239 N.C. App.—No. 3 Pages 252-468

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 7, 2017

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
LINDA STEPHENS
DONNA S. STROUD
ROBERT N. HUNTER, JR.
J. DOUGLAS McCULLOUGH
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
WENDY M. ENOCHS[1]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL. JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JOHN S. ARROWOOD
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.[2]
MARTHA GEER[3]

[1] Appointed 1 August 2016. [2] Retired 30 June 2015. [3]Retired 13 May 2016.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
SHELLEY LUCAS EDWARDS[4]

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[4] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 17 FEBRUARY 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

APPEAL AND ERROR

Appeal and Error—appealability—subject matter jurisdiction—denial of motion to dismiss—substantial right affected—The denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the North Carolina Workers' Compensation Act is immediately appealable as affecting a substantial right. **Bowden v. Young, 287.**

Appeal and Error—failure to raise constitutional issue at trial—no plain error review—The Court of Appeals dismissed defendant's argument that the trial court committed plain error by admitting a video recording containing defendant's request for a lawyer. Constitutional issues not raised at trial may not be raised for the first time before the Court of Appeals—even for plain error review. **State v. Houser, 410.**

Appeal and Error—frivolous appeal—sanctions—In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, defendant-Suntrust's motion for sanctions against plaintiff-ACC and its counsel for a frivolous appeal was granted. ACC and its appellate counsel were ordered to pay the costs and reasonable expenses, including reasonable attorneys' fees, incurred by SunTrust in the appeal. **ACC Constr., Inc. v. SunTrust Mortg., Inc., 252.**

Appeal and Error—interlocutory orders—substantial right—A preliminary injunction order compelling the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers affected a substantial right because defendants alleged that the notices contained confidential information and disclosure could result in a loss of federal administrative funding. Therefore, the interlocutory order was immediately appealable. **Wilson v. N.C. Dep't of Comm., 456.**

Appeal and Error—interlocutory orders—substantial right—just compensation—inverse condemnation—Because the Court of Appeals has previously held that an order granting partial summary judgment on the issue of North Carolina Department of Transportation's liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right, it considered the merits of the issues on appeal. **Kirby v. N.C. Dep't of Transp., 345.**

Appeal and Error—issue preservation—In an action by a bank to collect a deficiency on a loan debt following a foreclosure sale, defendant guarantor preserved his argument that he was not liable for the deficiency under N.C.G.S. § 45-21.36. **Branch Banking & Tr. Co. v. Smith, 293.**

Appeal and Error—mootness—effect of statutory amendment—A statutory amendment did not render plaintiffs' appeal of an interlocutory order moot. The amendment did not provide plaintiffs the relief they sought—the disclosure of daily hearing notices from the Division of Employment Security prior to the statutory amendment and attorney fees. **Wilson v. N.C. Dep't of Commerce, 456.**

Appeal and Error—notice of appeal—termination of parental rights—order ceasing reunification order—not designated—In a child neglect and dependency proceeding, the Court of Appeals denied DSS's motion to dismiss the appeal and respondent's petition for a writ of certiorari where DSS contended that

respondent had not designated the order ceasing reunification in her notice of appeal. Respondent's parental rights were terminated in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was identified as an issue in the record on appeal. **In re H.D., 318.**

Appeal and Error—record on appeal—failure to include transcripts—sufficiency of findings of fact—Although defendant wife challenged several specific findings by the trial court as unsupported by the evidence in an equitable distribution case, the Court of Appeals (COA) could not address defendant's arguments because the record on appeal did not include the transcripts of the proceedings in which the trial court heard the relevant evidence. Even though this was the fourth time this case had come before the COA, nothing in our appellate rules excused litigants from assembling a complete record simply because portions of that record may have been submitted to this Court in previous appeals years earlier. **Bodie v. Bodie, 281.**

ATTORNEYS

Attorneys—fees—amount awarded as sanction—calculation—In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err or abuse its discretion in calculating the amount of attorney fees it awarded as sanctions in conjunction with plaintiff-ACC's frivolous lawsuit. Although ACC was correct that the amount of attorneys' fees awarded in the sanctions order is more than double the amount that defendant-SunTrust's counsel stated he was seeking, the trial court's award was well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged here in relation to those customarily charged for similar work by attorneys of similar experience and skill. **ACC Constr., Inc. v. SunTrust Mortg., Inc., 252.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—adjudication—findings—sufficient—The unchallenged findings were sufficient in a child dependency and neglect proceeding to support the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2). **In re H.D., 318.**

Child Abuse, Dependency, and Neglect—change of permanent plan to adoption—order ceasing reunification orders included—In a child neglect and dependency proceeding, the Court of Appeals heard respondent's appeal from an order changing a permanent plan to adoption, which respondent addressed as an order ceasing reunification efforts, even though the order did not explicitly cease reunification efforts or require DSS to file a motion terminating parental rights. As a practical matter, the order ceased reunification efforts. **In re H.D., 318.**

Child Abuse, Dependency, and Neglect—continued reunification efforts futile—findings sufficient—The findings in a child neglect and dependency proceeding were sufficient where respondent contended that the court relieved DSS of its duty to seek reunification without first finding that continued efforts would be futile or inconsistent with the children's welfare. The findings, particularly the pending criminal charges, indicated repeated failures at creating an acceptable and safe living environment. **In re H.D., 318.**

a junior lienholder, the procedural history of the first action clearly demonstrates that ACC could and should have brought these claims in its prior lawsuit. Simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*. **ACC Constr., Inc. v. SunTrust Mortg., Inc., 252.**

Collateral Estoppel and Res Judicata—priorities between debts—claim of new injury—opportunities to protect rights not taken—In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, *res judicata* bared plaintiff-ACC's current claims for unjust enrichment and constructive trust despite plaintiff's argument that the claims arose from a new and distinct injury. Even though ACC's original lawsuit was filed before SunTrust initiated foreclosure proceedings and it could not have then claimed surplus proceeds, SunTrust initiated its foreclosure proceedings one month later, which provided ACC with ample notice of the need to protect its rights as a junior lienholder and more than a year to do so, given the timing of the foreclosure sale. ACC could and should have sought to protect its rights as a junior lienholder in *ACC I*. **ACC Constr., Inc. v. SunTrust Mortg., Inc., 252.**

CONSPIRACY

Conspiracy—larceny—evidence sufficient—There was sufficient evidence that a jury could return a verdict of guilty on a conspiracy to commit larceny charge where the conviction for felonious larceny was vacated due to erroneously admitted evidence of the value of the property. Defendant testified that he did not steal "the right kind of shirts that [the woman he was with] wanted" and that he went to Belk "with the guy that I know by the name of Chicago" with the intent of "tak[ing] anything I could get my hands on." Defendant pled guilty to being an habitual felon. **State v. Snead, 439.**

CONSTITUTIONAL LAW

Constitutional Law—failure to consider request for appointment of counsel—failure to meet burden of showing materiality—The trial court did not err in a robbery with a dangerous weapon, first-degree rape, possession of a firearm by a felon, two counts of first-degree sexual offense, crime against nature, first-degree kidnapping, and felony possession of cocaine case by failing to consider defendant's request for the appointment of counsel pursuant to N.C.G.S. § 15A-269(c). Defendant failed to meet his burden of showing materiality under N.C.G.S. § 15A-269(a)(1), and thus, was not entitled to the appointment of counsel. **State v. Turner, 450.**

COSTS

Costs—non-justiciable action—sanctions—In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err in imposing sanctions pursuant to N.C.G.S. § 6-21.5 based on its determination that plaintiff-ACC's claims raised no justiciable issues. **ACC Constr., Inc. v. SunTrust Mortg., Inc., 252.**

CRIMINAL LAW

Criminal Law—motion for DNA testing—incorrect theory of law given for dismissal—ruling upheld—The trial court did not err in a robbery with a dangerous weapon, first-degree rape, possession of a firearm by a felon, two counts of first-

Workers' Compensation—handling of claim—intentional infliction of emotional distress action—Industrial Commission—exclusive jurisdiction—The trial court's denial of a Rule 12(b)(1) motion to dismiss claims of intentional timing of emotional distress and bad faith by defendant insurer First Liberty handling a Workers' Compensation case was reversed and remanded for entry of an order dismissing plaintiff's claims for lack of subject matter jurisdiction. The exclusive jurisdiction of the Industrial Commission includes not only work-related injuries but also any claims that are "ancillary" to the original compensable injury and these "ancillary" claims include mishandling of plaintiff's workers' compensation claim and causing some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies. Although plaintiff Bowden is correct that intentional torts generally fall outside the scope of the Workers' Compensation Act, it has been repeatedly held that *all* claims concerning the processing and handling of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct is intentional or not. **Bowden v. Young, 287.**

Workers' Compensation—sufficiency of findings—exposure to asbestos—The Industrial Commission did not err in a workers' compensation case by finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. Findings of fact #3, #7, and #14 supported it. **Patton v. Sears Roebuck & Co., 370.**

SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2017:

January 9 and 23

February 6 and 20

March 6 and 20

April 3 and 17

May 1 and 15

June 5

July None

August 7 and 21

September 4 and 18

October 2, 16 and 30

November 13 and 27

December 11

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

ACC CONSTR., INC. v. SUNTRUST MORTG., INC.

[239 N.C. App. 252 (2015)]

ACC CONSTRUCTION, INC., PLAINTIFF
v.
SUNTRUST MORTGAGE, INC., JACKIE MILLER, TRUSTEE OF SUNTRUST MORTGAGE, INC., AND SUBSTITUTE TRUSTEE SERVICES, INC., AS TRUSTEE OF SUNTRUST MORTGAGE, INC., DEFENDANTS

No. COA14-789

Filed 17 February 2015

1. Collateral Estoppel and Res Judicata—debt priorities—prior action—identity of causes of action

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err by dismissing Plaintiff's (ACC) amended complaint based on *res judicata*. The only essential element of *res judicata* in question was whether there was an identity of causes of action. The issue could have been addressed in the first appeal, but ACC failed to prosecute the appeal and it was dismissed. ACC's argument amounts to a collateral attack on the trial court's judgment, which is not allowed. Furthermore, the Court of Appeals declined to allow ACC to rewrite the order in a way that distorts the procedural history of the litigation.

2. Collateral Estoppel and Res Judicata—lack of final judgment—plaintiff could have brought claims

Plaintiff's (ACC) claims in this action would still be barred by *res judicata* even if the doctrine of instantaneous seisin applied, as plaintiff argued. Despite the lack of a final judgment on the merits regarding ACC's rights as a junior lienholder, the procedural history of the first action clearly demonstrates that ACC could and should have brought these claims in its prior lawsuit. Simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*.

3. Collateral Estoppel and Res Judicata—priorities between debts—claim of new injury—opportunities to protect rights not taken

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, *res judicata* bared plaintiff-ACC's current claims for unjust enrichment and constructive trust despite plaintiff's argument that the claims arose from a new and distinct injury. Even though ACC's original lawsuit was filed before SunTrust initiated foreclosure proceedings

and it could not have then claimed surplus proceeds, SunTrust initiated its foreclosure proceedings one month later, which provided ACC with ample notice of the need to protect its rights as a junior lienholder and more than a year to do so, given the timing of the foreclosure sale. ACC could and should have sought to protect its rights as a junior lienholder in *ACC I*.

4. Costs—non-justiciable action—sanctions

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err in imposing sanctions pursuant to N.C.G.S. § 6-21.5 based on its determination that plaintiff-ACC's claims raised no justiciable issues.

5. Pleadings—Rule 11 sanctions—action brought for improper purpose

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err by awarding sanctions under Rule 11 based on its conclusion that ACC brought this action for an improper purpose. The fact that SunTrust did not specifically ask for Rule 11 sanctions based on the improper purpose prong is immaterial and the trial court's imposition of sanctions was sufficiently supported by its extensive findings of fact.

6. Attorneys—fees—amount awarded as sanction—calculation

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, the trial court did not err or abuse its discretion in calculating the amount of attorney fees it awarded as sanctions in conjunction with plaintiff-ACC's frivolous lawsuit. Although ACC was correct that the amount of attorneys' fees awarded in the sanctions order is more than double the amount that defendant-SunTrust's counsel stated he was seeking, the trial court's award was well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged here in relation to those customarily charged for similar work by attorneys of similar experience and skill.

7. Appeal and Error—frivolous appeal—sanctions

In an action with a complicated procedural history to determine the priorities between a mechanics lien and a deed of trust, defendant-Suntrust's motion for sanctions against plaintiff-ACC and

its counsel for a frivolous appeal was granted. ACC and its appellate counsel were ordered to pay the costs and reasonable expenses, including reasonable attorneys' fees, incurred by SunTrust in the appeal.

Appeal by Plaintiff from orders entered 3 March 2014 by Judge Marvin P. Pope, Jr., in Henderson County Superior Court. Heard in the Court of Appeals 20 November 2014.

Karolyi-Reynolds, PLLC, by James O. Reynolds, for Plaintiff.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV and Katie M. Iams, for Defendants.

STEPHENS, Judge.

This appeal arises from a long-standing dispute between Plaintiff ACC Construction, Inc. ("ACC") and Defendant SunTrust Mortgage, Inc. ("SunTrust") over the respective priorities of ACC's mechanic's claim of lien and SunTrust's deed of trust against a property generally known as Lot 3 of Rebecca's Pond subdivision in Henderson County ("the Property"). The procedural history stretches back over the course of multiple lawsuits to 2009. In the present case, ACC challenges the trial court's decision to grant SunTrust's Rule 12(b)(6) motion to dismiss ACC's claims for unjust enrichment and constructive trust based on *res judicata*, as well as the trial court's award of attorneys' fees to SunTrust as a sanction against ACC for bringing non-justiciable claims for an improper purpose. After careful consideration, we affirm the trial court's decision and grant SunTrust's motion for Rule 34 sanctions against ACC for prosecution of this frivolous appeal.

I. Facts and procedural history

In 2007, Christopher and Susan Wall ("the Walls") obtained a $765,000.00 loan from SunTrust to acquire the Property and build a house on it. The Property was originally owned by GHC Land Development, LLC, which transferred it to NC Land Finders, LLC by deed dated 3 April 2007. NC Land Finders then executed a deed conveying the property to the Walls on 5 April 2007 at a purchase price of $165,000.00. That same day, the Walls executed a deed of trust in favor of SunTrust. The deed from NC Land Finders to the Walls and the deed of trust from the Walls to SunTrust were both recorded in the Henderson County Registry on 13 April 2007. However, it was subsequently discovered that although

it had been executed, the deed conveying the Property from GHC to NC Land Finders had not been recorded, thus leaving a record gap in the chain of title. To correct this issue, the GHC deed was recorded in the Henderson County Registry on 16 May 2007. Out of an abundance of caution, the deed from NC Land Finders to the Walls and the deed of trust from the Walls to SunTrust were re-recorded on 18 September 2007.

The Walls hired ACC to build a house on the Property. On 12 June 2007, ACC began furnishing labor and materials. ACC completed construction in January 2009, but claimed that it had not been fully paid for the work it performed. On 20 January 2009, ACC filed a claim of lien against the Property in the amount of $296,513.71. Later in 2009, the Walls also defaulted on their debt to SunTrust by failing to make payments as due.

On 6 July 2009, ACC filed a lawsuit ("*ACC I*") in Henderson County Superior Court against the Walls and SunTrust to enforce its claim of lien and also seeking damages for breach of contract and recovery in *quantum meruit*. On 6 August 2009, SunTrust instituted a foreclosure special proceeding pursuant to its deed of trust in Henderson County Superior Court.

On 18 August 2009, ACC amended its complaint in *ACC I* to include a fourth cause of action for "Declaratory Judgment to Quiet Title and Motion for Injunctive Relief." In its amended complaint, ACC contended that its lien had priority over SunTrust's deed of trust, which ACC argued was void due to a defect in the Property's chain of title because at the time of its original execution in April 2007, the deed conveying the Property from GHC to NC Land Finders had not yet been recorded. Thus, ACC asked the court to enjoin the foreclosure, declare that ACC's lien held priority, declare "the rights, interests, and priorities of ACC and SunTrust as creditor[s] of the Walls," and declare "the rights, interests, and priorities of the parties in and to [the Property]."

