Allen Cobb, Jr. presiding.[1]

The evidence at Supplee's trial indicated the following: Sometime after October 2009, Supplee met with MMC's dean of education, Mike

1. Because plaintiff Benjamin Supplee is the only plaintiff who is a party to the appeal before us, we will focus on the record evidence relevant to Supplee's appeal.

Smith ("Smith") and expressed interest in the surgical technology ("surg tech") program at MMC's Wilmington, North Carolina campus. Supplee inquired about the requirements of the surg tech program and job prospects in the field after graduation. The surg tech program was a two year program that consisted of an eighteen month class component, followed by a six month clinical component. Smith gave Supplee MMC's college catalog. Thereafter, Supplee met with Amy Brothers ("Brothers"), an admissions representative for MMC. Supplee testified that although Brothers was aware that he wanted to apply to the surg tech program, Brothers encouraged him to apply to the health information technology ("HIT") program. Brothers told Supplee that he could transfer to the surg tech program if he did not like the HIT program.

During their meeting, Brothers handed Supplee a document entitled "Career Information Profile." The document asked whether Supplee had "ever been convicted of a crime." Supplee marked "no" after asking Brothers whether "a DUI count[s] because I knew it was on my record, I knew I had some issues in the past and she was like, no, you're fine."

On 10 December 2009, Supplee received an acceptance letter from the campus director of MMC and a congratulatory letter of acceptance from the career services director at MMC. On 15 December 2009, Supplee and Brothers signed an enrollment agreement for an associate degree in the HIT program. The agreement stated that Supplee's enrollment was "subject to all terms and conditions set forth in the Catalog" of MMC. The student catalog, under the heading "PROGRAM REQUIREMENTS" and "Background Checks," provided as follows:

> Students applying for admission will be required to have a criminal history check. While a criminal conviction is not a per se bar to admission, **[MMC] will review any applicant who has been convicted of a crime in order to determine his or her fitness for admission**, and will take into consideration the following factors: the nature and gravity of the criminal conviction, the time that has passed since the conviction and/or completion of the criminal sentence, and the nature of the academic program for which the applicant has applied.

(emphasis added).

In January 2010, Supplee began his courses at MMC. On 4 April 2010, after the end of the first quarter, Supplee transferred into the surg tech program. To complete the transfer, Supplee signed an enrollment agreement on 14 April 2010, almost identical to the HIT enrollment agreement,

that incorporated the terms and conditions of the catalog and stated that MMC would review a student's criminal background for admission purposes. Defendants backdated Supplee's start date in the surg tech program to 20 January 2010.

On 12 October 2010, during Supplee's first surg tech program specific class, he was given a document by defendants entitled "Background Check Statement of Disclosure" which provided as follows:

> Background checks will be provided as part of the curriculum, will be held in strictest confidence and specific information will not be released to the clinical site unless specifically requested by the clinical site administrator. . . . As a student in the Surgical Technology Program, I am aware that clinical sites in which I complete my clinical rotations may require proof of a criminal background check prior to my acceptance at the clinical site.

Supplee and Cynthia Woolford ("Woolford"), the program director of surgical technology at MMC, signed this document. Woolford testified that she reviewed the "Background Check Statement of Disclosure" with the whole class, including Supplee.

On or about 12 October 2010, Woolford provided Supplee with the "Surgical Technology Program Student Policy Manual." Under the subsection entitled "Admission," the surg tech manual stated that "[t]he college will perform a criminal background check upon admission to the program." Further, it stated that

> An applicant may be denied admission to the [surg tech] program for any of the following reasons: . . . b. Conduct not in accordance with the standards of a Surgical Technologist: . . . ii. Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the individual is unfit or incompetent to practice surgical technology or that the individual has deceived or defrauded the public. . . . e. Due to JCAHO [Joint Commission on Accreditation of Health Organizations] requirements for Hospital & Operating Rooms, Students with a felony criminal record, larceny, or drug-related background found on the criminal background check will not be admitted to the clinical sites.

Supplee testified that he had not been advised by defendants' representatives that a criminal background check had not been conducted, but believed they had already conducted one.

At trial, Woolford testified that based on MMC's written policy, criminal background checks are "supposed to be conducted of new applicants" during the admissions process. Ned Snyder, the campus director for MMC in Wilmington and the regional vice president for MMC in North Carolina, South Carolina, and Virginia testified that MMC had the same policy, regardless of whether the applicant was applying to the HIT or the surg tech program. In addition, regardless of whether the applicant answered "no" to the question of "have you ever been convicted of crime?" on the career information profile, MMC was supposed to run a criminal background check. Woolford testified that, "if a student during admission had a criminal charge that would automatically disqualify them from clinical sites," the purpose of the criminal background check made during admission was to screen out any applicants who would not be able to complete the program. Once a student was admitted, thirty days prior to being placed at a clinical site, MMC was supposed to conduct another criminal check in order to obtain the most recent results. Woolford testified that MMC had a "responsibility to determine the type of criminal backgrounds that will prohibit students from attending [clinical] externships." However, Woolford admitted that defendants did not conduct a criminal background check on Supplee during his admissions process. Woolford also testified that Supplee did not have a criminal background check conducted prior to the time he started the surg tech program.

Around May of 2011, Supplee's class was scheduled to go to an orientation at two clinical externship sites. Woolford testified that thirty days prior to May 2011, Woolford ordered the background check of Supplee. Prior to May 2011, Woolford was not aware of any criminal background check being conducted on Supplee. A contact at a clinical externship site informed MMC that four students, including Supplee, were not permitted to attend the orientation based on the results of their criminal background checks. Supplee's criminal background check revealed the following: two felony charges of breaking and entering and larceny which were dismissed in 2008; two convictions of driving while intoxicated which occurred in 2004 and 2008, one of which resulted in a probation violation.

Supplee testified that around 15 May 2011, he was pulled out of class by Woolford and told by Smith, that the criminal background check sent to the clinical site was rejected. Defendants "pointed to two dismissed felony charges and said that's why I was not being allowed to attend the orientation site so therefore I couldn't participate in the clinical portion. I couldn't – I couldn't finish." Supplee testified that "[Woolford] looked at

my background and everything else that I had on there. DUIs, traffic misdemeanors she said was okay, that that wasn't why I was being denied." Defendants presented Supplee with two options: Supplee could transfer into any other program at MMC at no charge or Supplee could get his felony charges expunged and reapply to the surg tech program to work towards completion. At Woolford's suggestion, Supplee elected to get the two felony charges of breaking and entering and larceny expunged. Supplee was successful in getting the charges expunged and reapplied to MMC in December of 2011. When Supplee attempted to reenroll, defendants informed him that their admissions policy regarding criminal background checks had changed, requiring a "clean record."

On 10 January 2012, DCEC sent Supplee a "Notice of Pre-Adverse Action" which stated the following:

> During the application process for the SURGICAL TECHNOLOGY program at [DCEC], you authorized a review of your background and qualifications for admission. This background check revealed criminal convictions that would almost certainly preclude participation in externship or clinical experience position placements that may be required to successfully complete the program you have applied. Based on this background check, [DCEC] rejects your application.

On 7 November 2013, a jury returned a verdict in favor of Supplee. The jury found that defendants entered into a contract with Supplee, that defendants breached the contract by non-performance, and that Supplee was entitled to recover from the defendants in the amount of $53,481.00. Costs in the amount of $2,298.30 were also taxed against defendants.

On 14 November 2013, defendants filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial. On 20 December 2013, the trial court denied both motions.

On 14 November 2013, defendants filed a motion for sanctions and/or appropriate relief. Defendants' motion stated that upon the motion of plaintiffs, the trials of Supplee and Thomas were separated; Supplee's trial occurring during the 28 October 2013 civil session and Thomas' trial scheduled for the week of 18 November 2013. Defendants provided that on or about 3 November 2013, a local news station called WECT, posted a story on its website disclosing that Supplee had prevailed on his breach of contract claim in the amount of $53,481.00 and that the damages were based upon "wasted tuition and lost income opportunities[.]" Defendants claimed that the alleged basis for the damages of "wasted

tuition and lost income opportunities" was not a matter of public record. The news story stated that plaintiffs' attorney, Mr. Kyle Nutt ("Mr. Nutt") of Shipman & Wright, LLP, made the following statement:

> the school was contractually obligated to screen their applicants' criminal backgrounds to make sure all potential students could eventually graduate from healthcare degree programs were certain offenses the school was aware of could potentially prevent students from completing required coursework at hospitals.

Mr. Nutt was also attributed to representing that "the school offered Supplee $25,000 at the start of trial to end the matter, but then removed the offer midway through trial." Defendants argue that the statements attributed to Mr. Nutt were not found in the jury's verdict sheet and were not a matter of public record. Furthermore, Mr. Nutt was attributed to stating that "his firm is representing another student going to trial over similar claims this month" and defendants contended that this statement was made with actual knowledge that Thomas' claims were scheduled to occur just two weeks after the article was published. Based on the foregoing, defendants moved the court to levy sanctions against plaintiff and/or Mr. Nutt and to grant appropriate relief based on their violation of Rule 3.6 of the North Carolina Rules of Professional Conduct and "their public dissemination of information that would not be admitted as evidence at Ms. Thomas' trial and which creates a substantial risk of prejudicing an impartial trial."

On 27 January 2014, the trial court entered an order on defendants' motion for sanctions and/or appropriate relief by concluding that Mr. Nutt's comments created a substantial risk of prejudicing the Thomas jury and that Mr. Nutt's extrajudicial statements were in violation of Rule 3.6(a) and/or 3.3 of the North Carolina Rules of Professional Conduct. Mr. Nutt was sanctioned in the amount of $1,000.00 and defendants were awarded $6,395.50 in attorneys' fees and $20.00 in costs.

Attorneys for plaintiffs, including Mr. Nutt, filed a motion for reconsideration, arguing that defendants waived claims referenced in their motion for sanctions and/or appropriate relief, that vital First Amendment considerations required a liberal construction of the "safe harbor" provisions contained in Rule 3.6(b) of the North Carolina Rules of Professional Conduct, and that under such a construction, Mr. Nutt's statements were protected disclosures as a matter of law.

On 11 February 2014, the trial court entered an order denying plaintiffs' motion for reconsideration.

On 16 January 2014 defendants filed notice of appeal; on 21 January 2014, Supplee filed notice of appeal; and, on 3 February 2014, Mr. Nutt filed notice of appeal.

II. Discussion

A. Defendants' Appeal

Defendants raise two issues on appeal. First, defendants argue that the trial court erred by denying their motions for directed verdict and judgment notwithstanding the verdict ("JNOV"). Next, defendants argue that the trial court erred by permitting the jury to consider speculative evidence of Supplee's lost profits and income. We address each of these arguments in turn.

i. Directed Verdict and Judgment Notwithstanding the Verdict

[1] Defendants contend that the trial court erred by denying their motions for a directed verdict and JNOV where Supplee failed to present sufficient evidence of a breach of contract claim. We reject defendants' arguments and conclude there was sufficient evidence of breach of contract by defendants in order to submit the issue to the jury.

> When considering the denial of a directed verdict or JNOV, the standard of review is the same. The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.

Green v. Freeman, 367 N.C. 136, 140-41, 749 S.E.2d 262, 267 (2013) (citations and quotation marks omitted). Whether defendants were entitled to a directed verdict or JNOV is a question of law and questions of law are reviewed *de novo*. *Id.* at 141, 749 S.E.2d at 267.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Branch v. High Rock Lake Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (citation omitted). Here, the parties stipulated that Supplee and defendants entered into a contract. Therefore, the issue before the jury was whether there was a breach of the terms of the contract.

Defendants rely on the holdings of *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) and *Ryan v. Univ. of N.C. Hospitals*, 128 N.C.

App. 300, 494 S.E.2d 789 (1998), and contend that Supplee's breach of contract claim based on the failure of defendants to conduct a criminal background check to determine if he was fit for admission into the surg tech program is not a recognized cause of action.

In *Ross*, a student accepted an athletic scholarship to attend Creighton University and play on its varsity basketball team. *Ross*, 957 F.2d at 411. Creighton was an "academically superior university" while the student came from an "academically disadvantaged background" and was "at an academic level far below that of the average Creighton student." *Id.* The student attended Creighton from 1978 until 1982, maintained a D average, and obtained 96 out of the 128 credits needed to graduate. When he left Creighton, the student had the overall language skills of a fourth grader and the reading skills of a seventh grader. *Id.* at 412. The student filed a complaint against Creighton, alleging that Creighton was aware of the student's academic limitations at admission and in order "to induce him to attend and play basketball, Creighton assured [the student] that he would receive sufficient tutoring so that he 'would receive a meaningful education while at CREIGHTON.' " *Id.* at 411. The student further alleged that he took courses that did not count towards a university degree at the advice of Creighton's Athletic Department, that the department employed a secretary to read, prepare, and type his assignments, and failed to provide him with sufficient and competent tutoring that it had promised. *Id.* at 412. The student asserted claims of breach of contract and negligence. The student argued three separate theories of how Creighton was negligent: "educational malpractice" for failing to provide him with a meaningful education and preparing him for employment after college; negligently inflicting emotional distress by enrolling him in a stressful university environment when he was not prepared and by failing to provide remedial programs to assist him; and, "negligent admission" which would allow recovery when an institution admits and then does not adequately assist an unprepared student. *Id.* The district court dismissed all of the student's claims under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim.

The student appealed and the United States Court of Appeals for the 7th Circuit held that the

> basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract. . . . It is quite clear, however, that Illinois would not

> recognize all aspects of a university-student relationship as subject to remedy through a contract action.

Id. at 416 (citations and quotation marks omitted). The *Ross* court explained that a breach of contract claim attacking the general quality of an education would be precluded. *Id.*

In order to state a claim for breach of contract, the court in *Ross* held that a plaintiff "must point to an identifiable contractual promise that the defendant failed to honor." *Id.* at 417.

> In these cases, the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all. Ruling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise.

Id. The *Ross* court read the student's complaint to

> allege more than a failure of the University to provide him with an education of a certain quality. Rather, he alleges that the University knew that he was not qualified academically to participate in its curriculum. Nevertheless, it made a specific promise that he would be able to participate in a meaningful way in that program because it would provide certain specific services to him. Finally, he alleges that the University breached its promise by reneging on its commitment to provide those services and, consequently, effectively cutting him off from *any* participation in and benefit from the University's academic program.

Id. Because the student's breach of contract claim would be an inquiry into whether Creighton "had provided any real access to its academic curriculum at all", the *Ross* court reversed the decision of the trial court and stated that "we believe that the district court can adjudicate [the student's] specific and narrow claim that he was barred from *any* participation in and benefit from [Creighton's] academic program without second-guessing the professional judgment of the University faculty on academic matters." *Id.*

In *Ryan*, the plaintiff was a resident who was "matched" with the University of North Carolina Family Practice Program ("University") under the terms of the National Residency Program based on their

respective preferences. The plaintiff and the University "entered into a one-year written contract that was renewable, upon the University's approval, each of the three years of the residency program." *Ryan*, 128 N.C. App. at 301, 494 S.E.2d at 790. The plaintiff's residency began on 1 July 1990 and sometime during the plaintiff's second year, problems arose and the University planned to terminate the residency. *Id.* The plaintiff used the internal appeal procedures and executed a contract with the University at the beginning of his third year which stated "in part that plaintiff knew he might graduate as much as six months later than the normal program." *Id.* The plaintiff graduated three months later than normal and it was undisputed that the plaintiff graduated from an accredited residency program. The plaintiff then initiated an action against the University for breach of contract, educational malpractice, intentional and negligent infliction of emotional distress, civil conspiracy, tortious interference with prospective business relationship, and self-defamation. *Id.* The trial court granted the University's motion to dismiss all claims and the plaintiff only appealed the dismissal of his breach of contract claim against the University. *Id.*

Relying on the holding in *Ross* that in order to state a claim for breach of contract, the student "must point to an identifiable contractual promise that the University failed to honor," our Court in *Ryan* held that although the plaintiff made several allegations in support of his breach of contract claim against the University, only one alleged a specific aspect of the contract that would not involve an "inquiry into the nuances of educational processes and theories." *Id.* at 302, 494 S.E.2d at 791. The plaintiff had alleged that the University breached the "Essentials of Accredited Residencies" by failing to provide a one month rotation in gynecology. Our Court held that the plaintiff had alleged facts sufficient to support his claim for breach of contract based on the University's failure to provide that one month rotation and reversed the trial court's order. *Id*. at 303, 494 S.E.2d at 791.

Defendants argue that the present case is distinguishable from *Ross* and *Ryan* because while *Ross* and *Ryan* permit a narrow breach of contract claim where a university promises certain educational services *after* enrollment, Supplee's complaint does not allege that defendants failed to provide a specific educational service. Rather, defendants assert that Supplee's argument is a negligent admission case which has already been rejected by *Ross*. We disagree with this characterization.

Based on *Ross*, Supplee's relationship with defendants was contractual in nature. Supplee signed two separate enrollment agreements on 15 December 2009 and 14 April 2010 that incorporated the terms and

conditions set forth in the MMC student catalog. The student catalog explicitly stated that students applying for admission would be "required to have a criminal history check" and that MMC "will review any applicant who has been convicted of a crime in order to determine his or her fitness for admission[.]" Therefore, the student catalog and the aforementioned term became a part of the contract between defendants and Supplee. *See Ross*, 967 F.2d at 416.

Supplee's claim for breach of contract pointed to this "identifiable contractual promise that the [defendants] failed to honor." *Ryan*, 128 N.C. App. at 302, 494 S.E.2d at 791. Supplee specifically alleged in his complaint that defendants had "failed to order, failed to review, or ignored results from the criminal background checks authorized by [Supplee] as part of the admission process." At trial, defendants conceded that although based on defendants' written policy, criminal background checks were "supposed to be conducted of new applicants" during the admissions process, defendants failed to conduct a criminal background check of Supplee during his admissions process in late 2009. Defendants also admitted that Supplee did not have a criminal background check conducted prior to the time he started the surg tech program in early 2010. Had defendants properly conducted a criminal background check of Supplee at admission in 2009, the results would have revealed his two felony charges of breaking and entering and larceny which were dismissed in 2008 and his two convictions of driving while intoxicated which occurred in 2004 and 2008. Defendants' failure to conduct a criminal background check prior to admitting Supplee was a specific aspect of the contract between defendant and Supplee that would not involve an "inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise." *Ross*, 957 F.2d at 417.