That same day, in response to SunTrust's initiation of foreclosure proceedings, ACC's President Gene Carswell—who is also a principal member-manager of GHC—executed a verification of a "Petition to Determine Lien Priorities and to Determine Disposition of Funds Upon Foreclosure Sale, and to Enjoin Foreclosure Sale." This petition, which was subsequently filed on 1 September 2009, requested that the court determine the respective lien priorities between ACC and SunTrust and determine how the foreclosure proceeds should be distributed. Here, however, ACC offered a different theory for its lien priority, contending that although SunTrust had a valid lien, it was only up to the

amount of the purchase price because it did not attach to the Property until the 18 September 2007 re-recording, and therefore "SunTrust's lien has priority over ACC's lien to the extent of $165,000.00 which was the purchase price of [the Property]. ACC's lien has priority over SunTrust's lien to the extent of disbursements made by SunTrust from construction loan proceeds in excess of $165,000.00." ACC further argued:

> 23. . . . SunTrust is entitled to receive the first $165,000.00 from the foreclosure sale proceeds after costs and taxes. Next, ACC is entitled to receive $179,998.01 from the foreclosure proceeds. Then, SunTrust is entitled to receive the balance of the foreclosure proceeds.
>
> . . . .
>
> 28. ACC needs for this court to determine how the sales proceeds from the foreclosure of [the Property] should be distributed upon completion of the foreclosure sale of [the Property].
>
> 29. ACC needs for this court to order the distribution of $179,998.01 to ACC from the sales proceed[s] of the foreclosure sale of [the Property].

Although ACC set a hearing on its foreclosure petition for 16 September 2009, the record does not indicate what happened at that hearing. In any event, on 30 August 2010, the assistant clerk of Henderson County Superior Court entered an order finding that SunTrust's deed of trust represented a valid debt and permitting SunTrust to proceed with its foreclosure sale of the Property, with a sale date set for 20 September 2010.

On 17 September 2010, ACC filed a separate action against SunTrust and the Walls seeking a preliminary and permanent injunction of the foreclosure sale and specifically asking for the court to determine "the rights of the parties with respect to the Claim of Lien and any proceeds which may arise from the foreclosure of [the Property]." This time, ACC argued that due to the aforementioned recording irregularities, it should be considered the senior lienholder against the Property under the theory that SunTrust did not acquire a valid lien to the Property until 18 September 2007. A hearing on ACC's request for injunctive relief was held on 27 September 2010—after the scheduled foreclosure sale but before the expiration of the upset-bid period—and, after the court denied that request by written order dated 30 September 2010, ACC voluntarily dismissed that action. The court did, however, grant ACC's Rule 60 motion to reinstate its claims from *ACC I*, which had previously

been voluntarily dismissed with prejudice on motion from ACC's former counsel prior to the termination of her representation in the matter.

The foreclosure sale for the Property was held as planned on 20 September 2010, and SunTrust was the winning bidder with a bid of $616,250.00. On 1 October 2010, the foreclosure trustee executed a notarized letter stating that the foreclosure sale proceeds had been distributed and "the original note involved in the above captioned foreclosure has been credited with the sum of $612,569.83 representing the full amount of the proceeds of the sale less allowable costs and fees." The trustee's final report was audited and approved by the Henderson County clerk of court on 12 October 2010. That same day, ACC filed notice of dismissal without prejudice regarding the fourth cause of action in its amended complaint in *ACC I* for "Declaratory Judgment to Quiet Title and Motion for Injunctive Relief."

On 15 August 2011, SunTrust moved for summary judgment in *ACC I*. At the hearing, SunTrust argued that its deed of trust should have priority over the foreclosure proceeds because it was recorded before ACC ever provided any work on the Property, that any irregularities in the chain of title were immaterial because ACC had sufficient notice thereof, and that the subsequent September 2007 re-recording had no impact on lien priorities. For its part, ACC urged that its lien should have first priority because SunTrust's deed of trust was not recorded within the Property's chain of title until September 2007, after ACC's lien had already attached. At one point during the hearing, the trial court[1] inquired:

> THE COURT: What happens if any of this money was used to purchase the real property? Then what doctrine comes into play?
>
> [ACC's counsel]: I don't think there's any doctrine that comes into play in that situation, Your Honor. I'm not aware of any.
>
> THE COURT: What about the doctrine of instantaneous seisin?
>
> [ACC's counsel]: The doctrine of instantaneous seisin would not be applicable here, Your Honor, because it is not a true purchase money deed of trust. . . .

1. The Honorable Gary M. Gavenus, Superior Court Judge, presided over this hearing.

After further discussion, during which ACC continued to deny the applicability of the doctrine of instantaneous seisin while insisting on a stringent application of our State's recording statutes, the trial court directed the parties' attention to this Court's holding in *West Durham Lumber Co. v. Meadows*, 179 N.C. App. 347, 635 S.E.2d 301 (2006), *disc. review denied*, 361 N.C. 704, 655 S.E.2d 404 (2007), noting:

> THE COURT: I'll give you this case and you all can go look at it. . . . It's not as confusing as this case. The scenario is very similar. There was a deed and a deed of trust, a purchase money deed of trust, only part of it being a purchase money deed of trust. The lumber company actually provided materials to the property prior to the deed and the deed of trust being recorded, and the [C]ourt held that the deed of trust had priority.

Toward the end of the hearing, the court inquired whether ACC was seeking any surplus proceeds from the foreclosure sale:

> THE COURT: But let me ask you this. As regards to this foreclosure proceeding, does [ACC] seek any alleged surplus at the foreclosure sale?
>
> [ACC's counsel]: I don't think there was any surplus, Your Honor.
>
> [SunTrust's counsel]: Not to my knowledge, Your Honor. I think it was a credit bid for the amount of the loan.
>
> [ACC's counsel]: The bank bid in at the sale the amount that it was owed, so there's no surplus to be had.
>
> [SunTrust's counsel]: Thus the lawsuit.
>
> THE COURT: I understand that.

On 13 September 2011, the trial court entered an order granting summary judgment to SunTrust. In its conclusions of law, the court concluded that:

> 1. [SunTrust's] Deed of Trust has priority over [ACC's] Claim of Lien.
>
> 2. The Foreclosure Action wiped out [ACC's] Claim of Lien.

ACC initiated an appeal of the summary judgment order to this Court. However, that appeal was dismissed by the trial court for failure to

prosecute. ACC then filed a Stipulation of Dismissal as to all claims against the Walls and attempted to file a new notice of appeal, which was ultimately dismissed by this Court in December 2012 prior to reaching the merits.

The present case arises from a complaint ACC filed on 11 October 2013, and amended on 9 December 2013, against SunTrust in Henderson County Superior Court for unjust enrichment and a constructive trust. This time, the theory behind ACC's lawsuit was that under the doctrine of instantaneous seisin, its rights as a junior lienholder had been violated because

> . . . the lien created by [SunTrust's] Deed of Trust is superior to ACC's claim of lien, as a matter of law, but only to the extent that funds were used to purchase real property, and that once SunTrust[] recovered its initial outlay for the Walls' purchase of real property, the remaining funds should have been used to satisfy ACC's junior claim of lien.

Thus, ACC requested that SunTrust "be ordered to convey to ACC funds sufficient to satisfy its claim of lien on [the Property]." SunTrust responded by filing a motion to dismiss and a motion for sanctions, arguing that ACC's claim was frivolous, unwarranted by existing law, and barred by *res judicata*.

During a hearing held on 17 February 2014, SunTrust argued in support of its motions that: (1) ACC had ample opportunity during the course of the prior litigation to raise its claims as a junior lienholder but failed to do so; (2) ACC had previously stated it was not seeking any surplus funds from the foreclosure sale and in fact denied that any surplus existed, and should therefore be estopped from arguing to the contrary; (3) nothing in the 13 September 2011 summary judgment order indicated that the doctrine of instantaneous seisin applied in this case; (4) even assuming *arguendo* that the doctrine did apply and ACC was a junior lienholder with a valid claim for surplus proceeds from the foreclosure sale, it was now barred from recovery because it failed to timely claim those proceeds from the clerk of court, which *West Durham Lumber* held was a mandatory prerequisite for aggrieved junior lienholders; and (5) given this case's factual similarity to *West Durham Lumber*, ACC should have known its attempt to raise these claims in a subsequent lawsuit would be barred by *res judicata*.

For its part, ACC argued that: (1) the doctrine of instantaneous seisin was the only possible rationale for the 13 September 2011 summary judgment order in favor of SunTrust, which meant ACC was entitled to

apply the foreclosure sale surplus proceeds to satisfy its junior lien; (2) ACC suffered a new, distinct injury when the trustee failed to deposit the surplus proceeds with the clerk of court; and (3) ACC was not required to include its claims as an aggrieved junior lienholder in *ACC I*, and therefore *res judicata* did not apply, because its original complaint was filed before SunTrust initiated the foreclosure proceedings that gave rise to its aforementioned injury. Toward the end of the hearing, the trial court expressed concern that ACC's new lawsuit amounted to a collateral attack on the 13 September 2011 order granting summary judgment to SunTrust in *ACC I*:

> And frankly, I was—when I read this, I was really surprised concerning the—the previous rulings in the case. In particular, the [13 September 2011 summary judgment order], where the court found the deed of trust has priority over the claim of lien and foreclosure action wiped out the claim of lien. Because to seek what you are asking for would require as a practical matter that that order be disregarded to give you money after all of this has been said and done in Judge Gavenus's order. Whether you go by theory of estoppel, instantaneous seisin, whatever, it required setting aside that and saying, well, your lien has priority because of unjust enrichment or any other reason. That in effect is setting aside the order which I don't think I have authority to do. So that's what troubled me about the case.

On 3 March 2014, the trial court granted both SunTrust's motion to dismiss and its motion for sanctions in separate written orders. In its order granting SunTrust's motion for sanctions pursuant to North Carolina Rule of Civil Procedure 11 and section 6-21.5 of our General Statutes, the court found as facts and concluded as a matter of law that the 13 September 2011 summary judgment order in *ACC I* was binding and final between the parties and that, in light of that order, ACC's subsequent lawsuit was frivolous, facially implausible, presented no justiciable issues, and was brought "for an improper purpose, including the harassment of SunTrust and the needless increase in the cost of litigation." Consequently, the trial court concluded that SunTrust was entitled to an award of sanctions against ACC for $19,045.50 in attorneys' fees. ACC gave written notice of appeal on 12 March 2014. On 12 September 2014, pursuant to Rule 34(a) of our Rules of Appellate Procedure, SunTrust filed a motion with this Court designated "Defendant-Appellee SunTrust Mortgage, Inc.'s Motion for Sanctions" and, by order dated 29 September 2014, that motion was referred to this panel.

II. Analysis

A. Motion to dismiss and res judicata

[1] ACC first argues that the trial court erred in dismissing its amended complaint based on *res judicata*. Specifically, ACC contends that its amended complaint states valid equitable claims available to it as a junior lienholder for surplus proceeds from a foreclosure sale under the doctrine of instantaneous seisin. We disagree.

On a Rule 12(b)(6) motion to dismiss, the question is

> whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. We consider [the] plaintiff's complaint to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognized claim.

Allred v. Capital Area Soccer League, Inc., 194 N.C. App. 280, 282-83, 669 S.E.2d 777, 778-79 (2008) (citations and internal quotation marks omitted). This Court's review of the trial court's granting of a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*. *Id.* at 283, 669 S.E.2d at 779.

In the present case, the trial court's order granting SunTrust's motion for sanctions makes clear that it granted SunTrust's Rule 12(b)(6) motion to dismiss based on *res judicata*. The doctrine of *res judicata* "precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction." *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (2005). "The purpose of the doctrine of *res judicata* is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994). In that sense, the doctrine of *res judicata* works in conjunction with other legal and equitable doctrines that preserve the integrity and finality of judgments by prohibiting collateral attacks and estopping litigants from intentionally adopting self-contradictory positions to

gain unfair advantage. *See, e.g.*, *State v. Cortez*, __ N.C. App. __, __, 747 S.E.2d 346, 358 (2013) ("A collateral attack upon a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. North Carolina does not allow collateral attacks on judgments.") (citations, internal quotation marks, and brackets omitted); *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) ("Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts and the judicial process. . . . It is to prevent litigants from playing fast and loose with the courts and deliberately changing positions according to the exigencies of the moment. Thus, judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation. The doctrine prevents the use of intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.") (citations, internal quotation marks, and brackets omitted). In order to successfully assert the doctrine of *res judicata*, a litigant must prove three essential elements: "(1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits." *Moody*, 169 N.C. App. at 84, 609 S.E.2d at 262.

Here, because SunTrust was previously granted summary judgment against ACC in *ACC I* and that judgment became final when ACC's appeal was dismissed by this Court, the only essential element of *res judicata* in question is whether there is an identity of causes of action. Under *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). "[S]ubsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*," *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993), because "the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined, but also as to all matters which could properly have been litigated and determined in the former action or proceeding." *Fickley v. Greystone Enters., Inc.*, 140 N.C. App. 258, 260, 536 S.E.2d 331, 333 (2000) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery[.]" *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

ACC contends that there is no identity of causes between *ACC I* and the present case for two related reasons. First, ACC argues that because the 13 September 2011 summary judgment order did not address its rights as a junior lienholder, there was never any final judgment on the merits to bar its claims for unjust enrichment and a constructive trust. Second, ACC argues that these claims arose from a new and distinct injury—namely, the trustee's distribution of the entirety of the foreclosure sale's proceeds to SunTrust instead of depositing the surplus with the clerk of court —that did not occur until well after ACC filed its original lawsuit. After careful consideration, we are not persuaded by either of ACC's arguments.

We note first that ACC's current lawsuit revolves around a flawed premise—specifically, that the 13 September 2011 summary judgment order was based on the doctrine of instantaneous seisin. ACC argues that the doctrine of instantaneous seisin is the only possible rationale for the court's conclusion that SunTrust's deed of trust has priority over its claim of lien, which was extinguished by the foreclosure of the Property. In support of this argument, ACC cites the trial court's discussion of the doctrine and its reference to this Court's decision in *West Durham Lumber* during the 15 August 2011 hearing.

As the trial court noted during that hearing, the facts in the present case are very similar to those in *West Durham Lumber*. In that case, Central Carolina Bank ("CCB") loaned a homebuilder $560,000.00 to finance the construction of a home, with $112,000.00 of that amount used to purchase the real property. 179 N.C. App. at 349-50, 635 S.E.2d at 302-03. The plaintiff, West Durham Lumber, first furnished materials for the construction of the home before the deed of trust securing the loan was ever recorded. *Id.* at 349, 635 S.E.2d at 302. When the homebuilder eventually defaulted on its payments, CCB initiated foreclosure proceedings and was the winning bidder at the foreclosure sale with a bid of $425,000.00. *Id.* at 350, 635 S.E.2d at 303. After the foreclosure sale, West Durham Lumber sued to enforce its lien claim and have its lien declared senior to CCB's lien, and the trial court ruled in its favor. *Id.* The bank appealed and on review, this Court held even though CCB's deed of trust was recorded after West Durham Lumber's lien attached with its first furnishing of materials, CCB still had first priority in the amount of $112,000.00 for the purchase price of the property based on the doctrine of instantaneous seisin. *Id.* at 354, 635 S.E.2d at 305. Moreover, we held that CCB's foreclosure had wiped out West Durham Lumber's junior lien, and that in order to recover anything West Durham Lumber was required to comply with the procedure mandated by N.C.

Gen. Stat. § 44A-13 to enforce its lien and also file a petition for recovery of surplus proceeds with the clerk of court as required by N.C. Gen. Stat. § 45-21.31. *Id.* at 355, 635 S.E.2d at 306. Because West Durham Lumber did not file any claim for surplus proceeds with the clerk, we held that it failed to perfect its claim and was blocked from recovery. *Id.*

West Durham Lumber then filed a second lawsuit against CCB (which by that time had merged with SunTrust) asserting claims for unjust enrichment and constructive trust under the theory that the bank should never have received all the foreclosure sale proceeds. *See West Durham Lumber Co. v. SunTrust Bank*, __ N.C. App. __, 673 S.E.2d 883 (2009) (unpublished), *available at* 2009 WL 678748 ("*West Durham Lumber II*"). When SunTrust moved for dismissal based on *res judicata*, West Durham Lumber argued that its claims should not be barred because they arose after the first lawsuit was filed and were separate and distinct from its claim for lien priority and enforcement against the real property. *Id.* at *1. The trial court rejected West Durham Lumber's argument and granted SunTrust's motion for dismissal. *Id.* On appeal, this Court affirmed that decision. Because West Durham Lumber should have included a claim for surplus proceeds in the prior litigation but failed to do so, its subsequent lawsuit was barred because "simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*." *Id.* at *2.

ACC's argument in the present case presumes that the doctrine of instantaneous seisin applies here just as it did in *West Durham Lumber*. However, ACC's argument is not supported by the 13 September 2011 summary judgment order, which does not mention the doctrine of instantaneous seisin or provide any indication that the trial court believed it was applicable to the underlying facts in this matter. Instead, the order simply concludes that

> 1. [SunTrust's] Deed of Trust has priority over [ACC's] Claim of Lien.
>
> 2. The Foreclosure Action wiped out [ACC's] Claim of Lien.

While ACC insists that the doctrine of instantaneous seisin is the only possible rationale for finding that SunTrust's deed of trust held priority over its claim of lien, the transcript from the 15 August 2011 hearing demonstrates otherwise. For example, SunTrust argued that its deed of trust should have priority over ACC's lien because it was recorded before ACC ever furnished labor or materials to the Property, and that ACC's lien was therefore extinguished by the foreclosure. SunTrust also

cited our Supreme Court's decision in *City of Durham v. Pollard*, 219 N.C. 750, 14 S.E.2d 818 (1941), which suggests that ACC is not the kind of party that our State's recording statute aims to protect. For its part, ACC denied that the doctrine of instantaneous seisin applied and insisted that its claim of lien held first priority. ACC also explicitly stated that it was not seeking any surplus proceeds from the foreclosure sale. Moreover, at the close of the hearing, the trial court requested that the parties submit briefs regarding whether this Court's holding in *West Durham Lumber* should control the outcome. However, the subsequent summary judgment order is devoid of any reference to either *West Durham Lumber* or the doctrine of instantaneous seisin.

In the present case, ACC argued during the 17 February 2014 hearing that SunTrust had actually accepted that the doctrine applied in this case because it submitted a brief after the 15 August 2011 hearing that included an argument in the alternative to that effect, with the implication being that SunTrust should be estopped from changing positions now to argue that it does not. But by ACC's own logic, it too should be estopped from arguing for the doctrine's application, given its express denial during the 15 August 2011 hearing that it was seeking any surplus proceeds and this Court's long-standing prohibition against self-serving changes of position. *See Price*, 169 N.C. App. at 191, 609 S.E.2d at 452. In any event, ACC could have addressed this issue in its appeal as of right to this Court in *ACC I*, but that appeal was dismissed after ACC failed to prosecute it. Therefore, ACC's argument in the present case that the *ACC I* summary judgment order was based on the doctrine of instantaneous seisin basically amounts to an attempt to collaterally attack the trial court's judgment, which is strictly barred under North Carolina law, *see Cortez*, __ N.C. App. at __, 747 S.E.2d at 358, and we emphatically decline to allow ACC to rewrite the order in a way that distorts the procedural history of this litigation.

[2] Even assuming *arguendo* that the doctrine of instantaneous seisin did apply in the present case, ACC's claims would still be barred by *res judicata*. ACC first contends that *res judicata* is inapplicable because there was never any final judgment on the merits in *ACC I* regarding ACC's rights to claim surplus proceeds as a junior lienholder. This may be true, but it does not mean ACC had no opportunity to include these claims in its prior litigation. In fact, ACC even acknowledges that at various points in the proceedings it actually did assert claims that could have resolved these issues. On the one hand, in its amended complaint in *ACC I*, ACC sought a declaratory judgment to quiet title and determine the parties' lien priorities. ACC likewise asked for a determination

of lien priorities when it filed for an injunction to block SunTrust from foreclosing on the Property. On the other hand, in the petition it filed in response to SunTrust's initiation of foreclosure proceedings, ACC not only requested a determination of lien priorities but also asserted the rights of a junior lienholder under the doctrine of instantaneous seisin, contending "SunTrust's lien has priority over ACC's lien to the extent of $165,000.00 which was the purchase price of [the Property]. ACC's lien has priority over SunTrust's lien to the extent of disbursements made by SunTrust from construction loan proceeds in excess of $165,000.00." However, ACC eventually took voluntary dismissals on each of these claims, which ACC now relies on as the lynchpin of its argument that the 13 September 2011 summary judgment order did not constitute a final judgment on the merits regarding its rights to claim surplus proceeds as a junior lienholder. Nevertheless, it is well established that, "[a] party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery," *Rodgers Builders, Inc.*, 76 N.C. App. at 23, 331 S.E.2d at 730, and that therefore under the doctrine of *res judicata*, "all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded." *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428, 349 S.E.2d at 556. Thus, despite the lack of a final judgment on the merits regarding ACC's rights as a junior lienholder, the procedural history of *ACC I* clearly demonstrates that ACC could and should have brought these claims in its prior lawsuit. Therefore, just as we held in *West Durham Lumber II*, ACC's current lawsuit is barred because "simply asserting a new legal theory or seeking a different remedy does not circumvent the application of *res judicata*." __ N.C. App. at __, 673 S.E.2d 883 at *2.

[3] ACC also argues that *res judicata* does not bar its current claims for unjust enrichment and constructive trust because these arose from a new and distinct injury—namely, the trustee's distribution of the entirety of the foreclosure sale's proceeds to SunTrust instead of depositing the surplus with the clerk of court. This Court previously rejected a similar argument by the unsuccessful plaintiffs in *West Durham Lumber II*. ACC admits that both the underlying facts and the theory behind its appeal are nearly identical to those in *West Durham Lumber II*, but it attempts to distinguish its case by focusing on the timing of its original lawsuit. Specifically, ACC emphasizes that, unlike the unsuccessful plaintiffs in the *West Durham Lumber* litigation who sued after the foreclosure sale was completed, ACC's original lawsuit was filed *before* SunTrust initiated foreclosure proceedings, which were not completed until over a year later. Thus, unlike in *West Durham Lumber*, ACC had

no opportunity to claim the surplus proceeds from the clerk of court prior to filing *ACC I*, and was further injured after the foreclosure sale because the trustee gave everything to SunTrust, thereby giving rise to ACC's current equitable claims, for which ACC insists it had no recourse as an aggrieved junior lienholder for pursuing other than this lawsuit, given the statutory limitations on the clerk of court's authority discussed by our Supreme Court in *In re Vogler Realty, Inc.*, 365 N.C. 389, 722 S.E.2d 459 (2012). Finally, ACC contends that its claims should not be barred by *res judicata* because, despite the similarities between this case and *West Durham Lumber II*, the latter should have no binding effect here since it was an unpublished opinion, and because *ACC I* was predicated on a good-faith belief that its lien held first priority and ACC should not have been required to amend its complaint or alter its argument when there is no North Carolina authority that explicitly requires a party to amend the party's complaint after litigation has been ongoing for a period in excess of a year when a new cause of action arises from a separate injury.

ACC may be correct that North Carolina law does not explicitly require a party to amend the party's complaint in order to avoid the effect of *res judicata* on a subsequently arising claim. Nevertheless, that does not necessarily mean that *res judicata* is inapplicable here. We are not persuaded by ACC's attempt to distinguish this case from *West Durham Lumber II*. ACC's argument fails because it ignores the fact that although ACC may not have been able to claim surplus proceeds from the clerk of court when it filed its original lawsuit on 6 July 2009, SunTrust initiated its foreclosure proceedings one month later on 6 August 2009, which provided ACC with ample notice of the need to protect its rights as a junior lienholder and more than a year to do so, given the timing of the foreclosure sale. Indeed, the procedural history of *ACC I*—specifically, the amended complaint ACC filed less than two weeks after SunTrust initiated foreclosure proceedings against the Property, as well as the petition it filed the very same day in response to those foreclosure proceedings—demonstrates that ACC clearly contemplated the need to protect its rights as a junior lienholder. What makes this case so similar to *West Durham Lumber II*, regardless of any minor differences in the timing of ACC's original lawsuit, is the fact that ACC failed to take the necessary steps to protect its rights as a junior lienholder. In that sense, given this Court's long-standing recognition that a party must bring forth the party's whole case at one time, ACC's current equitable claims and the issue of when they arose are entirely beside the point. ACC could and should have sought to protect its rights as a junior lienholder in *ACC I*. If anything, ACC's failure to exercise basic due diligence is even more egregious in the present case, given that

West Durham Lumber I made clear that junior lienholders must carefully follow the proper procedures in order to recover surplus proceeds, while *West Durham Lumber II* made clear that this Court will not bail out those who fail to do so by suspending the operation of *res judicata* to grant them a second bite at the apple. ACC is correct that as an unpublished opinion, *West Durham Lumber II* does not control the outcome of the present case. But given the extensive attention both parties focused on the *West Durham Lumber* litigation in their arguments to the trial court, ACC certainly had notice that its claims could be similarly barred, especially since there was nothing particularly novel about this Court's *res judicata* analysis in *West Durham Lumber II*. While that case is not binding on our decision here, we reach the same conclusion. ACC cannot circumvent the application of *res judicata* by seeking a different remedy and asserting a new theory for a claim that could and should have been resolved in *ACC I*. Accordingly, we hold that the trial court did not err in granting SunTrust's Rule 12(b)(6) motion to dismiss.

B. Sanctions

ACC also contends that the trial court erred in awarding $19,045.50 in attorneys' fees as sanctions to SunTrust pursuant to N.C. Gen. Stat. § 6-21.5 and North Carolina Rule of Civil Procedure 11. In support of this claim, ACC offers several arguments, all of which are meritless.

1. Sanctions pursuant to N.C. Gen. Stat. § 6-21.5

[4] First, ACC argues that the award of sanctions is unwarranted under N.C. Gen. Stat. § 6-21.5 because its claims were meritorious. We disagree.

Section 6-21.5 allows the trial court to award "reasonable attorney[s'] fees to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5 (2013). This statute requires the trial court to review "all relevant pleadings and documents to determine whether attorneys' fees should be awarded," evaluate "whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue," and make findings of fact and conclusions of law to support its award. *Lincoln v. Bueche*, 166 N.C. App. 150, 153-54, 601 S.E.2d 237, 241 (2004) (citations and internal quotation marks omitted). As this Court has previously explained,

> [s]urviving a Rule 12(b)(6) motion is not determinative on the issue of justiciability. A justiciable issue is one that

> is real and present as opposed to imagined or fanciful. Complete absence of a justiciable issue suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss.

Id. at 154, 601 S.E.2d at 242 (citations and internal quotation marks omitted). In the present case, ACC contends that because its claims were meritorious, the trial court erred in its conclusion of law that, "[e]ven giving ACC's pleadings the indulgent treatment they receive in ruling on a motion to dismiss, the Court finds that there was a complete absence of a justiciable issue of law raised by ACC in the Complaint and Amended Complaint filed in this case." However, as already discussed in detail, the record simply does not support ACC's argument that its claims were meritorious. Indeed, the trial court's sanctions order provides a thorough summation of the procedural history of both *ACC I* and the present case, with particular emphasis on the facts that ACC knew that the summary judgment order was binding and final law between the parties, and that in light of that summary judgment order ACC's claims were facially implausible. Specifically, the trial court found as facts that:

> 45. ACC knew at the time the Complaint and Amended Complaint were filed in this action that neither contained a justiciable issue.
>
> 46. Even if ACC did not know the Complaint lacked a justiciable issue when it was filed, ACC was clearly aware of that fact upon receiving emails from counsel for SunTrust explaining why the Complaint was frivolous.
>
> 47. ACC persisted in litigating the case well after the point at which ACC was aware (or should reasonably have been aware) that the Complaint and Amended Complaint lacked any claim related to a justiciable issue.

Accordingly, we hold that the trial court did not err in imposing sanctions pursuant to section 6-21.5 based on its determination that ACC's claims raised no justiciable issues.

2. Sanctions pursuant to Rule 11

[5] Next, ACC argues that the trial court erred in awarding sanctions under Rule 11 based on its conclusion that ACC brought this action for an improper purpose. We disagree.

Rule 11 requires that "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record[.]" N.C. Gen. Stat. § 1A-1, Rule 11(a) (2013). Our Supreme Court has made clear that,

> [a]ccording to Rule 11, the signer certifies that three distinct things are true: the pleading is (1) well grounded in fact; (2) warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); and (3) not interposed for any improper purpose. A breach of the certification as to any one of these prongs is a violation of the Rule.

Bryson v. Sullivan, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). When violations of the Rule occur, the trial court "upon motion or upon its own initiative, shall impose . . . an appropriate sanction." N.C. Gen. Stat. § 1A-1, Rule 11(a). The trial court's decision to impose sanctions under Rule 11 is subject to *de novo* review by this Court, which must determine

> (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under . . . Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Regarding sanctions imposed for violations of Rule 11's improper purpose prong, this Court has previously explained that, "an objective standard is used to determine whether a [complaint] has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior." *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (citation and internal quotation marks omitted). Moreover, an improper purpose may be inferred from "filing successive lawsuits despite the *res judicata* bar of earlier judgments." *Id.*

In the present case, ACC argues that the trial court erred in imposing Rule 11 sanctions because SunTrust did not specifically plead that ACC violated the improper purpose prong and because there are no findings of fact that support the trial court's legal conclusion that, "[i]n light

of the prior Summary Judgment Order, the Court finds that ACC filed the Complaint and the Amended Complaint for an improper purpose, including the harassment of SunTrust and the needless increase in the cost of litigation." This argument fails for several reasons. First, the fact that SunTrust did not specifically ask for Rule 11 sanctions based on the improper purpose prong is immaterial, given the Rule's explicit provision that sanctions can be imposed "upon motion or upon [the court's] own initiative." N.C. Gen. Stat. § 1A-1, Rule 11(a). Furthermore, we conclude that the trial court's imposition of sanctions was sufficiently supported by its extensive findings of fact, most significantly its finding that, "[b]ased upon the prior Summary Judgment Order and dismissal of its appeal, ACC knew that this Court's holding that 'The Deed of Trust has priority over the Claim of Lien' was binding and final law between SunTrust and ACC." Indeed, the trial court's rationale for granting SunTrust's motion to dismiss was that ACC's claims were barred by *res judicata*, which is a proper basis for inferring that the present action was brought for an improper purpose. *See Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689. Thus, given the extensive history of the litigation before us, which encompasses multiple lawsuits by ACC stretching back to 2009, and the fact that ACC's current lawsuit basically amounts to a collateral attack on the summary judgment order that resolved *ACC I*, we conclude that the trial court did not err in imposing sanctions based on its conclusion that ACC brought this action for an improper purpose.

3. Amount of award

[6] Finally, ACC complains that the amount of the trial court's award of attorneys' fees is excessively punitive. ACC cites no specific legal authority in support of this argument, but instead points to the disparity between the $8,100.00 SunTrust's counsel stated were his costs during the 17 February 2014 hearing and the $19,045.50 the trial court ultimately awarded as attorneys' fees in its sanctions order. This argument lacks merit.

As a general matter, a trial court's award of attorneys' fees must be supported by proper findings considering "the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Belcher v. Averette*, 152 N.C. App. 452, 457, 568 S.E.2d 630, 633 (2002). Under both section 6-21.5 and Rule 11, we review a trial court's award of attorneys' fees for abuse of discretion. *See*, *e.g.*, *Turner*, 325 N.C. at 165, 181 S.E.2d at 714; *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010).

In the present case, although ACC is correct that the amount of attorneys' fees awarded in the sanctions order is more than double the amount that SunTrust's counsel stated he was seeking during the 17 February 2014 hearing, the trial court's award of $19,045.50 is well supported by extensive factual findings based on affidavits regarding the amount of work performed, the degree of skill required, and the reasonableness of the rates charged here in relation to those customarily charged for similar work by attorneys of similar experience and skill. We therefore conclude that the trial court did not err or abuse its discretion in calculating the amount of sanctions it awarded as attorneys' fees in conjunction with ACC's frivolous lawsuit.

4. SunTrust's Rule 34 Motion

[7] Pursuant to Rule of Appellate Procedure 34, SunTrust moves for the imposition of sanctions against ACC and its counsel for the prosecution of this frivolous appeal. Rule 34(a) permits this Court to impose sanctions on an appellant where "the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[,]" or "the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C.R. App. P. 34(a)(1,2).

In light of the preceding analysis, we conclude that this appeal was frivolous and taken for an improper purpose. Therefore, we agree that sanctions are warranted and order that ACC and its appellate counsel pay the costs and reasonable expenses, including reasonable attorneys' fees, incurred by SunTrust on account of this appeal. N.C.R. App. P. 34(b)(2).