Further, defendants argue that even if a contractual duty existed, MMC could not be said to have committed a material breach of contract. Defendants assert that because Supplee initially applied to the HIT program and an enrollee's criminal background is not an "issue, concern or consideration" to complete the HIT program, even assuming *arguendo* that a contractual duty existed, a material breach could not have been committed. We reject this argument.

It is well established that "[i]n order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citation omitted).

"The question of whether a breach of contract is material is ordinarily a question for a jury." *Charlotte Motor Speedway, Inc. v. Tindall Corp.*, 195 N.C. App. 296, 302, 672 S.E.2d 691, 695 (2009).

In the case before us, evidence at trial demonstrated that defendants were aware in October 2009 that Supplee intended to pursue a degree in the surg tech program and were aware that criminal background checks were necessary for the completion of the surg tech program. Supplee testified that based on Brother's encouragement to enroll in the HIT program first and her assurance that Supplee could transfer from the HIT program into the surg tech program, Supplee initially enrolled in the HIT program. Supplee also testified that he would not have enrolled in the HIT program were it not for Brother's assurance that he would be able to transfer into the surg tech program. Once Supplee transferred into the surg tech program on 4 April 2010, defendants backdated his start date in the surg tech program to 20 January 2010. This evidence demonstrates that defendants' failure to conduct a criminal check prior to admission into either the HIT or surg tech program substantially defeated the purpose of the agreement or was a substantial failure to perform.

Viewing the foregoing evidence in the light most favorable to Supplee, there was sufficient evidence of each element of breach of contract to submit the issue to the jury. As such, we hold that the trial court did not err by denying defendants' motions for directed verdict and JNOV.

ii. Damages

[2] In their next argument, defendants contend that the trial court erred by admitting evidence of Supplee's landscaping business and the income he earned as a car salesman. Defendants argue that this evidence of lost profits and income was speculative and request a new trial on the issue of damages. We find defendants' arguments unconvincing.

> Admission of evidence is addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown. Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

Cameron v. Merisel Props., 187 N.C. App. 40, 51, 652 S.E.2d 660, 668 (2007) (citations and quotation marks omitted).

In the present case, Supplee testified that prior to enrolling at MMC, he worked as a full-time car salesman from August 2002 until October 2009 when he was laid off. After he was laid off, Supplee received unemployment compensation until the beginning of 2011. When he started school at MMC in 2010, Supplee began working as a school janitor. In 2011, after he was no longer enrolled at MMC, Supplee worked as an occasional waiter and landscaper. Supplee submitted records reflecting his taxed Social Security earnings and taxed Medicare earnings from 1994 until 2009. Supplee also presented his 2010 tax return and testified that he earned $727.00 in wages, salaries, tips, et cetera and received $16,231.00 in unemployment compensation during the period of time he was enrolled at MMC. For the year 2011, Supplee received $13,644.00 from unemployment compensation. After leaving MMC, Supplee testified that in 2011 he worked for a landscaping company by the name of Flora Landscape and earned $631.35 and also worked for Eddie Romanelli's and earned $2,048.00. Supplee further testified that he began a landscaping business in 2012 and submitted ledgers for the years 2012 through 2013 and testified as to his income in 2012 and 2013.

First, relying on *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 466 S.E.2d 324 (1996), defendants argue that evidence about Supplee's landscaping business was inadmissible because Supplee did not have an established history of profits; Supplee contended that the profits he earned after he left MMC would have been duplicated in previous years; and, Supplee made no effort to obtain sales figures and other financial data from similar landscaping businesses in the Wilmington area. Specifically, defendants contend that this evidence was too speculative.

In *McNamara*, the plaintiff leased a space to house a retail custom jewelry store at a mall owned by the defendant. *Id.* at 402, 466 S.E.2d at 326. The parties executed a five year lease and the plaintiff commenced his operations in August 1991. *Id.* at 403, 466 S.E.2d at 326-27. In January or February 1992, the defendant leased a space adjacent to the plaintiff's store to an aerobics studio and a dispute arose in regards to noise emanating from the aerobics studio. *Id.* at 403, 466 S.E.2d at 327. The plaintiff stopped paying rent after April 1992 and abandoned its leased space in December 1992. *Id.* The plaintiff sued the defendant for several claims including breach of contract. *Id.* at 403-404, 466 S.E.2d at 327. The trial court granted the defendant's motion to dismiss all claims, excluding the breach of contract claim and a jury returned a verdict in favor of the plaintiff in the amount of $110,000.00. *Id.* at 404, 466 S.E.2d at 327. On appeal, the defendant contested a denial of a requested peremptory

instruction on damages, argued that its motions for directed verdict and judgment notwithstanding the verdict should have been granted because the plaintiff did not meet his burden of proof with respect to damages, and, in the alternative, sought a new trial on the issue of damages. *Id.* at 407, 466 S.E.2d at 329. At trial, the plaintiff had confined his proof of damages solely to the issue of lost future profits and our Court provided the following:

> Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach. To recover lost profits, the claimant must prove such losses with "reasonable certainty." Although absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or speculative forecasts.

Id. at 407-408, 466 S.E.2d at 329 (citations and quotation marks omitted). Our Court found that the plaintiff did not have an established history of profits and that his evidence of lost profits consisted solely on the testimony of Dr. Craig Galbraith, a professor of management at the University of North Carolina at Wilmington. *Id.* at 408, 466 S.E.2d at 330. Agreeing with the defendants, our Court held that Dr. Galbraith's "calculations were not based upon standards that allowed the jury to determine the amount of plaintiff's lost profits with reasonable certainty." *Id.* at 409, 466 S.E.2d at 330. First, our Court found that Dr. Galbraith's estimation of the plaintiff's lost profits were based on the unsupported assumption that from January 1992 until the remaining term of the five year lease, the plaintiff's sales would have risen in a linear fashion to the point where they matched the average sales of independent national jewelers. *Id.* Rather, he relied exclusively on data from independent national jewelers without ascertaining whether these jewelers bore any similarity to plaintiff's business." *Id.* Based on the foregoing, our Court held that Dr. Galbraith's reliance on aforementioned data "rendered his calculations too conjectural to support an award of lost profits" and remanded to the trial court for a new trial on the issue of damages. *Id.* at 409-12, 466 S.E.2d at 330-32.

We find the circumstances in *McNamara* to be readily distinguishable from the facts of the present case. The *McNamara* court dealt with lost future profits, which "are difficult for a new business to calculate and prove." *Id.* at 408, 446 S.E.2d at 330 (citation omitted). In *McNamara*, the evidence to support the lost future profits of the plaintiff were held to be too conjectural for the aforementioned reasons. In the case *sub judice*, evidence regarding Supplee's landscaping business was based on

actual income earned by Supplee during the years 2012 and 2013. Most importantly, the evidence regarding Supplee's landscaping business was not used to calculate future lost profits, but was relevant to the jury's determination of whether Supplee was entitled to recover consequential damages from the defendants for breach of contract. As the trial court instructed, the jury could find that Supplee had suffered consequential damages which included Supplee's investment of his personal time as defined by his lost opportunity to earn income during his time of enrollment. Supplee testified that had he not been accepted and enrolled in MMC, he would have continued working. Therefore, evidence of the history of income he earned after his period of enrollment was relevant in the determination of consequential damages. Accordingly, we reject defendants' arguments that the trial court abused its discretion in admitting this evidence.

Second, relying on *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 356 S.E.2d 578 (1987), defendants argue that the trial court erred by admitting speculative evidence of Supplee's past income as a car salesman when Supplee failed to produce any evidence of any job offers he received while enrolled at MMC. Defendants also assert that this evidence was inadmissible because Supplee admitted he was laid off from a dealership in 2009 and did not voluntarily leave his employment to enroll in MMC; Supplee admitted that his income was declining at the time of his termination; Supplee testified that there was "no telling what [he] would have done" had he not enrolled in MMC; and, Supplee testified that after he was terminated as a car salesman, he was not returning to an automotive sales position.

In *Olivetti*, the plaintiff, a manufacturer of word processors, appealed the trial court's determination that the defendant, a dealer, was damaged by the plaintiff's misrepresentations. *Id.* at 544, 356 S.E.2d at 584. The trial court found that had it not been for the plaintiff's fraud, the defendant would have become a dealer for another manufacturer of a word processor. *Id.* The North Carolina Supreme Court held that the trial court correctly concluded that the plaintiff made material representations to the defendant, upon which the defendant reasonably relied. *Id.* at 549, 356 S.E.2d at 587. However, the Supreme Court held that "proof of damages must be made with reasonable certainty" and that "in order for [the defendant] to show that it was deprived of an opportunity to make profits, it must first show that there was in fact such an opportunity." *Id.* at 546, 356 S.E.2d at 585-86. Because there was no competent evidence in the record to support the finding made by the trial court that the defendant had such an opportunity to make profits,

the trial court's award of damages to the defendant was vacated. *Id.* at 549, 356 S.E.2d at 587.

After careful review, we find defendants' reliance on *Olivetti* misplaced. In *Olivetti*, the issue on appeal was whether there was competent evidence to support the trial court's finding that the defendant dealer would have become a dealer for another manufacturer had it not been for the plaintiff's misrepresentations. Here, the issue before our Court is whether evidence of Supplee's income as a car salesman is admissible. While the defendant in *Olivetti* sought lost future profits, Supplee's evidence of his income as a car salesman, like the evidence of Supplee's landscaping business, was relevant to the jury's determination of whether Supplee was entitled to recover consequential damages from defendants for breach of contract. Evidence of the history of Supplee's actual income earned prior to enrolling at MMC was probative in the determination of lost opportunity to earn income during his time of enrollment. As such, we reject defendants' argument that the challenged evidence was speculative and hold that the trial court did not abuse its discretion in its admission.

B. Plaintiff Supplee's Appeal

Supplee raises two issues on appeal. Whether the trial court erred by (i) striking portions of his 4 June 2013 affidavit and (ii) granting defendants' motion for summary judgment, in part.

i. Striking Supplee's Affidavit

[3] Supplee argues that the trial court erred by striking portions of his 4 June 2013 affidavit. We disagree.

"Our Court reviews the trial court's ruling on the admissibility of affidavits for an abuse of discretion." *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 592, 697 S.E.2d 338, 340 (2010).

It is well established that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting his prior sworn testimony. *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estates, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978). Our Court has held that where an affidavit contains additions and changes that are "conclusory statements or recharacterizations more favorable to plaintiffs [that] materially alter the deposition testimony in order to address gaps in the evidence necessary to survive summary judgment[,]" the trial court should properly exclude these portions of the affidavits. *Marion Partners, LLC v. Weatherspoon & Voltz, LLP*, 215 N.C. App. 357, 362, 716 S.E.2d 29, 33 (2011). "[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 own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* at 362-63, 716 S.E.2d at 33. Furthermore, "the appellant must show not only that the trial court abused its discretion in striking an affidavit, but also that prejudice resulted from that error." *Barringer v. Forsyth County*, 197 N.C. App. 238, 246, 677 S.E.2d 465, 472 (2009) (citation and quotation marks omitted).

In the case before us, Supplee was deposed on 14 May 2013. On 29 May 2013, defendants filed a motion for summary judgment. Thereafter, on 5 June 2013, Supplee filed an affidavit. On 6 June 2013, defendants filed a motion to strike Supplee's affidavit in which they argued that paragraphs four through seven, thirteen, and fifteen of Supplee's affidavit "either materially alter[ed] his deposition testimony or flatly contradict[ed] his prior sworn testimony." On 31 July 2013, the trial court entered an order striking paragraphs four through seven, thirteen, and fifteen "because they materially differ from Plaintiff Supplee's prior, sworn testimony and/or directly conflict with Plaintiff Supplee's prior, sworn testimony."

Paragraphs four through seven of Supplee's affidavit stated the following:

> 4. As part of the enrollment process, I was informed by representatives of [MMC] that a check of my criminal background would be performed.
>
> 5. As part of the enrollment process, [MMC] representatives also informed me that my acceptance into the school and any program of study I entered would be based upon the results of my criminal background check.
>
> 6. I was informed by [MMC] representatives that, in the event a conviction was found on my record during the enrollment process, [MMC] would determine whether or not I was fit for admission.
>
> 7. I agreed to submit to the criminal background check process required by [MMC] as part of the enrollment process to determine my eligibility for the school and any program of study I applied for.

During Supplee's 14 May 2013 deposition, Supplee testified that he revealed all the actions, conversations, and statements made by MMC

employees to the best of his recollection. He described his meetings with MMC's dean of education, Brothers, and Woolford and revealed the information that was discussed during those meetings. At no point during his deposition does Supplee testify that he was informed by MMC representatives that a criminal background check would be performed, that acceptance into a program would depend on the results of that criminal background check, that MMC would determine whether he was fit for admission based on the results of the criminal background check, or that he agreed to submit to the results of the criminal background check as described in paragraphs four through seven of his affidavit. We view paragraphs four through seven of Supplee's affidavit as additions that are comprised of conclusory statements or recharacterizations that are favorable to Supplee and that materially alter his prior deposition testimony. Based on the foregoing, we do not find that the trial court abused its discretion in striking these portions of Supplee's affidavit. Nonetheless, because the substance of paragraphs four through seven are independently corroborated by MMC's "Background Checks" provision included in the student catalog, which provided that students would be required to submit to a criminal history check and that MMC would review any applicant and determine their fitness for admission, we find even assuming *arguendo* that the trial court abused its discretion in striking paragraphs four through seven, Supplee has failed to show any resulting prejudice.

Paragraphs thirteen and fifteen of Supplee's affidavit provided as follows:

> 13. Prior to my dismissal from [MMC], I was never made aware by [MMC] that if I was denied access to one clinical externship facility, I would not be permitted to apply for admission to any other clinical externship facility.
>
> . . . .
>
> 15. Prior to my dismissal from [MMC], I was not aware that being denied access to a single clinical externship facility would immediately prohibit me from graduating from the Surgical Technology Program.

A review of plaintiff's deposition testimony demonstrates that he was aware that based on the results of a criminal background check, there "could be an issue . . . with the clinical sites in general[.]" However, Supplee's deposition testimony fails to indicate that he was aware that being denied to a single clinical externship facility would prohibit him

from applying for admission to another clinical externship facility or would prohibit him from graduating from the surg tech program. Thus, paragraphs thirteen and fifteen of Supplee's affidavit do not contradict or materially conflict with his prior deposition testimony; nor do they contain additions and changes that are conclusory statements or recharacterizations more favorable to Supplee that materially alter his deposition testimony. Yet, even if we were to find that the trial court abused its discretion in striking paragraphs thirteen and fifteen of Supplee's affidavit, we hold that this error was not prejudicial as the substance of the paragraphs were contained within paragraph seventeen, which was not struck by the trial court:

> 17. Had I known that the policies of a single third-party clinical site could render my investments, financial and otherwise, in a [surg tech program] degree to be of no value, I would not have enrolled in that program.

Based on the foregoing, we reject Supplee's arguments and affirm the order of the trial court, striking portions of Supplee's affidavit.

ii. Summary Judgment

In his next argument, Supplee contends that the trial court erred by granting defendants' motion for summary judgment as to Supplee's claims of fraud, unfair and deceptive trade practices (UDTP), negligent misrepresentation, and negligence.

> [W]e review the trial court's order de novo to ascertain whether summary judgment was properly entered. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 87, 747 S.E.2d 220, 226 (2013) (citation and quotation marks omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Hamby v. Profile Prods., LLC*, 197 N.C. App. 99, 105, 676 S.E.2d 594, 599 (2009) (citation omitted).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing

> through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Folmar v. Kesiah, __ N.C. App. __, __, 760 S.E.2d 365, 367 (2014) (citation omitted).

a. Fraud

[4] "[T]he essential elements of actionable fraud are: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) (citation omitted). "An unfulfilled promise is not actionable fraud, however, unless the promisor had no intention of carrying it out at the time of the promise, since this is misrepresentation of a material fact." *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 338, 713 S.E.2d 495, 503 (2011) (citation omitted).

In the present case, there are no genuine issues of material fact regarding Supplee's fraud claim because Supplee failed to present any evidence that defendants had the intent to deceive. Ned Snyder, the campus director of MMC at Wilmington, testified in a deposition that it was MMC's practice to run a criminal background check at admissions and at the clinical experience. Woolford also testified that based on MMC's written policy, criminal background checks were "supposed to be conducted of new applicants" during the admissions process. Despite defendants' policy, evidence demonstrated that defendants failed to conduct a criminal background check on Supplee prior to admissions. However, Supplee failed to present specific evidence that at the time of contract formation between Supplee and defendants, defendants had no intention of carrying out its unfulfilled promise; an essential element for a successful fraud claim. Consequently, we hold that the trial court did not err by granting defendants' motion for summary judgment as to Supplee's fraud claim.

b. UDTP

[5] "In order to prevail under [N.C. Gen. Stat. § 75-1.1(a)] plaintiffs must prove: (1) defendant committed an unfair or deceptive act or practice, (2) that the action in question was in or affecting commerce, (3) that said act proximately caused actual injury to the plaintiff." *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992). "[W]hether an action is unfair or deceptive is dependent upon the facts of each

case and its impact on the marketplace." *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998) (citations and quotation marks omitted).

> If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. "Unfairness" is a broader concept than and includes the concept of "deception." A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Mitchell v. Linville, 148 N.C. App. 71, 74, 557 S.E.2d 620, 623 (2001) (citations omitted). Furthermore, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *McInerney v. Pinehurst Area Realty, Inc.*, 162 N.C. App. 285, 289, 590 S.E.2d 313, 316-17 (2004) (citation and quotation marks omitted).