Conclusion

For determination of SunTrust's costs and expenses in defending this frivolous appeal, the matter is REMANDED to the trial court. The orders of the trial court granting SunTrust's Rule 12(b)(6) motion to dismiss and motions for sanctions pursuant to Rule 11 and section 6-21.5 are

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.

BAKER v. TUCKER

[239 N.C. App. 273 (2015)]

DEREK B. BAKER; BAKER & JAMES, INC.; AND B & J - TINGEN PLACE, LLC
v.
JAMES H. TUCKER, JR.

No. COA14-415

Filed 17 February 2015

Civil Procedure—motion to amend judgment—misapplication of law

In a dispute between business partners, the trial court did not err by granting plaintiff's Motion to Alter or Amend Judgment and Motion for Relief from Judgment. Plaintiffs' motion set forth valid grounds for amending the judgment under Rule of Civil Procedure 59 by alleging that the trial court failed to account for certain facts and, as a result, misapplied the law in its order distributing the assets of the dissolved companies.

Appeal by defendant from judgment entered 26 November 2013 by Judge Douglas B. Sasser in Lee County Superior Court. Heard in the Court of Appeals 25 September 2014.

Bain Buzzard & McRae, LLP, by Edgar R. Bain, for plaintiffs-appellees.

Harrington, Gilleland, Winstead, Feindel & Lucas, LLP, by Eddie S. Winstead III, for defendant-appellant.

GEER, Judge.

Defendant James H. Tucker, Jr. appeals from an amended judgment entered pursuant to the motion of plaintiffs Derek B. Baker, Baker & James, Inc. ("the Corporation"), and B & J - Tingen Place, LLC ("the LLC") to amend a judgment ordering the judicial dissolution of the Corporation and the LLC of which plaintiff Baker and defendant were the sole owners. Plaintiffs' motion to amend alleged that the trial court failed to account for the Corporation's outstanding liabilities -- in particular, a debt owed to plaintiff Baker -- in calculating the companies' net worth and distributing funds following dissolution. The trial court agreed and amended the judgment to correct the calculation error. On appeal, defendant primarily argues that the trial court erred in amending the judgment because plaintiffs' motion did not set forth any of the grounds listed in Rule 59(a) of the Rules of Civil Procedure, as required

for a valid motion to amend pursuant to Rule 59(e). N.C.R. Civ. P. 59(e). We disagree.

This Court has adopted a liberal interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial and has recognized that Rule 59(a) "provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law." *Batlle v. Sabates*, 198 N.C. App. 407, 416, 681 S.E.2d 788, 795 (2009). Here, plaintiffs' motion alleges that the trial court failed to adequately account for certain facts and, as a result, misapplied the law by failing to order a distribution of the Corporation and the LLC's assets in accordance with the parties' interests. The grounds set forth in plaintiffs' motion to amend have been held to be valid pursuant to Rules 59(a)(7), (8), and (9). Accordingly, we hold that plaintiffs' motion constituted a valid motion to amend the judgment pursuant to Rule 59(e) and affirm the amended judgment.

Facts

On 29 March 2012, plaintiffs filed a complaint against defendant alleging that plaintiff Baker and defendant had formed various business entities together, including the Corporation and the LLC, that developed and built residential properties, some of which defendant had sold and wrongfully appropriated the proceeds to himself. Plaintiffs brought claims for damages for the misappropriated funds, unfair and deceptive trade practices, and judicial termination of the Corporation and the LLC.

On 4 June 2012, defendant answered plaintiffs' complaint, moving to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, denying many of the allegations regarding his wrongdoing, and counterclaiming against plaintiff Baker for breach of fiduciary duty and unjust enrichment.

On 24 May 2013, following a bench trial, the trial court entered a judgment in which it judicially dissolved the Corporation and the LLC, ordered that all funds held by the Corporation and the LLC be disbursed to plaintiff Baker, and taxed the costs of the action against defendant. On 4 June 2013, pursuant to Rules 59 and 60 of the Rules of Civil Procedure, plaintiffs filed a "MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR RELIEF FROM JUDGMENT," alleging as follows:

> 1. The Court has erred in its judgment in not providing for the payment of the outstanding liabilities of the companies.

(a) The decretal portion of the judgment does not correspond with the Court's findings of fact. In paragraph 9) C) of the Court's findings of fact, the parties stipulated that Derek Baker paid money to the corporation as a loan in the sum of $85,588.37.

(b) In finding of fact 17) of the Court's judgment, the Court found that the net worth of the companies is $102,157.86. In arriving at this figure in the calculation of net worth, the debt owed Derek Baker is shown as a liability in the sum of $85,588.37, as is the interest on such loan in the sum of $7,739.10, for a total outstanding liability of $93,327.47 due Derek Baker.

(c) The Court has not, in the findings of fact or in the decretal portion of the judgment, provided for the repayment of the indebtedness due Derek Baker. There is no provision anywhere in the judgment for the repayment of the outstanding liability of the companies, which is the debt due Derek Baker. The Court's attention is called to the proposed judgment as prepared and submitted by the Plaintiff.

(d) In the Court's judgment, in order for Plaintiff Derek Baker to be repaid the funds loaned, it would be necessary for the Court to enter judgment against Defendant James H. Tucker, Jr. in favor of Derek Baker in a sum equal to one-half of the outstanding liabilities, to wit, $46,663.73, which would be the amount owed by Defendant Tucker.

(e) An affidavit of Marc Gilfillan, CPA, is attached hereto with regard to the Court's findings and the error in the decretal portion of the judgment.

2. The Court should amend and correct its judgment, based on its own findings of fact, to provide for the payment of the outstanding liabilities of the companies, which would be judgment against Defendant James H. Tucker, Jr. for his one-half of the outstanding liabilities in the sum of $46,663.73.

3. The Court has erred in its judgment in not placing the burden of proof on the Defendant on the issue of the $100,000 salary paid to Plaintiff Baker. The Court states, in finding of fact 15), that the Court cannot find, from a

> preponderance of the evidence, that there was any agreement with regard to the payment of salary to Derek Baker. The Defendants [sic] raised the issue relating to salary in a counterclaim which was filed. The burden of proof relative to whether or not there was an agreement as to salary was on the Defendant. If the Court cannot find, by a preponderance of evidence, anything about the salary, then the Defendant should not receive any credit for the $100,000.00 salary paid to Plaintiff Baker. In the Court's finding of fact, it appears that the Court had not correctly placed the burden of proof on the Defendant with regard to the matter of the salary, and the decretal portion of the judgment should not have given the Defendant any credit with regard to such salary.
>
> 4. If the Court can make no finding with regard to the salary, the Defendant has not carried the burden of proof and would not be entitled to a credit for the salary paid to Plaintiff. If, in the alternative, the Court considers that the Plaintiff received $100,000.00 in salary to which he was not entitled, the Plaintiff is still entitled to recover for one-half of the companies' outstanding liabilities which are owed to him by virtue of loans made to the companies.
>
> WHEREFORE, the Plaintiff respectfully prays that the Court hold a hearing with regard to this matter and proceed to alter or amend the judgment by virtue of the discrepancies between the findings of fact and the decretal portion of the judgment.

In sum, plaintiffs claimed that, based upon the findings of fact, the original order should have required defendant to pay the sum of $46,663.73 to plaintiff Baker.

On 26 November 2013, the trial court filed an amended judgment in response to plaintiffs' motion and again judicially dissolved the Corporation and the LLC, but this time ordered defendant to pay plaintiff Baker $46,663.73. Defendant timely appealed the amended judgment to this Court.

Discussion

On appeal, defendant argues that the trial court erred in entering an amended judgment because plaintiffs' motion did not properly state any

basis for amendment of the judgment under Rule 59 or Rule 60 of the Rules of Civil Procedure. The trial court's amended judgment did not specify whether the court was acting pursuant to Rule 59 or 60.

We first consider whether plaintiffs' motion is valid pursuant to Rule 60. In a similar case in which a party requested that a judgment be amended pursuant to Rule 60, this Court stated:

> Counsel for defendant and the trial court have misconceived the purposes of Rule 60(b)(6), N.C.R. Civ. Proc. Defendant seeks to *amend* the divorce judgment, *not* to be *relieved* of the judgment. N.C.G.S. 1A-1, Rule 59(e), governs amendments to judgments and requires that motions to alter or amend judgments be made within ten days after entry of the judgment. . . .
>
> . . . .
>
> Defendant's motion is to amend the judgment. By the very words of the court's order, "be and the same are hereby amended," the district court attempted to amend the divorce judgment. The motion was not properly made pursuant to Rule 60(b)(6) and the court erred in so considering it.

Coleman v. Arnette, 48 N.C. App. 733, 735, 269 S.E.2d 755, 756 (1980).

Here, as in *Coleman*, plaintiffs actually requested that the judgment be "alter[ed] or amend[ed.]" *See id.* The trial court then filed an "AMENDED JUDGMENT" and stated it was "allow[ing]" plaintiffs' motion "to alter or amend[.]" As plaintiffs sought and ultimately were allowed to amend the judgment, their motion was not properly a Rule 60, but rather a Rule 59(e) motion. We, therefore, turn to Rule 59(e).

"[O]ur standard of review under Rule 59(e) is abuse of discretion[.]" *Young v. Lica*, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003). The grounds for a Rule 59(e) motion are found at Rule 59(a). In *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469-70, 645 S.E.2d 105, 108 (2007) (internal citations and quotation marks omitted), this Court explained that

> [t]o qualify as a Rule 59 motion . . . the motion must state the grounds therefor and the grounds stated must be among those listed in Rule 59(a). We note that [w]hile failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion

> and the relief sought must be consistent with the Rules of Civil Procedure.

Rule 59(a) provides that reasons for altering or amending a judgment include:

> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
>
> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.

N.C.R. Civ. P. 59(a).

Defendant, without citing any authority, asserts that because the judgment was entered after a bench trial, "without the benefit of a jury, a number of the grounds set forth in Rule 59(a) do not even apply." Our Courts have not adopted a narrow interpretation of the grounds listed in Rule 59(a) when applied to Rule 59(e) motions to amend an order entered without a jury trial. Although many of the grounds listed in Rule 59(a) address errors that involve a jury, Rule 59(a) also applies to bench trials. The rule specifically provides that "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." *Id.* In the context of a motion

to amend an order pursuant to a bench trial, this Court has recognized that Rule 59(a) "provides ample basis for a party to seek relief on the basis that the trial court misapprehended the relevant facts or on the basis that the trial court misapprehended or misapplied the applicable law." *Batlle*, 198 N.C. App. at 416, 681 S.E.2d at 795.

In *Batlle*, an action for breach of a separation agreement, the defendant moved for sanctions pursuant to Rule 37 of the Rules of Civil Procedure based on the plaintiff's failure to timely respond to discovery requests. 198 N.C. App. at 409, 681 S.E.2d at 791. The trial court granted the defendant's motion and entered an order dismissing the plaintiff's amended complaint with prejudice and ordering the plaintiff to pay attorneys' fees. *Id.* at 411, 681 S.E.2d at 792. The trial court subsequently entered an order denying the plaintiff's Rule 59 motion to amend the order, and the plaintiff appealed both orders to this Court. 198 N.C. App. at 412, 681 S.E.2d at 793.

On appeal, this Court first addressed whether the plaintiff's motion stated a valid basis for obtaining relief under Rule 59(a). The plaintiff's motion cited Rules 59(a)(7) and (9) as grounds for the relief requested. In holding that the motion was valid, this Court reasoned:

> In her motion, Plaintiff essentially challenged the trial court's balancing of the equities, argued that Defendant was not prejudiced by her delay in providing discovery, and claimed that "a lesser sanction would have been appropriate in this matter." At an absolute minimum, this argument would, if valid, provide a recognized basis for challenging the validity of an order dismissing a complaint as a sanction for failing to provide discovery, since trial judges are required to give consideration to lesser sanctions before acting in that fashion. Thus, even if the remainder of Plaintiff's motion constituted nothing more than a mere rearguing of information that had been previously presented to the trial court, her challenge to the sufficiency of the trial court's consideration of lesser sanctions constitutes a valid basis for granting a motion to alter or amend a judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(e), under N.C. Gen. Stat. § 1A-1, Rules 59(a)(7) and (9).

Batlle, 198 N.C. App. at 417-18, 681 S.E.2d at 796 (internal citation and footnote omitted). Thus, in concluding that the plaintiff's motion stated valid grounds under Rule 59(a)(7) despite the absence of a jury verdict,

the Court necessarily read Rule 59(a)(7) liberally and construed the trial court's disposition and ruling on the Rule 37 motion for sanctions as the "verdict."

Defendant next argues that plaintiffs' motion cannot be considered a Rule 59(a)(8) motion because plaintiffs failed to show that they objected to the alleged error of law at trial. This Court, however, has also declined to strictly construe Rule 59(a)(8) when applied to an order entered after a bench trial. In *Elrod v. Elrod*, 125 N.C. App. 407, 408, 481 S.E.2d 108, 109 (1997), a custody action, the defendant appealed the denial of her motion to amend an order requiring the defendant to enroll her children in public school. This Court held that the defendant's motion was a proper motion pursuant to Rule 59(a)(8) because it "was based on specifically enumerated errors of law." 125 N.C. App. at 410, 481 S.E.2d at 110. Significantly, the Court did not adopt a strict reading of Rule 59(a)(8), and recognized that "[a]lthough [defendant] had not prior to the filing of the motion entered any objection to the Order, because the motion was timely filed and because the issues raised in the motion relate to matters in the Order (as opposed to errors allegedly occurring during a trial), it is properly considered a Rule 59(e) request to modify the [order] because of errors of law." 125 N.C. App. at 410, 481 S.E.2d at 110.

In this case, the trial court ordered the judicial dissolution of the Corporation and the LLC "pursuant to the provisions of Chapter 55 of the North Carolina General Statutes." Pursuant to N.C. Gen. Stat. § 55-14-33(b) (2013), "[a]fter entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with G.S. 55-14-05 . . . ." N.C. Gen. Stat. § 55-14-05(a)(3) and (4) (2013), in turn, provide that "[d]ischarging or making provision for discharging its liabilities" and "[d]istributing its remaining property among its shareholders according to their interests" are necessary acts to winding up a dissolved corporation's affairs.

In plaintiffs' motion to amend, plaintiffs allege that, despite having made a finding that plaintiff Baker had loaned the Corporation $85,588.37, the trial court failed to account for that liability in calculating how much money each party is owed after dissolution. Thus, by failing to account for the Corporation's liabilities and incorrectly calculating the total net worth of the companies, the trial court acted contrary to N.C. Gen. Stat. § 55-14-05.

In other words, the trial court "misapprehended the relevant facts or . . . misapplied the applicable law" -- grounds that this court has held

to be valid grounds for relief pursuant to Rules 59(a)(7) and (9). *Batlle*, 198 N.C. App. at 416, 681 S.E.2d at 795. Furthermore, under *Elrod*, the grounds stated in plaintiffs' motion could also be considered a valid ground for amendment pursuant to Rule 59(a)(8), despite the lack of an objection raised at trial, because it concerns an error of law arising for the first time in the order. *See also Batlle*, 198 N.C. App. at 417 n.3, 681 S.E.2d at 796 n.3 (noting that the plaintiff's challenge to the sufficiency of the trial court's consideration of lesser sanctions was an argument that could not have been advanced prior to the entry of the order "since [plaintiff] had no way to know the exact language that the trial court would employ in ruling on Defendant's request for sanctions prior to that time").

Accordingly, we hold that plaintiffs' motion constituted a valid motion to amend pursuant to Rules 59(a)(7), (8), and (9). Defendant has made no argument that the trial court abused its discretion in granting the motion. We, therefore, affirm the trial court's granting of plaintiffs' motion and the amended judgment.

Affirmed.

Chief Judge McGEE and Judge STROUD concur.

BARRY HOYT BODIE
v.
CLAIRE VOEGLER BODIE

No. COA14-629

Filed 17 February 2015

1. Divorce—equitable distribution—remand instructions—findings of fact—recalculation of award

The trial court did not err in an equitable distribution case by failing to strictly follow the mandate from this Court in *Bodie III* by going beyond the remand instructions in its findings of fact. When the Court of Appeals remands an equitable distribution case for specific findings, such as the value of mortgages and tax liabilities, that remand necessarily authorizes the trial court to recalculate other related portions of the award that are impacted by the new findings.