Our case law establishes that "[s]imple breach of contract . . . do[es] not qualify as unfair or deceptive acts, but rather must be characterized by some type of egregious or aggravating circumstances before the statute applies." *Norman*, 131 N.C. App. at 177, 507 S.E.2d at 273. Breach of contract accompanied by fraud or deception, on the other hand, constitutes an unfair or deceptive trade practice. *Unifour Constr. Servs. v. Bellsouth Telcoms.*, 163 N.C. App. 657, 666, 594 S.E.2d 802, 808 (2004).

In support of his UDTP claim, Supplee first argues on appeal that defendants "knowingly made false representations of material fact concerning their intent to perform background checks" and "knowingly omitted material information about the discretion of a single clinical site to unilaterally reject a student for any reason and prohibit the student from finishing the program." As previously discussed, we held that Supplee could not establish a valid claim for fraud based on Supplee's failure to produce evidence that defendants intended to deceive Supplee at the time of contract formation. A review of the record does not reveal any evidence that defendants knowingly made the alleged false representations or knowingly omitted material about a clinical sites' discretion. Necessarily, Supplee's UDTP claim under the theory of breach of contract accompanied by fraud or deception must fail as Supplee has failed to demonstrate how defendants' breach of contract was characterized by egregious or aggravating circumstances.

Second, Supplee argues that defendants engaged in an unfair practice or act when it took intentional actions amounting to an inequitable

assertion of power. Supplee contends that defendants accomplished this by immediately dismissing him from the surg tech program once a single clinical internship site rejected him. We disagree. In Supplee's own deposition, Supplee testifies as to how defendants suggested he get his criminal record expunged and then reapply to the surg tech program. Supplee further testified that defendants offered an option of transferring into another MMC curriculum at no cost to Supplee. These facts do not display an inequitable assertion of power and do not display a practice that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Rather, the case before us involves a breach of contract based on an identifiable contractual promise that defendants failed to honor. "There is nothing so oppressive or overreaching about defendant[s'] behavior in breaching the contract that would transform the case into one for an unfair trade practice." *Coble v. Richardson Corp. of Greensboro*, 71 N.C. App. 511, 520, 322 S.E.2d 817, 824 (1984). Accordingly, we affirm the trial court's granting of summary judgment in favor of defendants on Supplee's UDTP claim.

c. Negligence

[6] Supplee argues that the trial court erred by granting summary judgment in favor of defendants as to his negligence claim because defendants had a duty to conduct a criminal background check in order to determine his eligibility for admission into and completion of the surg tech program.

In order to state a claim for negligence, a plaintiff must show "(1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013) (citation omitted). In *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978), the North Carolina Supreme Court held that "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Id.* at 81, 240 S.E.2d at 350. However, the *Ports Authority* Court recognized four general categories under which a breach of contract may constitute a tort action:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other

than the property which was the subject of the contract, or was a personal injury to the promisee.

(3) The injury, proximately caused by the promisor's negligent, or willful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.

(4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Id. at 82, 240 S.E.2d at 350-51 (citations omitted).

We hold that none of the four general exceptions set forth in *Ports Authority* apply to the facts at hand. Rather, this negligence cause of action is analogous to the claim brought forward by the plaintiff in *Ross*. *See Ross*, 957 F.2d at 415 (the plaintiff alleged that a university owed him a duty "to recruit and enroll only those students reasonably qualified and able to academically perform" at the university). As held in *Ross*, we also hold that recognizing Supplee's cause of action, a "negligent admission" claim, would present difficult "problem[s] to a court attempting to define a workable duty of care." *Id.* Addressing Supplee's "negligent admission" claim would require subjective assessments as to the requirements for admission into the surg tech program, requirements for completion of the surg tech program, requirements of the clinical sites, and the results of Supplee's criminal background check. Because "[r]uling on this issue would . . . require an inquiry into the nuances of educational processes and theories," we reject his claim and affirm summary judgment in favor of defendants on this issue. *Id.* at 417.

d. Negligent Misrepresentation

[7] Lastly, Supplee argues that the trial court erred by granting summary judgment in favor of defendants on the issue of negligent misrepresentation. We do not agree.

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Howard v. County of Durham*, __ N.C. App. __, __, 748 S.E.2d 1, 7 (2013) (citation omitted).

> Under general principles of the law of torts, a breach of contract does not in and of itself provide the basis for liability in tort. Ordinarily, an action in tort must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty.

Hardin v. York Memorial Park, __ N.C. App. __, __, 730 S.E.2d 768, 775-76 (2012) (citations and quotation marks omitted).

The allegations in Supplee's complaint and the evidence before the trial court demonstrate that Supplee's claim is that defendants failed to conduct a criminal background check prior to admissions and Supplee's damages were caused by the aforementioned failure. The duty that defendants had to conduct a criminal background check arose under the terms of the contract between the parties and not by operation of law independent of the contract. As such, the breach of that contractual duty cannot provide the basis for an independent claim of negligent misrepresentation. Therefore, we hold that the trial court did not err by granting summary judgment in favor of defendants on Supplee's claim for negligent misrepresentation.

C. Mr. Nutt's Appeal

[8] On appeal, Mr. Kyle Nutt argues that the trial court erred by granting defendants' motion for sanctions. We agree.

"[A] Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *In re Small*, 201 N.C. App. 390, 394, 689 S.E.2d 482, 485 (2009) (citation omitted). We review our court's inherent authority to impose sanctions for an abuse of discretion. *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 663, 554 S.E.2d 356, 361 (2001). "In reviewing a trial court's findings of fact, our review is limited to whether there is competent evidence in the record to support the findings." *In re Key*, 182 N.C. App. 714, 717, 643 S.E.2d 452, 455 (2007) (citation omitted).

Rule 3.6 of the North Carolina Rules of Professional Conduct provides as follows:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) the information contained in a public record;
>
> (3) that an investigation of a matter is in progress;
>
> (4) the scheduling or result of any step in litigation;
>
> (5) a request for assistance in obtaining evidence and information necessary thereto[.]

N.C. Revised R. Prof'l. Conduct Rule 3.6(a) and (b). The comment section to Rule 3.6 states that a "relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive." N.C. Revised R. Prof'l. Conduct Rule 3.6 cmt.

North Carolina Rules of Professional Conduct Rule 3.3, entitled "Candor Toward the Tribunal," provides that "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" N.C. Revised R. Prof'l. Conduct Rule 3.3(a)(1).

On 27 January 2014, the trial court entered an order on defendants' motion for sanctions and/or appropriate relief. The trial court made the following pertinent findings of fact:

> 7. . . . Plaintiffs moved pursuant to Rule 42 for an order granting each Plaintiff a separate trial.
>
> 8. In that motion, [Mr. Nutt] represented, among other things, that: (1) the respective Plaintiffs had "vastly different" criminal records; (2) the charges that "led to each Plaintiffs' dismissal were entirely different"; (3) the Plaintiffs' damages "were different in amount, time

period, and nature"; (4) there were "significant factual differences" between the Plaintiffs' respective breach of contract claims; (5) Supplee "has decided to appeal the Court's Summary Judgment Order"; (6) Thomas, "due to the greatly different factual difference in her case and desire to reach a final adjudication in a more timely manner, has expressed her intent to proceed directly to trial"; and (7) it would be "prejudicial and inconvenient for Plaintiff Thomas to be forced to wait for the outcome of the appeal of Plaintiff Supplee's distinctly separate case." . . . .

. . . .

11. Mr. Nutt [] moved to have Supplee's claim tried first, despite representing to this Court that Thomas desired to have her claim adjudicated in a more timely manner. The Honorable Phyllis M. Gorham . . . permitted Supplee's trial to proceed before Thomas' trial.

12. Supplee's breach of contract claim came on for trial on October 28, 2013, before the undersigned Superior Court Judge. Thomas' trial was scheduled for November 18, 2013, which was also to be heard by the undersigned[.]

13. The jury returned a verdict in favor of Supplee on November 1, 2013, in the amount of $53,481. . . .

14. The jury's verdict sheet did not identify the basis for the award (i.e., whether damages were awarded based on evidence of tuition paid, lost wages, or some combination thereof).

15. On or about November 3, 2013, WECT posted a story on its website disclosing that Mr. Supplee had prevailed on his breach of contract claim in the amount of $53,481, and that the damages were based upon "wasted tuition and lost income opportunities[.]" . . . .

16. The alleged basis for the damages, "wasted tuition and lost income opportunities[,]" is not a matter of public record.

17. Mr. Nutt acknowledged to this Court that he supplied the information to WECT for the article.

18. Mr. Nutt was reported in the article as stating that "the school was contractually obligated to screen their applicants' criminal backgrounds to make sure all potential students could eventually graduate from healthcare degree programs w[h]ere certain offenses the school was aware of could potentially prevent students from completing required coursework at hospitals."

19. The specific statements attributed to Mr. Nutt by WECT were not found on the jury's verdict sheet.

20. Mr. Nutt also informed WECT that "the school offered Supplee $25,000 at the start of trial to end the matter, but then removed the offer midway through trial."

21. The settlement amount and withdrawal of the offer was an inadmissible settlement communication, and was likewise not a matter of public record.

22. In the WECT article, Mr. Nutt stated that "his firm is representing another student going to trial over similar claims this month."

. . . .