2. Appeal and Error—record on appeal—failure to include transcripts—sufficiency of findings of fact

Although defendant wife challenged several specific findings by the trial court as unsupported by the evidence in an equitable distribution case, the Court of Appeals (COA) could not address defendant's arguments because the record on appeal did not include the transcripts of the proceedings in which the trial court heard the relevant evidence. Even though this was the fourth time this case had come before the COA, nothing in our appellate rules excused litigants from assembling a complete record simply because portions of that record may have been submitted to this Court in previous appeals years earlier.

3. Divorce—equitable distribution—reduction of distributive award on remand

The trial court did not abuse its discretion in an equitable distribution case by reducing defendant wife's $100,000 distributive award to $25,000. The trial court was well within its discretion in reducing the distributive award in light of its new fact findings on remand.

Appeal by defendant from order entered 20 February 2014 by Judge Mack Brittain in Transylvania County District Court. Heard in the Court of Appeals 5 November 2014.

Roberts & Stevens, P.A., by Phillip T. Jackson, for plaintiff-appellee.

Donald H. Barton, P.C., by Donald H. Barton, for defendant-appellant.

DIETZ, Judge.

This is the fourth time this equitable distribution case has come before us on appeal. The last time we heard this case, we remanded with instructions for the trial court to make a number of specific findings and then adjust its distributional decision accordingly.

In this fourth appeal, Defendant argues that the trial court's latest order suffers from *seventeen* separate reversible errors. This brings to mind an observation from the U.S. Court of Appeals for the Sixth Circuit which, faced with a similar situation, observed that "[w]hen a party comes to us with nine grounds for reversing the district court, that usually means there are none." *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012).

Here, Defendant's seventeen arguments fall into three general categories. First, Defendant argues that the trial court made various findings outside the scope of the remand, thus violating the mandate rule. Second, Defendant contends that various fact findings are not supported by competent record evidence. Third, Defendant argues that the district court abused its discretion when selecting an appropriate distributive award.

For the reasons set forth below, we reject all seventeen arguments. When this Court remands an equitable distribution case for specific findings, such as the value of mortgages and tax liabilities, that remand necessarily authorizes the trial court to recalculate other related portions of the award that are impacted by the new findings (and, indeed, we specifically authorized the trial court to do so). With regard to whether the trial court's fact findings are supported by competent evidence, we cannot address Defendant's arguments because the record on appeal does not include the transcripts of the proceedings in which the trial court heard the relevant evidence. We are thus constrained to reject these arguments. Finally, the trial court was well within its discretion in reducing the distributive award to Defendant in light of its new fact findings on remand. Accordingly, we reject Defendant's arguments and affirm the trial court.

Facts and Procedural History

Plaintiff Barry Hoyt Bodie and Defendant Claire Voegler Bodie married in April 1996 and separated in July 2005. One month later, Plaintiff commenced an action for child custody and equitable distribution. On 3 August 2009, the trial court entered an order on the equitable distribution claim ordering Plaintiff to pay Defendant a distributive award of $100,000. Plaintiff appealed, but this Court dismissed the appeal as interlocutory because Defendant's alimony claim was still pending. *Bodie v. Bodie*, 208 N.C. App. 281, 702 S.E.2d 556 (2010) (unpublished) (*Bodie I*). In early 2011, after all issues were resolved in the lower court, Plaintiff again appealed to this Court. In an opinion filed 5 June 2012, we remanded to the trial court for additional findings of fact pertaining to the classification and values of specified items and to adjust any conclusions of law and its distributional decision as necessary. *Bodie v. Bodie*, 221 N.C. App. 29, 44, 727 S.E.2d 11, 21 (2012) (*Bodie II)*. The trial court entered a new order on 23 August 2012 and Plaintiff appealed again.

On the third appeal to this Court, we remanded to the trial court to find several specific, additional facts:

(1) the value of the appreciation of the 401(k) account;

(2) whether the funds Plaintiff used to make post-separation payments on marital debts came from marital or separate property;

(3) the value of the 2004 loan; and

(4) the value of the 2005 tax obligation.

Bodie v. Bodie, ___ N.C. App. ___, ___, 746 S.E.2d 22, 2013 WL 3131126, *5 (2013) (unpublished) (*Bodie III*). We also directed the trial court to classify a second mortgage as marital debt and find the value of that mortgage. *Id.* We then instructed the trial court to adjust its distributional decision as necessary in light of these new findings. *Id.*

On 20 February 2014, the trial court entered an order making the additional findings required by our mandate. In light of those findings, the trial court concluded that an "unequal division of the marital estate is equitable" and that the "previously ordered distributional award of $100,000.00 to [Defendant] is not warranted based on the unequal distribution." The trial court then reduced Defendant's distributive award to $25,000. Defendant timely appealed.

Analysis

I. Remand Instructions and the Mandate Rule

[1] Defendant first argues that the trial court erred because it failed to strictly follow the mandate from this Court in *Bodie III* by going beyond the remand instructions in its findings of fact. We disagree.

"[W]hen reviewing an equitable distribution order, this Court will uphold the trial court's written findings of fact as long as they are supported by competent evidence. However, the trial court's conclusions of law are reviewed *de novo*." *Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citation and internal quotation marks omitted). "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962).

Defendant argues that, when this Court remanded with instructions to make a series of specific findings of fact, the trial court was limited solely to making those findings, and could not alter other portions of its award. For example, Defendant contends the trial court went beyond the mandate by addressing the net value of a residential house located

at 98 Soquilli Drive because "the value of the Soquilli house and its net date of separation value had been addressed" by this Court in *Bodie II*.

But in *Bodie III*, this Court expressly instructed the trial court to "(1) classify the second mortgage on the Soquilli house as marital debt; (2) find the value of that mortgage, and (3) adjust the distributional decision accordingly." *Bodie III*, ___ N.C. App. at ___, 746 S.E.2d at 22, 2013 WL 3131126, at *5. Those remand instructions necessarily authorize the trial court to adjust any findings that are impacted by the newly determined mortgage value on the Soquilli house. When this Court remands an equitable distribution proceeding with instructions to recalculate the value of a home mortgage, this remand instruction necessarily anticipates that the trial court will, in turn, adjust the net value of the property in light of the new mortgage calculation. That is precisely what the trial court did here.

Similarly, the trial court did not violate the mandate rule by calculating the value of certain distributions from Plaintiff's 401(k) account and calculating the value of interest and penalties incurred to pay the parties' 2005 tax obligation. Again, these calculations were necessary in light of our instruction and the previous findings of the trial court. For example, after determining the value of the parties' 2005 tax liability as this Court's remand instructions required, the trial court necessarily had to determine how that liability was paid and the source of the funds used to pay it in order to arrive at an accurate distributional award. In short, after a careful review of the record, we are unable to identify any actions by the trial court that departed from our remand instructions. Accordingly, we reject Defendant's mandate rule arguments.

II. Review of Particular Fact Findings

[2] Defendant also challenges several specific findings by the trial court as unsupported by the evidence. For example, Defendant challenges the trial court's determination of how much separate property Plaintiff used to pay down marital debt. Defendant makes similar arguments with respect to various other determinations of marital and divisible property values.

We are unable to review these arguments because the record on appeal does not include copies of the transcripts of the proceedings where evidence on these issues was submitted to the trial court. The trial court's order at issue in this appeal states that its findings are based on "the greater weight of the evidence presented during the 30 January 2009, 3 March 2009, 5 May 2009, and 13 July 2009 sessions of Transylvania County District Court." The record on appeal in this case

does not include transcripts of those proceedings, although Plaintiff represents that those transcripts contain more than 800 pages of witness testimony.

The North Carolina Rules of Appellate Procedure state that in appeals from the trial division "review is solely upon the record on appeal, the verbatim transcript of the proceedings, if one is designated, and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a) (2013). We recognize that this is the fourth time this case has come before this Court, but nothing in our appellate rules excuses litigants from assembling a complete record simply because portions of that record may have been submitted to this Court in previous appeals years earlier. As the rules plainly instruct, we must review *this* appeal solely upon the record and verbatim transcripts submitted in *this* appeal.

Here, the record on appeal does not include the evidence and testimony on which the trial court relied to make the findings challenged by Defendant on appeal. "Where the record is silent on a particular point, we presume that the trial court acted correctly." *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). Accordingly, we reject Defendant's challenges to the trial court's findings of fact.

III. Distributive Award

[3] Defendant next argues that the trial court abused its discretion by reducing her $100,000 distributive award to $25,000. Defendant contends that this award is not a fair and equitable division of the parties' marital and divisible property.

Our standard of review of an equitable distribution order is abuse of discretion. *Shope v. Pennington*, ___ N.C. App. ___, ___, 753 S.E.2d 688, 690 (2014). "[T]he trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision." *Lawing*, 81 N.C. App. at 162, 344 S.E.2d at 104.

As with our review of the trial court's findings of fact, our review of the trial court's distributive award decision is constrained by the lack of transcripts and other evidence documenting the proceedings below. The trial court stated in its order that, in light of the findings made on remand, "[t]he previously ordered distributional award of $100,000.00 to Wife is not warranted based on the unequal distribution herein stated and the same should be rescinded in favor of a $25,000 distributional award to Wife." On the record before us, there is nothing indicating that the distributive award is "so arbitrary that [it] could not have been the

result of a reasoned decision." *Id.* Accordingly, we reject Defendant's challenge to the trial court's distributive award.

Conclusion

For the reasons set forth above, we reject Defendant's arguments in each of the seventeen issues presented on appeal and affirm the trial court's order.

AFFIRMED.

Judges BRYANT and DILLON concur.

JEFFREY BOWDEN
v.
DWAYNE MAURICE YOUNG, COASTAL PLAINS RESTAURANT, AND
FIRST LIBERTY INSURANCE CORPORATION

No. COA14-819

Filed 17 February 2015

1. Appeal and Error—appealability—subject matter jurisdiction—denial of motion to dismiss—substantial right affected

The denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the North Carolina Workers' Compensation Act is immediately appealable as affecting a substantial right.

2. Workers' Compensation—handling of claim—intentional infliction of emotional distress action—Industrial Commission—exclusive jurisdiction

The trial court's denial of a Rule 12(b)(1) motion to dismiss claims of intentional timing of emotional distress and bad faith by defendant insurer First Liberty handling a Workers' Compensation case was reversed and remanded for entry of an order dismissing plaintiff's claims for lack of subject matter jurisdiction. The exclusive jurisdiction of the Industrial Commission includes not only work-related injuries but also any claims that are "ancillary" to the original compensable injury and these "ancillary" claims include mishandling of plaintiff's workers' compensation claim and causing some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies. Although plaintiff Bowden

is correct that intentional torts generally fall outside the scope of the Workers' Compensation Act, it has been repeatedly held that *all* claims concerning the processing and handling of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct is intentional or not.

Judge DILLON concurs by separate opinion

Appeal by defendant from order entered 21 April 2014 by Judge Quentin T. Sumner in Wilson County Superior Court. Heard in the Court of Appeals 3 December 2014.

Anderson Law Firm, by Michael J. Anderson, for plaintiff-appellee.

Wall Templeton & Haldrup, P.A., by William W. Silverman, J. Mark Langdon, & Robin A. Seelbach, for defendant-appellant.

DIETZ, Judge.

Plaintiff Jeffrey Bowden was injured at work. While his workers' compensation claim was pending, he sued First Liberty Insurance Corporation, the insurer handling the claim, for intentional infliction of emotional distress and bad faith. Bowden alleged that First Liberty engaged in a host of intentionally wrongful conduct while handling his claim and that he suffered various emotional injuries as a result.

First Liberty moved to dismiss the claims on the ground that the Industrial Commission had exclusive jurisdiction. The trial court denied the motion and First Liberty appealed.

We reverse. This case is controlled by *Johnson v. First Union Corp.*, 131 N.C. App. 142, 143-44, 504 S.E.2d 808, 809 (1998) and *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, 142 N.C. App. 472, 477-78, 543 S.E.2d 209, 212 (2001). In *Johnson* and *Deem*, this Court held that claims arising from an employer's or insurer's processing and handling of a workers' compensation claim—even intentional torts—fall within the exclusive jurisdiction of the Industrial Commission. We agree with First Liberty that the claims asserted in this case are indistinguishable from those we previously held to be within the exclusive jurisdiction of the Industrial Commission in *Johnson* and *Deem*. Accordingly, we reverse the trial court and remand for dismissal of the claims against First Liberty for lack of subject matter jurisdiction.

Facts and Procedural History

Jeffrey Bowden managed a fast food restaurant in Wilson, North Carolina. On 4 July 2013, Defendant Dwayne Maurice Young allegedly assaulted Bowden during an attempted armed robbery at the restaurant. Bowden later filed a workers' compensation claim for various physical and emotional injuries caused by the assault.

First Liberty Insurance Company handled Bowden's claim on behalf of Coastal Plains Restaurant, its insured. Bowden claims that First Liberty engaged in a pattern of improper conduct while processing his claim. He contends that First Liberty communicated with his doctors without his permission and wrongly sought a second opinion from "a professional witness for the defense in claims under the Workers Compensation Act, who opined in exactly the fashion for which he was paid." He also claims that First Liberty treated him belligerently over the phone, denied some of his requests for medical treatment via "form letter," improperly filed paperwork to suspend his compensation, and "insisted that [Bowden] needed to settle his Workers Compensation claim."

Based on this alleged conduct, Bowden sued First Liberty in Wilson County Superior Court while his workers' compensation case was still pending before the Industrial Commission. He alleged claims for bad faith and intentional infliction of emotional distress on the ground that First Liberty purposefully "create[d] an atmosphere of duress intended to force Plaintiff to settle his claim or be made to feel like a fraud or malingerer."

On 14 April 2014, First Liberty moved to dismiss all of Bowden's claims against it pursuant to N.C. R. Civ. P. 12(b)(1) (2013), arguing that the trial court lacked subject matter jurisdiction. The company argued that the Workers' Compensation Act vests exclusive jurisdiction over such claims with the Industrial Commission. The trial court denied this motion, and First Liberty timely appealed.

Analysis

I. Appellate Jurisdiction

[1] We first address our own jurisdiction to hear this appeal. Ordinarily, the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. *See*, *e.g.*, *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384-85, 677 S.E.2d 203, 207 (2009). However, the denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the North Carolina Workers' Compensation Act is immediately appealable as affecting a substantial right. *Burton v. Phoenix*

Fabricators & Erectors, Inc., 362 N.C. 352, 661 S.E.2d 242 (2008); *Estate of Vaughn v. Pike Elec., LLC*, ___ N.C. App. ___, ___, 751 S.E.2d 227, 231 (2013). Accordingly, we have jurisdiction over this appeal.

II. Exclusive Jurisdiction of the Industrial Commission

[2] The sole issue raised by First Liberty on appeal is whether the allegations in Bowden's complaint state any claims that fall outside the exclusive jurisdiction of the North Carolina Industrial Commission. This is a legal question that we review *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

The Workers' Compensation Act provides the exclusive remedy for work-related injuries. *Johnson*, 131 N.C. App. at 145, 504 S.E.2d at 810. The Act is intended "to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Id.* at 144, 504 S.E.2d at 810 (internal quotation marks omitted).

The exclusive jurisdiction of the Industrial Commission includes not only work-related injuries but also any claims that are "ancillary" to the original compensable injury. *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212. These "ancillary" claims include claims that "defendants' mishandling of plaintiff's workers' compensation claim caused some type of tortious injury to the plaintiff for which the plaintiff seeks court sanctioned remedies." *Riley v. Debaer*, 149 N.C. App. 520, 526, 562 S.E.2d 69, 72, *aff'd per curiam*, 356 N.C. 426, 571 S.E.2d 587 (2002) (dismissing negligent infliction of emotional distress claim against injured worker's rehabilitation specialist for lack of jurisdiction). As this Court has explained, "the Industrial Commission, charged with administration of the Workers' Compensation Act, is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers and health care providers in matters under the Workers' Compensation Act." *N.C. Chiropractic Ass'n, Inc. v. Aetna Cas. & Sur. Co.*, 89 N.C. App. 1, 9, 365 S.E.2d 312, 316 (1988).