24. Mr. Nutt represented to WECT that Thomas' case was "similar" to Mr. Supplee's claims, while Mr. Nutt represented and has maintained before this Court that the two Plaintiffs present divergent and distinct fact patterns that necessitated two trials.

. . . .

29. Mr. Nutt's comments created a substantial risk of prejudicing the Thomas jury, and were in violation of Rule 3.6(a) of the North Carolina Rules of Professional Conduct.

30. Partially as a result of Mr. Nutt's comments to the news media, Defendants settled Thomas' case and avoided a trial, did not pursue their counterclaim against Thomas[.]

Based on the foregoing, the trial court concluded that Mr. Nutt had violated Rule 3.6 of the North Carolina Rules of Professional Conduct "by making extrajudicial statements to the news media" and that

Mr. Nutt "knew or reasonably should have known that the extrajudicial statements he made would be disseminated by means of public communication and would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The trial court also concluded that Mr. Nutt either violated Rule 3.6 or Rule 3.3, or both, when he either misrepresented the difference in the plaintiffs' claims or knew or should have known that their cases were not "similar."

First, Mr. Nutt argues that his statements made to the media, excluding his statement concerning the settlement offer made to Supplee, were protected by the "safe harbor" provisions of Rule 3.6(b). Here, the trial court found in findings of fact numbers fifteen through nineteen that Mr. Nutt's extrajudicial comments included stating the basis of the damages awarded by the jury and stating that the defendants were contractually obligated to screen their applicants' criminal backgrounds to ensure all potential students could successfully complete healthcare degree programs. The trial court found that these statements were not a matter of public record. After thoughtful review, we find that the jury's award of damages and the amount of damages were clearly a matter of public record. Mr. Nutt's extrajudicial statement stating that the basis of damages was "wasted tuition and lost income opportunities" qualifies under Rule 3.6(b), as it pertained to Supplee's claim. Supplee's claim against defendants were specifically for damages based on expenses spent to enroll and participate in classes at MMC and for "forsaken income-earning opportunities." These claims, contained in Supplee's 21 August 2012 complaint, were matters of public record. Mr. Nutt's statement that defendants were "contractually obligated to screen their applicants' criminal backgrounds" also involves the claim involved in the present case, and therefore, are among the subjects a lawyer may state extrajudicially. Thus, we hold that the trial court abused its discretion by finding that the aforementioned statements were sanctionable under Rule 3.6.

We now address the trial court's finding of fact number twenty through twenty-one regarding Mr. Nutt's extrajudicial statement that defendants made Supplee a $25,000 settlement offer at the start of the trial, which was later removed midway through the trial. The trial court found that this statement was an inadmissible settlement communication and not a matter of public record. Rule 3.6 requires that a lawyer "who is participating or has participated in the investigation or litigation of a matter" may not make an extrajudicial statement that he knows "will have a substantial likelihood of materially prejudicing an adjudicative proceeding *in the matter*." N.C. Revised R. Prof'l Conduct Rule 3.6(a). (emphasis added). Here, the trial court found that Mr. Nutt's statements

were made on 3 November 2013, two days after a jury returned a verdict in favor of Supplee. Therefore, we conclude that Mr. Nutt's extrajudicial statement could not have had a substantially likelihood of materially prejudicing Supplee's proceeding as it had already concluded and find that the trial court abused its discretion in finding that this statement violated Rule 3.6.

Next, Mr. Nutt argues that the trial court erred by entering finding of fact number thirty and we agree. Finding of fact number thirty provided that partially based on Mr. Nutt's extrajudicial statements, defendants settled in Thomas' case and avoided a trial. We find nothing in the record to support this finding. Mr. Nutt merely stated in his statements to the media that "his firm was representing another student going to trial over similar claims this month" and did not identify Thomas by name. Additional information about Thomas' claims would have been a matter of public record.

Lastly, Mr. Nutt asserts that the trial court erred by finding that his extrajudicial statements violated Rule 3.3 of the North Carolina Rules of Professional Conduct. Here, the trial court based its finding of a violation of Rule 3.3 on the fact that while Mr. Nutt represented to the trial court that Supplee's and Thomas' cases "present[ed] divergent and distinct fact patterns that necessitated two trials[,]" Mr. Nutt represented to the media that Thomas' case was "similar" to Supplee's claims. We conclude that these two representations are not contradictory and do not constitute a "false statement" under Rule 3.3. It is clear from the record that Supplee and Thomas' 21 August 2012 joint complaint alleged the same legal claims against defendants and that after the 31 July 2013 summary judgment order, the only claim at issue in both Supplee and Thomas' trials was breach of contract. Mr. Nutt's representations to the media that Supplee and Thomas had similar claims and Mr. Nutt's representations to the trial court that Supplee and Thomas's cases had "divergent and distinct fact patterns" are not mutually exclusive. Stating that two cases have similar claims as well as "divergent and distinct fact patterns" does not represent a lack of candor toward the tribunal in violation of Rule 3.3.

Based on the foregoing, we hold that the trial court abused its discretion by holding that Mr. Nutt either violated Rule 3.6 or Rule 3.3, or both, and reverse the trial court's 27 January 2014 order on defendants' motion for sanctions.

III. Conclusion

We affirm the 20 December 2013 order of the trial court denying defendants' motions for directed verdict and judgment notwithstanding the verdict and hold that the trial court did not abuse its discretion by admitting evidence of Supplee's landscaping business and income earned as a car salesman. We hold that the trial court did not abuse its discretion by striking portions of Supplee's affidavit and affirm the 31 July 2013 order of the trial court granting defendants' motion for summary judgment, in part. We reverse the 27 January 2014 order on defendants' motion for sanctions.

Affirmed in part; reversed in part.

Judges CALABRIA and STEELMAN concur.

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WACHOVIA BANK, N.A., PLAINTIFF
v.
EDNA S. COLEMAN A/K/A EDNA COLEMAN, ET AL., DEFENDANTS

No. COA14-683

Filed 3 February 2015

1. Appeal and Error—issue not raised below—choice of statute of limitations

The applicable statute of limitations for a reformation claim arising from a foreclosure was the three-year statute of limitations for fraud or mistake, which both parties relied on at trial, rather than the ten-year statute of limitations for sealed instruments which plaintiff raised for the first time on appeal. The Court of Appeals declined to exercise its discretion to suspend the Appellate Rules.

2. Statutes of Limitation and Repose—accrual—due diligence—double checking deed of trust description—question for jury

In a claim for reformation of a deed of trust, summary judgment was not appropriate on defendant's due diligence statute of limitations defense where the statute of limitations for fraud or mistake applied. This statute of limitations is triggered when the plaintiff discovered or should have discovered the mistake in the exercise of due diligence. Whether a plaintiff exercised due diligence is ordinarily a question for the jury.

3. Laches—reformation of deed of trust—delay in discovering mistake—reasonableness an issue of fact

In an action for reformation of a deed of trust arising from a foreclosure, defendants' laches defense raised issues of fact that could not be resolved at summary judgment. The evidence plaintiff presented was sufficient to create a genuine issue of material fact concerning whether its delay in discovering the mistake was reasonable.

4. Estates—non-claim statute—reformation of deed of trust not barred

A claim for reforming a deed of trusting arising from a foreclosure was not barred by the non-claim statute, N.C.G.S. § 28A-19-3(a) (2013). The non-claim statute does not preclude actions that seek to effectuate and enforce a deed of trust.

5. Reformation of Instruments—due diligence—not required

Reformation is available where a legal instrument does not express the true intentions of the parties due to mutual mistake or the mistake of the draftsman. Although defendants argued that summary judgment was appropriate on the merits because plaintiff did not use reasonable diligence in drafting the deed of trust, there is no reasonable diligence requirement in an action for reformation based on mutual mistake. Since defendants' statute of limitations and laches defenses raise issues of fact that cannot be resolved at summary judgment, the trial court's entry of summary judgment was reversed and the case remanded.

Appeal by plaintiff from order entered 20 February 2014 by Judge A. Robinson Hassell in Davidson County Superior Court. Heard in the Court of Appeals 20 October 2014.

Womble Carlyle Sandridge & Rice, LLP, by Kenneth B. Oettinger, Jr., Chad Ewing, and Lee Davis Williams, for plaintiff-appellant.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for defendant-appellee.

DIETZ, Judge.

In 2007, Robert and Edna Coleman refinanced their home mortgage through Wells Fargo Bank, N.A. (then Wachovia Bank). The Colemans' home is situated on two lots adjacent to another two empty, undeveloped

lots. The deed of trust prepared by Wachovia listed the correct street address for the Coleman home, but mistakenly referenced the book and page number and tax parcel ID of the adjacent, undeveloped lots.

In 2010, Wells Fargo attempted to foreclose on the property and discovered, for the first time, the mistaken references in the deed of trust. Wells Fargo sought reformation of the instrument on the ground of mutual mistake. Defendants Edna Coleman and the Estate of Ronald Coleman (who passed away) moved for summary judgment, arguing that had Wells Fargo acted with reasonable diligence, it would have immediately discovered the error. Defendants also argued that the reformation claim is barred by the statute of limitations, the equitable doctrine of laches, and the non-claim statute. The trial court granted Defendants' motion for summary judgment.