Bowden acknowledges these legal principles but contends that, because his claims against First Liberty are intentional torts, they fall within an exception to the exclusive jurisdiction of the Industrial Commission. Bowden is correct that intentional torts generally fall outside the scope of the Workers' Compensation Act. *See Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991). But this Court repeatedly has held that *all* claims concerning the *processing* and *handling* of a workers' compensation claim are within the exclusive jurisdiction of the Industrial Commission, whether the alleged conduct

is intentional or not. *Johnson*, 131 N.C. App. at 143-44, 504 S.E.2d at 809; *Deem*, 142 N.C. App. at 477-78, 543 S.E.2d at 212.

In *Johnson*, two injured employees claimed that their workers' compensation carrier had fabricated evidence and engaged in other wrongful conduct while handling their claims. *Johnson*, 131 N.C. App. at 143, 504 S.E.2d at 809. The employees sued, "alleging fraud, bad faith refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy." *Id.* This Court affirmed dismissal of the claims for lack of jurisdiction, holding that the Workers' Compensation Act "gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims and all related matters, including issues such as those raised in the case at bar." *Id.* at 143-44, 504 S.E.2d at 809.

Several years later, in *Deem*, this Court reaffirmed the Johnson holding in even clearer terms. In that case, the employee alleged that his employer intentionally mishandled his workers' compensation claim to force him back to work "at a made up job." *Deem*, 142 N.C. App. at 477, 543 S.E.2d at 212. The employee brought claims for "fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy *arising out of the handling of his workers' compensation claim.*" *Id.* at 475, 543 S.E.2d at 210 (emphasis in original). When the employer argued that those claims were within the exclusive jurisdiction of the Industrial Commission, the injured worker made the *identical* argument that Bowden makes here:

> [P]laintiff at bar argues that it matters not that his claims originally arose out of his compensable injury. Instead, he argues that the "intentional conduct" of defendants fails to come under the exclusivity provisions of the Act because that conduct did not arise out of and in the course of plaintiff's employment relationship.

Id. at 477, 543 S.E.2d at 211. This Court rejected that argument, holding that "plaintiff's claims are ancillary to his original compensable injury and thus, are absolutely covered under the Act and this collateral attack is improper." *Id.* at 477, 543 S.E.2d at 212.

We distill from *Johnson* and *Deem* a straightforward rule: all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission, regardless of whether the alleged conduct was intentional or merely negligent.

Here, all of Bowden's factual allegations against First Liberty involve the company's handling of his worker's compensation claim. He alleges that First Liberty wrongly sought a second opinion from "a professional witness for the defense"; that First Liberty denied some of his requests for medical treatment via "form letter"; that First Liberty contacted his doctors without his permission; that First Liberty's representatives were rude and aggressive with him during phone calls; that First Liberty improperly filed paperwork to suspend his compensation; and that First Liberty "insisted that [Bowden] needed to settle his Workers Compensation claim."

After careful review of Bowden's complaint, we conclude that every allegation supporting his tort claims against First Liberty arises out of the company's processing and handling of his workers' compensation claim. Accordingly, those claims fall within the exclusive jurisdiction of the Industrial Commission. As this Court concluded in *Johnson* and *Deem*, the Industrial Commission "is better suited than the Court to identify and regulate alleged abuses, if any, by insurance carriers" in the handling of workers' compensation claims. *N.C. Chiropractic Ass'n*, 89 N.C. App. at 9, 365 S.E.2d at 316.

CONCLUSION

The allegations against First Liberty Insurance Corporation in Plaintiff's complaint all arise out of First Liberty's processing and handling of Plaintiff's workers' compensation claim. Those claims fall within the exclusive jurisdiction of the Industrial Commission. We reverse the trial court's denial of First Liberty's Rule 12(b)(1) motion and remand this case for entry of an order dismissing Bowden's claims against First Liberty for lack of subject matter jurisdiction.

REVERSED.

Judge BRYANT concurs.

Judge DILLON, concurring by separate opinion.

I concur in the majority's holding. I write separately, however, because I do not agree with the majority's conclusion that "all claims arising from an employer's or insurer's processing and handling of a workers' compensation claim fall within the exclusive jurisdiction of the Industrial Commission[.]" (Emphasis added.) Rather, I believe an employee can pursue a civil action against his insurer, as he can against his employer, where the insurer " 'intentionally engages in misconduct

knowing it is substantially certain to cause serious injury or death' and that conduct causes injury or death[.]" *Trivette v. Yount*, 366 N.C. 303, 306, 735 S.E.2d 306, 308-09 (2012), (quoting *Woodson v. Rowland*, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991)). Indeed, in *Deem v. Treadaway & Sons Painting & Wallcovering, Inc.*, a case relied upon in the majority's analysis, the Court appears to recognize a *Woodson* exception to the exclusivity of the Workers' Compensation Act in claims against the insurer. 142 N.C. App. 472, 477-78, 543 S.E.2d 209, 212, *disc. review denied*, 354 N.C. 216, 553 S.E.2d 911 (2001). However, in concluding that the claim of the plaintiff in that case did not rise to the level of a *Woodson* claim, the *Deem* Court noted that "it is also well established that the [*Woodson*] exception is extremely narrow[.]" *Id.* at 478, 543 S.E.2d at 212.

In any event, I do not believe that Plaintiff in this case has set forth allegations which, if true, rise to the level of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. Accordingly, I concur in the holding reached by the majority.

BRANCH BANKING AND TRUST COMPANY, Plaintiff
v.
HUI S. SMITH, CHONG SU KIM, JERRY D. SMITH, JOON HEE NAM, MOUNIB AOUN, JIHAD L. LIBBUS, YON SU NAM, and HOSUN KIM, Defendants

No. COA14-554

Filed 17 February 2015

1. Appeal and Error—issue preservation

In an action by a bank to collect a deficiency on a loan debt following a foreclosure sale, defendant guarantor preserved his argument that he was not liable for the deficiency under N.C.G.S. § 45-21.36.

2. Pleadings—summary judgment—deficiency judgment defense

In an action by a bank (BB&T) to collect a deficiency on a loan debt following a foreclosure sale, the trial court erred by granting summary judgment in favor of BB&T, which had purchased the property. Defendant raised N.C.G.S. § 45-21.36 as an affirmative defense and forecasted evidence that the property was worth more than the debt.

3. Guaranty—foreclosure—deficiency judgment defense

In an action by a bank (BB&T) to collect a deficiency on a loan debt following a foreclosure sale from which BB&T purchased the property, a guarantor on the loan was entitled to the N.C.G.S. § 45-21.36 defense even though the borrower LLC had been dismissed from the action.

4. Guaranty—mortgage—guaranty agreement

In an action by a bank to collect a deficiency on a loan debt following a foreclosure sale, the guarantor did not waive the N.C.G.S. § 45-21.36 defense by the terms of his guaranty agreement.

Appeal by Defendant Mounib Aoun from order entered 30 October 2013 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 5 November 2014.

Howard, Stallings, From & Hutson, P.A., by John N. Hutson, Jr. and Michael A. Burger, for Plaintiff-Appellee.

Harris Sarratt & Hodges, LLP, by H. Clay Hodges, for Defendant-Appellant.

DILLON, Judge.

I. Background

In 2008, Plaintiff Branch Banking and Trust Company ("Bank") made a loan ("Loan") to Garrett Enterprise, LLC ("Borrower-LLC")[1] for a real estate project in Durham. The Loan was in the principal amount of $1,675,000.00 and was secured by the Durham real estate ("the Property").

The Bank entered into separate guaranty agreements with the eight individual Defendants ("Guarantors") - including Mounib Aoun ("Appellant") - to guaranty the Loan. The guaranty agreement executed by Appellant limited his liability to $418,750.00, plus interest, costs, and fees.

By 2012, the Loan was in default with over $1.4 million still owing, and the Bank foreclosed on the Property. At the foreclosure sale, the Bank was the sole bidder, purchasing the Property for $800,000.00. After

1. Garrett Enterprise, LLC was previously a Defendant in this suit but on 21 August 2013 the Bank dismissed all claims against it without prejudice.

the net proceeds from the foreclosure sale were applied, a deficiency of approximately $700,000.00 remained on the Loan debt.

Following the foreclosure sale, the Bank commenced this action against the Borrower-LLC and the eight Guarantors to collect the deficiency. Appellant and the other Defendants filed responsive pleadings.

The Bank voluntarily dismissed all claims against the Borrower-LLC and filed a motion for summary judgment against the Guarantors. Following a hearing on the matter, the trial court entered an order granting summary judgment in favor of the Bank against all eight Guarantors. The amount of the judgment entered against Appellant was $502,309.52.

Appellant filed a timely appeal from the order against him. However, none of the other Guarantors noticed an appeal.

II. Analysis

This action involves the application of N.C. Gen. Stat. § 45-21.36 (2013), which makes available a statutory defense or offset to certain loan obligors in actions brought by a lender to recover the deficiency following the foreclosure sale of the collateral. Typically, following a foreclosure sale, the amount of the debt is deemed reduced by the amount of the net proceeds realized from said sale. *See* N.C. Gen. Stat. § 45-21.31(a)(4) (2013). However, this general rule is abrogated by G.S. 45-21.36 in situations where the foreclosing creditor – which in this case is the Bank – ends up purchasing the property at the foreclosure sale. Specifically, G.S. 45-21.36 provides that where the foreclosing creditor purchases the property and subsequently sues to collect the deficiency, certain obligors may "as [a] matter of defense" show that the collateral "was fairly worth the amount of the [entire] debt[,]" a showing which would "defeat . . . any deficiency judgment against [any said obligor]." N.C. Gen. Stat. § 45-21.36. Alternatively, G.S. 45-21.36 provides that the obligor may by way of "offset" show that the creditor's winning foreclosure bid was "substantially less than [the collateral's] true value[,]" a showing which would "offset any deficiency judgment against [any said defendant]." *Id.*[2]

2. By way of illustration, if a lender forecloses on collateral securing a $1 million loan and the lender purchases the collateral at the sale for $600,000, the lender would normally have a valid deficiency claim for $400,000 against the obligors. However, the obligors to which G.S. 45-21.36 applies could "defeat" the claim by way of a "defense" by showing that the collateral was worth at least $1 million (the full loan amount). Alternatively, those obligors could "reduce" their liability by way of an "offset" by showing that the $600,000 bid was "substantially less" than the actual value of the collateral. For example, if the collateral was shown to be worth $850,000 and if $600,000 was determined to be "substantially less" than $850,000, then those obligors' liability for the deficiency would only be $150,000.

On appeal, Appellant argues that summary judgment was inappropriate because there was an issue of fact as to whether he was entitled to the G.S. 45-21.36 offset/defense. For the reasons below, we agree and reverse the summary judgment entered *against Appellant* and remand the matter to the trial court for further proceedings.[3]

A. Appellant Preserved The Issues Raised in this Appeal

[1] Initially, we address the Bank's contention that Appellant waived his right to argue the G.S. 45–21.36 defense/offset because he did not make this argument at the summary judgment hearing. *See* N.C.R. App. P. 10(b)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make").

The record before us reveals that Appellant pleaded G.S. 45-21.36 as an affirmative defense. At the summary judgment hearing, the transcript shows that Appellant's counsel cited G.S. 45-21.36 as a basis for his position that his client was not liable for the deficiency. Specifically, at the hearing, the Bank's counsel argued that the offset defense was only available to the Borrower-LLC and could not be used by the Guarantors since the Bank had dismissed its claims against the Borrower-LLC. The trial court then asked Appellant's counsel if he agreed with the Bank's argument. In his response, Appellant's counsel did make an argument based on the statute: "[The fact that the Bank dismissed its claims against the Borrower-LLC] does not foreclose, however, the issues that are raised by that statute [G.S. 45-21.36]."

We note that Appellant's counsel conceded that the deficiency amount was established by the amount paid by the Bank at foreclosure. However, this concession does not waive Appellant's argument that G.S. 45-21.36 provides him a defense or offset to his liability for the deficiency.

In sum, Appellant's counsel did raise G.S. 45-21.36 as a defense during the argument; Appellant also raised this ground in his pleading which was before the trial court; and the trial court considered this ground in its questioning of counsel. Accordingly, we overrule this argument and proceed to the merits of Appellant's appeal.

---

3. Appellant also argues that summary judgment was inappropriate on the Bank's claims against the *other seven Guarantors on their respective guaranty agreements*, as well. However, since the other Guarantors failed to notice an appeal, we lack jurisdiction to review the summary judgment order as to them. *See*, *e.g.*, *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979) (holding that "only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions").

B. There Is An Issue of Fact Regarding the Property's Value

[2] At the summary judgment stage, the burden rested with Appellant, the non-moving party, to forecast evidence to create an issue of fact that either (1) the Property was worth more than the amount of the approximately $1.4 million debt or (2) the amount the Bank paid to purchase the Property ($800,000.00) was substantially less than the Property's true value. *See Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 370, 663 S.E.2d 450, 452 (2008), *cert denied*, 363 N.C. 372, 678 S.E.2d 232 (2009). We believe that Appellant met his burden. For example, an affidavit of one of the Guarantors authenticated an e-mail sent by an officer of the Bank indicating that an appraisal ordered by the Bank five months prior to the foreclosure sale indicated that the Property was worth over $2.1 million[4]. Accordingly, we hold that there was evidence before the trial court which created a genuine issue of material fact as to the value of the Property at the time of the foreclosure sale.

C. Section 45-21.36 Applies to Appellant as a Guarantor Even Though the Borrower-LLC Had Been Dismissed

[3] The Bank argues that Appellant is not entitled to the defense/offset provided by G.S. 45-21.36. The language in the statute provides that the defense/offset is available to "the mortgagor, trustor or other maker of any such obligation whose property has been so purchased [at foreclosure by the creditor]." N.C. Gen. Stat. § 45-21.36. Many decisions from this Court appear to support the position of the Bank that the G.S. 45-21.36 defense/offset is not available to a mere guarantor. *See First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 264, 261 S.E.2d 145, 148 (1979) (holding that "it seems clear that the General Assembly intended to limit protection [afforded by G.S. 45-21.36] to those persons who held a property interest in the mortgaged property, and that such protection was not applicable to other parties liable on the underlying debt"); *see also Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, ___ N.C. App. ___, ___, 742 S.E.2d 201, 204 (2013); *NCNB Nat. Bank of N. Carolina v. O'Neill*, 102 N.C. App. 313, 316, 401 S.E.2d 858, 860 (1991); *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 762-63, 394 S.E.2d 294, 296 (1990) (holding that "[t]he protection of [G.S. 45-21.36] is limited . . . to persons who hold a property interest in the

4. We note that the date of the appraisal was several months prior to the date of foreclosure, which is the relevant date for purposes of G.S. 45-21.36. However, the appraisal providing an opinion of value as of a date not too remote from the foreclosure date is some evidence of value as of the relevant date. It is for the jury to determine how much weight to afford the appraisal.

mortgaged property"); *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 579-80, 389 S.E.2d 429, 432 (1990).

We are compelled, however, by our Supreme Court's holding in *Virginia Trust Company v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938) to conclude that Appellant, though merely a guarantor, is entitled to the G.S. 45-21.36 defense/offset, even where the Borrower-LLC has been dismissed from the action.

The loan at issue in *Dunlop* was secured by a borrower's real estate collateral and guaranteed by a separate guarantor. *Id.* at 196-97, 198 S.E. at 645. When the borrower defaulted, the creditor foreclosed on the collateral and cast the winning bid at the foreclosure sale; however, the creditor's bid was less than the amount of the debt, resulting in a deficiency. *Id.* at 197, 198 S.E. at 645. As a result, the creditor brought a deficiency action against the guarantor's estate, but did not name the borrower in the suit. *Id.*

The guarantor's executors, in their answer, pleaded the defense provided under G.S. 45-21.36, alleging that the fair market value of the collateral exceeded the indebtedness. *Id.*

In response, the creditor filed a motion to strike the executors' defense, arguing that the protections of the statute were "unavailable to a guarantor of the debt." *Id.* at 198, 198 S.E. at 645. After the creditor's motion to strike was denied, the creditor immediately appealed the trial court's ruling.

On appeal, our Supreme Court applied the following standard of review:

> On a motion to strike out, the test of relevancy of a pleading is the right of the pleader to present the facts to which the allegation relates in the evidence upon the trial. If the defense provided in [section 45-21.36] is available to the defendants in this case, they are entitled to introduce evidence of the facts constituting such defense on the trial.

Id. at 198, 198 S.E. at 646 (citations omitted). In other words, the allegations brought by the guarantor's estate could survive the creditor's motion to strike *only if* they were relevant and constituted a valid defense. In its ruling, our Supreme Court held that because the allegations were relevant based "upon the merits[,]" *id.* at 199, 198 S.E. at 646, the guarantor's estate had a right to "present the facts" concerning the statutory defense at trial. *Id.* at 198, 198 S.E. at 646. While explaining its conclusion, our Supreme Court further stated that

> [i]t is not, of course, for us to say whether the defendants can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it.

Id. In so many words, the Court affirmed the guarantor's executors' right to assert the statutory defense, but appropriately declined to comment on whether the guarantor's executors could produce the evidence to support the defense.

The Bank argues that *Dunlop* does not apply because the Supreme Court was not making a "clear and unequivocal" decision regarding whether the statutory defense was available to a guarantor. It is true that in certain cases under the pleading practices of that time our Supreme Court often chose not to rule on the relevancy of a pleaded defense in an interlocutory appeal, but would rather remand the matter so that the relevancy could be determined *after* evidence was offered at the trial court level, as in the case of *Hildebrand v. Telephone Co.*, 216 N.C. 235, 4 S.E.2d 439 (1939), a case cited in the Bank's brief.

However, in *Dunlop*, the Supreme Court – while noting the interlocutory nature of the appeal in that case – *did* make a "clear and unequivocal" ruling on the relevancy of the defense pleaded by the guarantor's executors in that case:

> We are not sure of [the creditor's] right to appeal on this matter [], since the same question could have been raised on objections to the evidence, and, if necessary, reviewed on appeal from the final judgment, and it does not now appear that any substantial right has been affected. **But since the holding [not to strike the guarantor's pleading] is adverse to [the creditor's] contention, and the appeal has precedent, we prefer to decide the matter upon the merits.**
>
> **The judgment denying the [creditor's] motion is AFFIRMED.**

Dunlop, 214 N.C. at 199, 198 S.E. at 647 (citations omitted and emphasis added). In other words, though *Dunlop* contains dicta which might seem equivocal to the modern reader, as it was written in 1938, the holdings are clear: An irrelevant pleading must be struck, and the Supreme Court considered the issue raised by the creditor's appeal and decided on the legal merits that the trial court did not err in denying the creditor's motion

to strike the statutory defense pleaded by the guarantor's executors. We are bound by this holding until our Supreme Court speaks on this issue and renders a holding contrary to that in *Dunlop*, notwithstanding holdings by this Court which may appear to conflict with *Dunlop*.[5]

D. Appellant Did Not Waive the G.S. 45-21.36 Defense/Offset

[4] Finally, the Bank argues that even if the G.S. 45-21.36 defense/offset is available to Appellant, Appellant waived the defense under the terms of his guaranty agreement. Specifically, the Bank cites to language in the guaranty agreement which states that "the undersigned [Appellant] hereby waives the benefits of all provisions of law[.]" However, the Bank omits the rest of the clause which limits the scope of the waiver:

> the undersigned hereby waives the benefits of all provisions of law, including but not limited to the provisions of N.C.G.S., section 26-7, or its successor, for stay or delay of execution or sale of property or other satisfaction of judgment against the undersigned on account of obligation and liability hereunder until judgment be obtained therefor against the [Borrower-LLC] and execution thereon returned unsatisfied, or until it is shown that the [Borrower-LLC] has no property available for the satisfaction of the indebtedness, obligation or liability guaranteed hereby, or until any other proceedings can be had[.]

When read in its entirety, the language makes no mention of a waiver of Appellant's potential G.S. 45-21.36 defense/offset. Rather, it only purports to waive any obligation by the Bank under law to first pursue its remedies against the Borrower-LLC and the collateral before pursuing Appellant. Accordingly, this argument is overruled.

III. Conclusion

In conclusion, we hold that the trial court erred in granting summary judgment against Appellant. We hold that under our Supreme Court's decision in *Dunlop*, *supra*, Appellant is entitled to assert the defense/offset provided under G.S. 45-21.36. Further, we hold that there was sufficient evidence before the trial court at the summary judgment hearing

---

5. This issue is currently before our Supreme Court in *High Point Bank & Trust Co. v. Highmark Props., LLC* ___ N.C. App. ___, 750 S.E.2d 886 (2013), *petition for discretionary review allowed*, 367 N.C. 321, 755 S.E.2d 627 (2014).

to create a genuine issue of material fact as to the value of the Property. Accordingly, we reverse the order against Appellant and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

SHELBY J. GRAHAM, Plaintiff

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under Pooling and Servicing Agreement dated as of November 1, 2005, Morgan Stanley Home Equity Loan Trust 2005-4 Mortgage Pass through Certificates, Series 2005-4, Defendant/Third-Party Plaintiff

v.

BRANCH BANKING AND TRUST COMPANY, Third-Party Defendant

No. COA13-881-2

Filed 17 February 2015

1. Trespass—party asserting claim—not in possession of property at time unauthorized entry first occurred

On rehearing, the Court of Appeals determined that it was not bound by the portion of *Woodring v. Swieter*, 180 N.C. App. 362 (2006), suggesting that a trespass claim can never succeed when the party asserting the claim was not in possession of the property at the time the unauthorized entry first occurred.

2. Trespass—summary judgment—removal of encroaching structure

The trial court did not err in a trespass case by granting summary judgment in favor of plaintiff and BB&T, and issuing a mandatory injunction requiring defendant to remove the encroaching portions of the pertinent structures. A defendant's wrongful maintenance of an encroaching structure is itself a trespass each day it so remains and constitutes a distinct wrong. The forecast of evidence showed that all of the elements of a trespass claim were satisfied.

Appeal by defendant from order entered 19 March 2013 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Originally heard in the Court of Appeals 11 December 2013. Petition for Rehearing allowed 13 August 2014.

Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for plaintiff-appellee and third-party defendant-appellee.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Christopher C. Finan, for defendant/third-party plaintiff-appellant.

DAVIS, Judge.

Deutsche Bank National Trust Company ("Defendant") appeals from the trial court's order awarding summary judgment in favor of Shelby J. Graham ("Plaintiff") and Branch Banking and Trust Company ("BB&T") on Plaintiff's trespass claim. On 1 July 2014, this Court filed an opinion reversing the trial court's order and remanding for the entry of summary judgment in favor of Defendant. On 4 August 2014, Plaintiff filed a petition for rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. We granted Plaintiff's petition for rehearing on 13 August 2014, and after careful review upon rehearing, we conclude that the trial court's order should be affirmed.

Factual Background

Plaintiff and Defendant are the owners of two adjoining parcels of land in the Mayfield Village subdivision ("Mayfield Village") in Guilford County, North Carolina. Plaintiff acquired Lot 1, Section 1 of Mayfield Village ("Lot 1") by general warranty deed on 25 July 1996.[1] Plaintiff did not have Lot 1 surveyed at the time of purchase. Defendant acquired Lot 2, Section 1 of Mayfield Village ("Lot 2") pursuant to a trustee's deed recorded on 28 May 2010. Similarly, Defendant did not have Lot 2 surveyed at the time it acquired the property.

In September of 2010, one of Plaintiff's neighbors approached her and expressed an interest in purchasing Lot 2 from Defendant. Plaintiff's neighbor asked her if she was aware "that there was a property line dispute between [Lot 1] and [Lot 2]." Plaintiff replied that she did not know of any such dispute.

In early 2011, another individual, Danny Frazier ("Mr. Frazier"), approached Plaintiff, expressed an interest in acquiring Lot 2, and inquired about a property line dispute. At some point, Mr. Frazier had the property surveyed, and the survey — which he provided to Plaintiff

1. The deed listed Shelby G. Coffer — Plaintiff's married name — as the grantee. Plaintiff is no longer married, and in 2001, Plaintiff executed and recorded a deed conveying Lot 1 to Shelby J. Graham.

— indicated that portions of the house and septic system on Lot 2 encroached on Lot 1.

Plaintiff's title insurance company then contacted Boswell Surveyors, Inc. to prepare a survey of the property ("the Boswell survey"). The Boswell survey likewise indicated that the house and septic system on Lot 2 — which were constructed in 1994 — are "in fact partially located on Lot 2 Mayfield Village and partially encroach[] over onto Lot 1."

On 8 March 2012, Plaintiff's attorney sent a letter to Defendant demanding that the encroaching structures be immediately removed from Lot 1. The letter stated that if Defendant did not respond within seven days, a civil action would be filed.

Twelve days later, Plaintiff filed a complaint against Defendant in Guilford County Superior Court alleging that the encroaching structures were an "ongoing and continuing trespass" on her property. On 23 May 2012, Defendant filed an answer, counterclaims for reformation of its deed and to quiet title, and a third-party complaint against BB&T, the holder of the deed of trust encumbering Plaintiff's property. Defendant filed an amended answer on 18 July 2012, adding a counterclaim for adverse possession. Defendant voluntarily dismissed its counterclaim for adverse possession on 31 October 2012.

On 13 February 2013, Plaintiff and BB&T filed a joint motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Following a hearing, the trial court entered an order on 19 March 2013 granting summary judgment in favor of Plaintiff and BB&T on Plaintiff's trespass claim and ordering Defendant to remove the encroaching structures. Defendant appealed to this Court.

Analysis

[1] In our prior opinion in this case, we held that summary judgment in favor of Plaintiff and BB&T was improper because Plaintiff was not in possession of the property when the trespass initially occurred and, therefore, had failed to establish the first element of a claim for trespass. In so holding, we relied on this Court's decision in *Woodring v. Swieter*, 180 N.C. App. 362, 637 S.E.2d 269 (2006). Upon reconsideration, however, we conclude that the portion of *Woodring* we relied upon in our opinion is inconsistent with prior decisions of North Carolina's appellate courts regarding the law of continuing trespass to real property.

"[A] claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized

entry by defendant; and (3) damage to plaintiff." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (citation and quotation marks omitted). In *Bishop v. Reinhold*, 66 N.C. App. 379, 384, 311 S.E.2d 298, 301, *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984), this Court addressed the law of continuing trespass to real property. In *Bishop*, the defendants constructed their new house in such a manner that a portion of the home encroached upon the plaintiffs' property. *Id.* at 380, 311 S.E.2d at 299. The plaintiffs brought a trespass claim seeking the removal of the encroaching portion of the house, and the defendants asserted the three-year statute of limitations as an affirmative defense. *Id.* at 384, 311 S.E.2d at 301. We held that the plaintiffs' action seeking removal of the encroachment "would not be barred until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription." *Id.* We reasoned that a defendant's wrongful maintenance of a structure encroaching upon the plaintiff's property "is a separate and independent trespass each day it so remains" such that the three-year statute of limitations applicable to trespass claims begins to run every day the encroaching structure remains on the plaintiff's land. *Id.*

While the present case does not present a statute of limitations issue, we construe the precedential effect of *Bishop* as encompassing the issue presented here. Implicit in the holding of *Bishop* is the principle that the first element of a trespass claim may be satisfied even where — as here — the landowner asserting the claim did not own the property at the time the original trespass was committed as long as she was in possession of her land while the trespass was ongoing. Accordingly, subsequent landowners who, like Plaintiff, purchase the subject property after the encroaching structure has already been built may still meet the first element of a trespass claim given that the maintenance of the encroaching structure is itself a trespass that continues each day the encroachment exists. *See Adams Creek Assocs. v. Davis*, ___ N.C. App. ___, ___, 746 S.E.2d 1, 9, *disc. review denied*, 367 N.C. 234, 748 S.E.2d 322 (2013) (determining that plaintiffs stated valid claim for trespass even though defendants' encroaching structures were built before plaintiffs acquired possession of property at issue).

Such an interpretation is also consistent with caselaw from our Supreme Court. In *Caveness v. Charlotte, Raleigh & S. R.R. Co.*, 172 N.C. 305, 90 S.E. 244 (1916), the Supreme Court discussed the circumstances under which the right to recover on a trespass theory passes to a subsequent landowner. The Court explained that

> [a] subsequent purchaser cannot recover for a completed act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case for a continuing trespass, and in the latter for a fresh injury.

Id. at 309, 90 S.E. at 246 (citation and quotation marks omitted).

We note that this analysis is similarly in harmony with generally accepted principles of the law of trespass. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 83 (5th ed. 1984) ("[W]here the defendant erects a structure . . . upon the land of the plaintiff, the invasion is continued by a failure to remove it. In such a case, there is a continuing wrong so long as the offending object remains. A purchaser of the land may recover for the continuing trespass, and a transferee of the defendant's interest in the chattel or structure may be liable."); *see also* 75 Am.Jur.2d *Trespass* § 29 (2007) ("[I]f a possessory interest in land has been transferred after the actor placed something on the land that constitutes a continuing trespass, a transferee of the land may maintain an action for continuing the trespass there."); 87 C.J.S. *Trespass* § 26 (2010) ("If a trespass is continuing, any person in possession of the land at any time during its continuance may maintain an action for trespass."). Indeed, as Plaintiff notes in her petition for rehearing, a contrary holding would allow for a private taking of the portion of the landowner's property upon which the encroachment sits — a result that the jurisprudence of our State does not permit.

Here, the trespass at issue is one that continues to affect Plaintiff's possession of her property and is clearly continuing in nature. *See Young v. Lica*, 156 N.C. App. 301, 305-06, 576 S.E.2d 421, 424 (2003) ("An essential right inuring the ownership of real property is the ability to exclude others from the property. When one builds upon another's land without permission or right, a continuing trespass is committed."). Therefore, because it is undisputed that Plaintiff was in possession of her property while the encroaching structures remained on her land, she has satisfied the first element of a trespass claim.

In reaching a contrary result in our prior opinion in this case, we relied on this Court's decision in *Woodring*. In *Woodring*, the defendants constructed an underground water pipeline that encroached upon the neighboring property. *Woodring*, 180 N.C. App. at 366, 637 S.E.2d at 274. Gary and Henry Woodring, who each at varying times owned the

neighboring property, filed a complaint against the defendants alleging various claims, including a claim for trespass. *Id.* The trial court granted summary judgment in favor of the defendants on the trespass claim, and we affirmed the trial court's ruling. *Id.* at 364, 637 S.E.2d at 273.

In reaching our conclusion that summary judgment in the defendants' favor was proper, we first noted that Henry Woodring did not have standing to bring a trespass claim because he had conveyed all of his interest in the property to Gary Woodring prior to the filing of their complaint. *Id.* at 367, 637 S.E.2d at 275. We then concluded that Gary Woodring was also unable to prevail on his trespass claim against the defendants, stating the following:

> The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. Plaintiff Gary Woodring obtained no legally recognized interest [in the land] until Henry deeded his interest in the two acre parcel to Gary in November 1998, approximately six years after the installation of the waterline — the date when the original trespass was committed. As a result, plaintiff failed to satisfy the first element of a claim for trespass, and, accordingly, summary judgment in favor of defendants was proper.

Id. at 376, 637 S.E.2d at 280-81 (citations, quotation marks, and emphasis omitted).

It is well established that as a general rule we are bound by the prior decisions of this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). However, it is also well settled that "where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Respess v. Respess*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 701 (2014) (citation and quotation marks omitted).

On rehearing, we determine that we are not bound by the portion of the *Woodring* decision suggesting that a trespass claim can never succeed when the party asserting the claim was not in possession of the property at the time the unauthorized entry *first* occurred. Such a proposition is inconsistent with both our earlier opinion in *Bishop* and our Supreme Court's discussion of the law of continuing trespass

in *Caveness*. Therefore, we conclude that *Woodring* does not control the outcome of the present case. *See Respess*, ___ N.C. App. at ___, 754 S.E.2d at 702.

[2] Defendant next contends that summary judgment was improper because Plaintiff cannot establish the second element of her trespass claim in that she failed to show that *Defendant* committed an unauthorized entry onto her property. Specifically, Defendant argues that it did not personally construct either of the encroaching structures, was not in possession of the property when the structures were first built, and is "a mere successor in title" to the party who committed the original unauthorized entry onto Plaintiff's property.

However, as our Court explained in *Bishop*, a defendant's wrongful maintenance of an encroaching structure is itself a "trespass each day it so remains" and constitutes a distinct wrong. *Bishop*, 66 N.C. App. at 384, 311 S.E.2d at 301. Thus, because it is undisputed that Defendant failed to remove the encroaching structures from Plaintiff's property, the second element of Plaintiff's trespass claim is likewise established. *See* Restatement (Second) of Torts § 161(2) (1965) ("A trespass may be committed by the *continued presence* on the land of a structure, chattel, or other thing which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing." (emphasis added)). Accordingly, Defendant's argument on this issue is overruled.