We reverse and remand this case for further proceedings. A claim for reformation does not require proof that the party seeking reformation acted with reasonable diligence. Indeed, even if the mistake was the result of negligence or neglect, a trial court still has the authority to reform the instrument if there is clear, cogent, and convincing evidence that the mutual mistake prevents the instrument from embodying the parties' actual, original agreement. Likewise, this action is one to enforce a deed of trust, with the reformation claim a necessary part of that enforcement effort. Thus, the non-claim statute, which bars certain untimely claims against a decedent's estate, does not apply.

Finally, with respect to the statute of limitations and laches defenses, there are genuine issues of material fact that preclude entry of summary judgment. Both defenses turn on when Wells Fargo should have discovered the mistake in the exercise of reasonable or due diligence. There is competing evidence on this issue and it must be resolved by a jury. Accordingly, we reverse the trial court's entry of summary judgment and remand for further proceedings.

Facts and Procedural History

Defendants Edna S. Coleman and the Estate of Ronald G. Coleman own lots 42, 43, 44, and 45 in the Rockland Shores Estates subdivision in Davidson County, North Carolina. Although the lots are neighboring, they are of considerably different value. Mr. Coleman acquired lots 42 and 43, which are commonly known as 167 Lakeview Drive, Linwood, North Carolina, on 3 March 1987. This property is improved with a single-family home and had a tax value of $95,000 at the time the complaint was filed in this action. Mr. Coleman and his wife acquired lots 44 and 45 on 24 September 1996. This unimproved property is located adjacent

to the developed property and had a tax value of $11,900 at the time the complaint was filed.

On 19 January 2007, Mr. Coleman borrowed money from Wells Fargo's predecessor in interest, Wachovia Bank, N.A., in the principal amount of $138,567.00. A promissory note was completed that same day, secured by a deed of trust executed by both Mr. and Mrs. Coleman. The deed of trust, prepared by Wachovia and recorded in the Davidson County Registry on 8 February 2007, identified the property as:

> All that real property situated in the County of Davidson, State of North Carolina:
>
> Being the same property conveyed to the Grantor by Deed recorded in Book 1007, Page 1013, Davidson County Registry, to which deed reference is hereby made for a more particular description of this property.
>
> Property Address: 167 Lakeview Drive
>
> Parcel ID: 06-027-A-000-0044

The property address in the deed of trust identifies the developed property on lots 42 and 43, but the book and page description and the parcel ID identify the unimproved property on lots 44 and 45.

About a month before the deed of trust was executed, Wachovia obtained an appraisal of the developed property in connection with its loan to Mr. Coleman. That appraisal estimated the property's value at $215,000 as of 15 December 2006. The report specifically identified lot 42 and recites "Deed Book: 5700 Page: 664" as the legal description of the property being appraised. Although the Davidson County Register of Deeds does not have a book 5700, the deed at book 570, page 664 refers to lots 42 and 43, the developed property on which the Colemans built their home. Wachovia did not obtain an appraisal of the adjacent, undeveloped property.

Defendants applied approximately $131,699.27 of the loan to pay off their existing mortgage on the developed property. Sadly, Mr. Coleman died on 28 October 2008. Mrs. Coleman notified Wachovia shortly after her husband's death. In addition, as administratrix of the Ronald G. Coleman Estate, Mrs. Coleman provided notice to creditors through publication in a local newspaper on four dates throughout January and February 2009.

Wells Fargo acquired the loan at issue in this case on or about 20 March 2010, when it obtained substantially all of Wachovia's assets by

way of merger. After the Coleman Estate defaulted on its payment obligations under the terms of the note, Wells Fargo initiated foreclosure proceedings in Davidson County on 8 December 2010. Defendants contested the foreclosure proceedings on the ground that the deed of trust contained the legal description of the unimproved property, rather than the developed property upon which Wells Fargo sought to foreclose.

Wells Fargo voluntarily dismissed the foreclosure proceedings and instituted this action seeking reformation of the deed of trust and judicial foreclosure of the developed property. In the alternative, Wells Fargo sought a declaratory judgment or equitable lien and judicial foreclosure of the undeveloped property described in the deed of trust.

Both parties moved for summary judgment. At the hearing, the parties agreed that there were no contested issues of material fact and that their respective arguments were based on "basically the same information." Defendants argued that Wells Fargo was barred from relief by the statute of limitations, laches, lack of reasonable diligence, and the nonclaim statute.

Without specifying the grounds on which it based its judgment, the superior court entered an order granting Defendants' motion for summary judgment and dismissing Wells Fargo's claims with prejudice. Wells Fargo timely appealed.

Analysis

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). In ruling on a motion for summary judgment, the trial court has no authority to resolve factual issues and must deny the motion if there is any genuine issue of material fact. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Id.* (internal quotation marks omitted). An issue of fact is genuine where supported by substantial evidence, and "is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). This Court reviews appeals from summary judgment *de novo*. *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011).

I. Timeliness of Wells Fargo's Claims

A. Statute of Limitations

[1] Defendants argue that Wells Fargo's reformation claim is barred by the statute of limitations. To address this argument, we must first determine which statute of limitations to apply in this appeal. In the trial court, both parties relied entirely on the three-year statute of limitations "[f]or relief on the ground of fraud or mistake" under N.C. Gen. Stat. § 1-52(9) (2013). On appeal, Wells Fargo argues for the first time that the ten-year statute of limitations applicable to sealed instruments, N.C. Gen. Stat. § 1-47(2), is the proper limitations statute for this action.

Wells Fargo concedes that this argument was not raised below, but asks this Court in its discretion to suspend the Appellate Rules and permit the company to raise the argument for the first time on appeal. We decline to do so and find this argument waived on appeal.[1] *See* N.C. R. App. P. 10 (2013); *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal."). We therefore apply the three-year statute of limitations in N.C. Gen. Stat. § 1-52(9).

[2] An order granting summary judgment "based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). For a claim based on fraud or mistake subject to section 1-52(9), "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9). A plaintiff "discovers" the mistake—and therefore triggers the running of the three-year limitations period—when he actually learns of its existence or should have discovered the mistake in the exercise of due diligence. *See Hyde v. Taylo*r, 70 N.C. App. 523, 528, 320 S.E.2d 904, 908 (1984).

Our case law is clear that the question of whether a plaintiff has exercised due diligence is ordinarily one for the jury. *See*, *e.g.*, *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163. "This is particularly true when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524, 649

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1. Our finding of waiver on appeal does not bar the trial court from addressing this issue on remand.

S.E.2d at 386. Thus, where there is a dispute of material fact concerning when the plaintiff should have discovered the mistake in the exercise of due diligence, summary judgment is inappropriate, and the case must be submitted to a jury. *See Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001).

Defendants argue that Wells Fargo should have discovered the mistake in the deed of trust at the time it was executed and recorded, more than three years prior to the filing of this action. They argue that Wells Fargo, in the exercise of due diligence, should have cross-referenced the legal description in the loan documents with the description contained in the Davidson County Registry. Although the deed of trust listed the correct street address of the developed property, the book and page number and parcel ID number referenced the undeveloped property. Defendants also contend that Wells Fargo should have discovered discrepancies between the information in the deed of trust and the same information in the appraisal report (which contained the correct book and page number for the developed property, albeit with an apparent typo). Defendants maintain that, had Wells Fargo done any of this follow-up diligence, it would have discovered the mistake. Thus, Defendants assert that they have shown as a matter of law that Wells Fargo failed to exercise due diligence. We disagree.

Our Supreme Court, applying N.C. Gen. Stat. § 1-52(9), has held that "the mere registration of a deed, containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud, will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations." *Vail v. Vail*, 233 N.C. 109, 117, 63 S.E.2d 202, 208 (1951). Instead, "there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to the discovery of the facts constituting the fraud."[2] *Id.*

In other words, the mere fact that there were indications of fraud or mistake on the face of the document does not trigger the statute of limitations as a matter of law. Instead, the running of the limitations period turns on the factual determination of when, in the exercise of due diligence, the party reasonably should have been expected to follow up and ultimately discover the mistake. This is a factual determination that ordinarily must be resolved by a jury. *See id.* at 118, 63 S.E.2d at 209.

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2. Section 1-52(9) applies equally to both fraud and mutual mistake.

This Court confirmed the *Vail* holding in *Huss*, where we reversed the trial court's grant of summary judgment in a reformation case based on the statute of limitations. 31 N.C. App. at 467-68, 230 S.E.2d at 163. In *Huss*, a litigant petitioned for a partition sale of real property allegedly owned by her and her ex-husband as tenants in common. *Id.* at 465, 230 S.E.2d at 161. The ex-husband sought reformation, arguing that the inclusion of his wife's name on the deed was the result of a mutual mistake, and that he had specifically requested assurances from the grantors of the property that it would be recorded solely in his name. *Id.* The husband conceded that he did not even read the deed. Nevertheless, this Court held that "[w]hether failure to read a deed will bar relief depends on the facts and circumstances in each case" and that it was for the jury to determine what constituted the exercise of due diligence on those particular facts. *Id.* at 468, 230 S.E.2d at 163.

Under *Vail* and *Huss*, summary judgment is inappropriate in this case. The deed of trust listed the correct street address of the developed property. Although the legal description was not accurate, that mistake would have been discovered only if Wells Fargo had double-checked the accuracy of the book and page description and the parcel ID, which would have disclosed the mistaken references to the adjacent, undeveloped property. Wells Fargo maintains that, given the accurate property address, its failure to immediately double-check the legal description and discover the mistake was not unreasonable. Under *Vail* and *Huss*, whether this type of double-checking would be necessary "in the exercise of due diligence," and at what point it should have taken place, are factual determinations that cannot be resolved at summary judgment. Accordingly, we hold that summary judgment was not appropriate based on Defendants' statute of limitations defense.

B. Laches

[3] Defendants next argue that summary judgment was appropriate because Wells Fargo's claims are barred by the equitable doctrine of laches. As with Defendants' statute of limitations defense, we hold that their laches defense raises issues of fact that cannot be resolved at summary judgment.

"The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton*, 211 N.C. App. at 88-89, 712 S.E.2d at 230 (internal quotation marks omitted). "Delay which will constitute laches depends upon the facts and circumstances of each case. When

the action is not barred by the statute, equity will not bar relief except upon special facts demanding extraordinary relief." *Huss*, 31 N.C. App. at 469, 230 S.E.2d at 163.

Laches is an affirmative defense which must be pleaded, and the burden of proof is on the party asserting the defense. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). To succeed on the defense of laches, the defendant must show that the delay "resulted in some change in the condition of the property or the relation of the parties." *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001). "[T]he mere passage or lapse of time is insufficient to support a finding of laches; for the doctrine of laches to be sustained, the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke it." *Taylor*, 290 N.C. at 622-23, 227 S.E.2d at 584-85.

Here, Defendants failed to show that they are entitled to summary judgment on the issue of laches. On the question of whether the delay was reasonable, Wells Fargo forecast evidence explaining its delay in seeking reformation, including the fact that the street address on the deed of trust correctly referenced the developed property. It was only the book and page numbers and the parcel ID that allegedly were mistaken, and those mistakes were not apparent on the face of the document. Reasonableness is a quintessential fact issue, *see Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983), and the evidence Wells Fargo presented in this case is sufficient to create a genuine issue of material fact concerning whether its delay in discovering the mistake was reasonable. Accordingly, Defendants' laches defense cannot be resolved at summary judgment.

C. Non-Claim Statute

[4] Defendants next argue that because Wells Fargo failed to present its reformation claim within the statutory window to present claims against a decedent's estate, this cause of action is barred by the non-claim statute, N.C. Gen. Stat. § 28A-19-3(a) (2013). We reject this argument because the non-claim statute does not preclude actions that seek to effectuate and enforce a deed of trust.

Like a statute of limitations, the non-claim statute works to limit the time in which a claimant may bring the suit against a decedent's estate. *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 196 N.C. App. 376, 386-87, 675 S.E.2d 122, 129 (2009). The purpose of the non-claim statute is "to provide faster and less costly procedures for administering estates" by allowing the personal representative to efficiently identify all claims

against the estate and requiring that creditors present their claims within a specified time frame. *Id.* at 387, 675 S.E.2d at 129. However, the statute balances these interests in efficiency against the rights of real property creditors, explicitly providing that "[n]othing in this section affects or prevents any action or proceeding to enforce any mortgage, deed of trust, pledge, lien (including judgment lien), or other security interest upon any property of the decedent's estate, but no deficiency judgment will be allowed if the provisions of this section are not complied with." N.C. Gen. Stat. § 28A-19-3(g).

This is an action to "enforce . . . [a] deed of trust." Wells Fargo expressly seeks enforcement of the deed of trust at issue in this case, and its claim for reformation of the deed of trust—seeking to correct an alleged mutual mistake preventing enforcement—is a necessary part of the overall enforcement action. Accordingly, we hold that the non-claim statute does not apply and thus cannot support the trial court's entry of summary judgment.

II. Wells Fargo's Claim for Reformation

[5] Finally, we address the merits of Wells Fargo's reformation claim. "Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by fraud of the other, the written instrument fails to embody the parties' actual, original agreement." *Metropolitan Prop. & Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997). Where a legal instrument does not express the true intentions of the parties due to mutual mistake or the mistake of the draftsman, reformation is available. *McBride v. Johnson Oil & Tractor Co.*, 52 N.C. App. 513, 515, 279 S.E.2d 117, 119 (1981).

On appeal, Defendants argue that summary judgment was appropriate on the merits based entirely on a single legal argument: that reformation is impermissible because Wells Fargo did not use "reasonable diligence" in drafting the deed of trust. As explained above, there is a fact dispute concerning whether Wells Fargo used reasonable diligence, and thus summary judgment would be inappropriate on this ground. But there is a more fundamental flaw in Defendants' argument: there is no "reasonable diligence" requirement in an action for reformation based on mutual mistake.

A mutual mistake is one that is shared by both parties to the contract, "wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the

written instrument designed to embody such agreement." *Dillard*, 126 N.C. App. at 798, 487 S.E.2d at 159. A party seeking reformation on the ground of mutual mistake must prove that the parties agreed upon a material stipulation to be included in the written instrument, that the stipulation was omitted by the parties' mistake, and that because of the mistake, the written instrument does not express the parties' intention. *See Branch Banking & Trust Co. v. Chicago Title Ins. Co.*, 214 N.C. App. 459, 464, 714 S.E.2d 514, 518 (2011). The party seeking reformation must prove the existence of the mutual mistake by "clear, cogent and convincing evidence." *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981); *see also Durham v. Creech*, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977).

Notably, "[n]egligence on the part of one party which induces the mistake does not preclude a finding of mutual mistake." *Dillard*, 126 N.C. App. at 798, 487 S.E.2d at 159 (brackets omitted). In *Dillard*, for example, the defendant provided the wrong street number on his application for a property insurance policy. *Id.* at 797-98, 487 S.E.2d at 158-59. This Court affirmed reformation of the policy to cover the correct property address despite the fact that the policyholder's own neglect caused the mistake. *Id.* at 799, 487 S.E.2d at 159. And in *Huss*, as explained above, a husband claimed that his ex-wife's name was mistakenly included on a deed to his property. *Huss*, 31 N.C. App. at 465, 230 S.E.2d at 161. The husband conceded that the existence of his ex-wife's name was apparent on the face of the deed, and admitted that he did not even read the deed. *Id.* We nevertheless concluded that he had stated a claim for reformation, explaining that "[i]t is not required that the pleader allege facts as to how and why the mutual mistake came about." *Id.* at 467, 230 S.E.2d at 162.

Simply put, a party seeking reformation of a written instrument need not allege or prove that the mutual mistake was a reasonable or neglect-free mistake. Even if the mistake resulted from that party's failure to exercise reasonable diligence, reformation is available if there is clear, cogent, and convincing evidence that the mistake was a mutual one and that it prevents the instrument from embodying the parties' actual, original agreement. *Dillard*, 126 N.C. App. at 798-99, 487 S.E.2d at 159; *see also* 25A Strong's N.C. Index 4th Reformation of Instruments § 1, at 82 (2006).

Here, Wells Fargo presented uncontested evidence that the deed of trust includes the correct property address of the developed property. The appraisal conducted during the loan origination process was performed on the developed property. Defendants applied the vast majority of the loan to pay off their existing mortgage on that developed property.

Finally, and most importantly, Defendants did not forecast any evidence at trial tending to show that the deed of trust was intended to reference the undeveloped, empty lots.

Because Defendants have not forecast any evidence to rebut Wells Fargo's showing of mutual mistake, Wells Fargo is entitled to reformation unless Defendants prevail on one of their defenses. As discussed above, Defendants' statute of limitations and laches defenses raise issues of fact that cannot be resolved at summary judgment. Accordingly, we reverse the trial court's entry of summary judgment and remand this case for further proceedings below.

Conclusion

For the reasons set forth above, there are material issues of fact precluding resolution of this case as a matter of law. Accordingly, we reverse the trial court's entry of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 FEBRUARY 2015)

GUIDING LIGHT MISSIONARY BAPTIST ASS'N, INC. v. MT. ZION BAPTIST CHURCH No. 14-750	Rowan (12CVS270)	Reversed and Remanded in Part, Dismissed in Part
HARTLINE v. HARTLINE No. 14-837	Jackson (12CVS707)	Affirmed
IN RE J.F. No. 14-867	McDowell (10JA72-75)	Affirmed
MACON BANK, INC. v. CORNBLUM No. 14-631	Swain (11CVS225)	Affirmed
OLATOYE v. BURLINGTON COAT FACTORY WAREHOUSE CORP. No. 14-590	Durham (12CVS5611)	Vacated and Remanded in Part, Affirmed in Part
PEEPLES v. PEEPLES No. 14-1026	Rowan (13CVD1202)	Affirmed
STATE v. KING No. 14-996	Onslow (13CRS50792-94)	No Error
STATE v. LEONARD No. 14-182	Rowan (09CRS51935) (10CRS55545)	Affirmed
WILSON v. CONLEYS CREEK LTD. P'SHIP No. 14-823	Jackson (12CVS196)	No Prejudicial Error

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