Because the forecast of the evidence in this case showed that all of the elements of a trespass claim were satisfied, the trial court's order granting summary judgment in favor of Plaintiff and BB&T and issuing a mandatory injunction requiring Defendant to remove the encroaching portions of the structures was proper. *See Williams v. S. & S. Rentals, Inc.*, 82 N.C. App. 378, 383, 346 S.E.2d 665, 669 (1986) ("[T]he usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment.").

Conclusion

For the reasons stated above, we affirm the trial court's 19 March 2013 order granting summary judgment in favor of Plaintiff and BB&T on Plaintiff's claim for trespass.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.

IN RE FORECLOSURE OF FOSTER

[239 N.C. App. 308 (2015)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY RALPH M. FOSTER AND SHYVONNE L.STEED-FOSTER DATED FEBRUARY 26, 2010 AND RECORDED IN BOOK 6428 AT PAGE 134 IN THE DURHAM COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA14-108

Filed 17 February 2015

Mortgages and Deeds of Trust—foreclosure—motions for injunction and sanctions

Judge Fox properly denied respondents' motion to reconsider an order dismissing their appeal by Judge Gessner in an action arising from a foreclosure. Although the foreclosure ended when Judge Collins dismissed Wells Fargo's appeal to superior court from the clerk's dismissal of the foreclosure, and appeal from that order was not timely, respondents had remaining a motion for a permanent injunction against foreclosure and a motion for sanctions. The superior court did not have subject matter jurisdiction over respondents' motion for a permanent injunction in this proceeding; the proper way to invoke equitable jurisdiction to enjoin a foreclosure sale is by bring an action pursuant to N.C.G.S. § 45-21.34. As to sanctions, Judge Collins' order dismissing the foreclosure did not prevent respondents from calendaring the motion, so that the record that ultimately came before Judge Fox contained no order dismissing or denying respondents' motion for sanctions, leaving no order to reconsider.

Appeal by respondents from order entered 8 August 2013 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 7 May 2014.

Womble, Carlyle, Sandridge & Rice, LLP, by Christopher W. Jones, for petitioner-appellee.

Ralph M. Foster and Shyvonne L. Steed-Foster, pro se, respondents-appellants.

GEER, Judge.

Wells Fargo Bank, NA initiated foreclosure proceedings against respondents Ralph M. Foster and Shyvonne L. Steed-Foster. The clerk of superior court denied the foreclosure petition, and the superior court

dismissed Wells Fargo's appeal of the clerk's order. The court did not, however, rule on respondents' motions for sanctions and permanent injunctive relief for fraud on the court. Respondents appealed the dismissal order to this Court, but they never served a proposed record on appeal. The superior court granted Wells Fargo's motion to dismiss respondents' appeal. Respondents moved for relief under Rule 60 of the Rules of Civil Procedure from the order dismissing their appeal and for reconsideration of their motions for sanctions and permanent injunctive relief. The superior court denied the Rule 60 motion, and we affirm.

Facts

On 26 February 2010, respondents executed a promissory note in the amount of $340,506.00 secured by a deed of trust on their real property. On 31 July 2012, the substitute trustee initiated a foreclosure proceeding at the request of Wells Fargo by filing a "NOTICE OF HEARING ON FORECLOSURE OF DEED OF TRUST." On 2 January 2013, after a hearing, the clerk of superior court entered an order dismissing the petition. Wells Fargo filed written notice of appeal from the clerk's order on 7 January 2013.

On 22 January 2013, respondents filed a motion entitled "MORTGAGORS [sic] MOTION FOR SANCTIONS AND FOR DENIAL OF FORECLOSURE WITH PREJUDICE AND/OR FOR PERMANENT INJUNCTIVE RELIEF FOR FRAUD UPON THE COURT AND MORGAGORS [sic] BY WELLS FARGO BANK, NA." The motion alleged that Wells Fargo had committed fraud upon the court by producing at the 2 January 2013 hearing a copy of the promissory note that had been altered by the addition of Wells Fargo as an endorsee. Attached to respondents' motion were the affidavits of Shyvonne and Ralph Foster, a copy of the promissory note sent to respondents in response to a July 2012 qualified written request, and a copy of the promissory note submitted by Wells Fargo at the 2 January 2013 hearing.

On 28 January 2013, counsel for Wells Fargo was not present when the case was called before Judge George B. Collins, but appeared later that afternoon and moved for a continuance. On 1 February 2013, Judge Collins entered an order denying Wells Fargo's motion for continuance and dismissing Wells Fargo's appeal "without prejudice." Judge Collins did not hear respondents' motion for sanctions or permanent injunction, and the order did not mention those motions. Respondents filed a written notice of appeal to this Court on 11 February 2013 from the 1 February 2013 order.

On 2 April 2013, after the time had expired for service of a proposed record on appeal, respondents filed a motion for extension of their time to serve the proposed record on appeal. The motion stated:

> There remain issues to be resolved in this case regarding mortgagors [sic] motion for sanctions for fraud upon the court and for permanent injunction. If Mortgagors are successful in obtaining the requested relief then no appeal is necessary. On the other hand, if relief is denied, mortgagors would seek to amend the notice of appeal to include such order and make appropriate additions to their proposed record to avoid a piece meal appeal.

The motion stated that it "was timely filed, however it was inadvertently file [sic] in a related proceeding instead of this proceeding." The motion was originally filed on 14 March 2013 in 12 CVS 6015.

On 25 April 2013, Wells Fargo moved to dismiss respondents' appeal pursuant to Rules 11 and 25 of the Rules of Appellate Procedure. At the hearing on 13 May 2013, Judge Paul G. Gessner rendered a ruling granting Wells Fargo's motion to dismiss, denying respondents' motion for an extension, and denying respondents' motion for sanctions. On 31 May 2013, Judge Gessner entered a written order dismissing respondents' appeal, but the order did not include any ruling on respondents' motion for sanctions.

On 23 May 2013, after Judge Gessner rendered his ruling but before entry of the 31 May 2013 written order, respondents filed a "MOTION TO VACATE ORDER DISMISSING APPEAL AND MOTION TO VACATE, AMEND AND/OR FOR RECONSIDERATION OF THE DENIAL OF RESPONDENTS' MOTION FOR SANCTIONS AND PERMANENT INJUNCTIVE RELIEF" pursuant to Rules 59 and 60 of the Rules of Civil Procedure. This motion was heard on 29 July 2013 by Judge Carl R. Fox, and on 8 August 2013, Judge Fox entered an order denying the motion. Respondents timely appealed to this Court.

Discussion

Respondents argue that Judge Fox erred in denying their motion for Rule 60(b) relief from Judge Gessner's 31 May 2013 order dismissing respondents' appeal of Judge Collins' order. The standard of review of a trial court's ruling on a Rule 60(b) motion is well settled:

> [A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its

> discretion. [A] trial judge's extensive power to afford relief [under Rule 60(b)] is accompanied by a corresponding discretion to deny it, and the only question for our determination . . . is whether the court abused its discretion in denying defendant's motion. A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

McKyer v. McKyer, 182 N.C. App. 456, 459, 642 S.E.2d 527, 529-30 (2007) (internal citations and quotation marks omitted).

Judge Collins' 1 February 2013 order dismissed Wells Fargo's appeal of the clerk's dismissal of the foreclosure proceeding. Although the order dismissed the appeal "without prejudice," Wells Fargo is barred from appealing the clerk's order by N.C. Gen. Stat. § 45-21.16(d1) (2013) (clerk's order in foreclosure proceeding "may be appealed to the judge of the district or superior court having jurisdiction *at any time within 10 days after said act*" (emphasis added)). Therefore, the 2 January 2013 clerk's order dismissing the foreclosure petition stands, and the 1 February 2013 order effectively ended the foreclosure proceeding.

It is well settled that "[o]nly a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1–271 (1983)), *superseded on other grounds by* N.C. Gen. Stat. § 35A-1102. "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Id.* Here, the 1 February 2013 order did not injuriously affect respondents -- on the contrary, it ended the foreclosure of respondents' property. Nevertheless, respondents contend that their appeal of the order should not have been dismissed because respondents' motions for permanent injunctive relief and sanctions remained pending in the trial court.

Regarding respondents' motion for permanent injunctive relief, this Court has held that "[a]t a foreclosure hearing pursuant to N.C. Gen. Stat. § 45–21.16, '[t]he Clerk of Superior Court is limited to making the four findings of fact specified in the statute, and it follows that the Superior Court Judge is similarly limited in the hearing *de novo*.' " *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009) (quoting *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978)). " 'The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34.' " *Id.* at 296, 681 S.E.2d at 458 (quoting *In re Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429).

Thus, "[o]n a *de novo* appeal to the Superior Court in a section 45-21.16 foreclosure proceeding, the trial court must 'declin[e] to address [any party's] argument for equitable relief, as such an action would . . . exceed[] the superior court's permissible scope of review[.]' " *Id.* (quoting *Espinosa v. Martin*, 135 N.C. App. 305, 311, 520 S.E.2d 108, 112 (1999)). Accordingly, we hold that Judge Collins properly declined to rule on respondents' motion for permanent injunctive relief, as the superior court did not have subject matter jurisdiction to grant that relief in this proceeding.

Thus, the only motion pending after the dismissal of the foreclosure proceeding was respondents' motion for sanctions. This Court has held that "neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions." *Dodd v. Steele*, 114 N.C. App. 632, 634, 442 S.E.2d 363, 365 (1994). Consequently, the 1 February 2013 order dismissing the foreclosure proceeding, and respondents' filing an appeal of that order did not prohibit respondents from calendaring their motion for sanctions with the trial court. Respondents, therefore, were not aggrieved by the 1 February 2013 order.

"Where a party is not aggrieved by the judicial order entered, . . . his appeal will be dismissed." *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam). We therefore hold that Judge Fox properly denied respondents' motion to vacate the order dismissing respondents' appeal. Because of our holding, we need not address the parties' arguments regarding respondents' failure to serve a proposed record on appeal in violation of Rule 11 of the Rules of Appellate Procedure.

Respondents next argue that Judge Fox erred by failing to reconsider respondents' motions for permanent injunctive relief and sanctions. Regarding permanent injunctive relief, as previously discussed, the trial court did not have authority to grant such relief in a foreclosure proceeding pursuant N.C. Gen. Stat. § 45-21.16(d1).

With respect to respondents' motion for sanctions, the record before Judge Fox contained no order dismissing or denying respondents' motion for sanctions. Regardless whether Judge Gessner orally made any ruling on the motion for sanctions, the order actually entered only dismissed respondents' appeal -- it did not address the motion for sanctions. Therefore, no order existed to be reconsidered, and Judge Fox properly denied respondents' Rule 60 motion.

Affirmed.

Judges BRYANT and CALABRIA concur.

IN RE ALLESSANDRINI

[239 N.C. App. 313 (2015)]

IN THE MATTER OF RAYMOND KYLE ALESSANDRINI, CUSTODIAN UNDER NC UNIFORM TRANSFERS TO MINORS ACT

No. COA14-850

Filed 17 February 2015

Fiduciary Relationship—custodian of account—Uniform Transfers to Minors Act—accounting of expenses

The trial court did not err by denying petitioners' motion for summary judgment and by granting summary judgment for respondent father in an action seeking an accounting by the father as custodian of accounts he established for his children under the Uniform Transfers to Minors Act. The uncontroverted evidence showed respondent paid reasonable expenses for the benefit of the minors out of his personal funds and reimbursed himself from the custodial accounts.

Appeal by Petitioners from order entered 7 April 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 7 January 2015.

Raymond Kyle Alessandrini, pro se, for respondent.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.L.L.C., by John F. Scarbrough, for petitioners.

TYSON, Judge.

Michell Alessandrini, Ainsley Alesandrini and Vince Allesandrini ("petitioners") appeal from an order which denied their motion for summary judgment and granted summary judgment in favor of Raymond Alessandrini ("respondent"). We affirm.

I. Background

In the 1990's, respondent's father established accounts for the benefit of respondent's three children pursuant to the Uniform Transfers to Minors Act ("UTMA"). Respondent Raymond Alessandrini, their father, was named as the custodian. The bulk of the custodial funds are deposited in two Edward Jones accounts, one for the benefit of Ainsley, and the other for the benefit of Vince.

On 11 February 2011, the children's mother, petitioner Michell Alessandrini, filed a special proceeding on behalf of the children and

petitioned the Rowan County Clerk of the Superior Court for an accounting. Petitioners alleged respondent had refused to produce the financial records of the accounts, refused to release funds to pay for expenses of the children, and improperly withdrew custodial funds. Petitioners filed an amended petition on 24 August 2012 to require respondent to fully account, immediately pay for certain expenses of the children, reimburse the accounts for any misappropriated funds, and to pay petitioners' attorney's fees and costs.

The matter was heard before the Clerk of the Rowan County Superior Court on 4 October 2012. The Clerk ordered respondent to file an accounting of funds. Respondent filed the accounting on 4 January 2013. The accounting showed that respondent withdrew $5,000.00 from the Edward Jones custodial account for the benefit of Ainsley by check dated 1 September 2009. He withdrew $22,749.97 from the Edward Jones custodial account for the benefit of Vince by check dated 22 July 2010.

Following respondent's filing, the Clerk of the Rowan County Superior Court recused himself from further participation due to an unrelated conflict of interest. Pursuant to a joint motion of the parties under N.C. Gen. Stat. § 7A-104(b), the superior court entered an order and removed the special proceeding to the superior court. On 28 February 2014, petitioners filed a motion for summary judgment for the relief requested in the 24 August 2012 amended petition. On 27 March 2014, respondent filed a cross motion for summary judgment.

The parties' motions for summary judgment were heard on 7 April 2014. The court found no genuine issue of material fact existed, denied petitioners' motion for summary judgment, and granted summary judgment in favor of respondent. Petitioners appeal.

II. Summary Judgment

Petitioners' sole argument on appeal asserts the trial court erred in denying their motion for summary judgment and by granting summary judgment for respondent. Petitioners argue genuine issues of material fact existed of whether respondent breached his fiduciary duty by paying himself $5,000.00 from Ainsley's custodial account and $22,749.97 from Vince's custodial account. We disagree.

A. Standard of Review

Summary judgment is proper 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).

> An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense. A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on 'undisputed aspects of the opposing evidential forecast,' where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004)(citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. UTMA

Chapter 33A of our General Statutes, entitled "North Carolina Uniform Transfers to Minors Act," governs UTMA accounts in this State. N.C. Gen. Stat. § 33A-12(a) sets forth the fiduciary duties of a custodian concerning custodial property. The statute provides the custodian shall: "(1) Take control of custodial property; (2) Register or record title to custodial property if appropriate; and (3) Collect, hold, manage, invest, and reinvest custodial property." N.C. Gen. Stat. § 33A-12(a) (2013). "In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries." N.C. Gen. Stat. § 33A-12(b) (2013).

The Act requires the custodian to keep the custodial property separate and distinct from all other property, so that it can be clearly

identified as custodial property of the minor. N.C. Gen. Stat. § 33A-12(d) (2013). The custodian is required to "keep records of all transactions with respect to custodial property." N.C. Gen. Stat. § 33A-12(e) (2013).

C. Use of Custodial Property

N.C. Gen. Stat. § 33A-14, entitled "Use of Custodial Property," states:

> (a) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

N.C. Gen. Stat. § 33A-14(a) (2013). Use of custodial funds is in addition to, not in substitution for, the parental obligation to support the minor. N.C. Gen. Stat. § 33A-14(c) (2013).

In support of his motion for summary judgment, respondent's affidavit states that at or near the time of the $5,000.00 withdrawal from Ainsley's account, she had incurred college tuition expenses of $5,315.75, and the $5,000.00 withdrawal contributed to her tuition.

Respondent's affidavit further states that at or near the time of the withdrawal of $22,749.97, Vince had incurred expenses related to travel abroad totaling $8,593.32. Vince also incurred expenses for his computer in the amount of $1,709.23, and expenses related to his vehicle in the amount of $6,454.53. The remainder of respondent's accounting for Vince's UTMA account shows purchases from drug stores and clothing stores and orthodontic expenses.

Petitioner presented no evidence and does not argue the expenditures incurred and set forth in respondent's affidavit and accounting were not paid for the benefit of the children, nor do they argue that respondent did not pay the expenses out of pocket. Petitioners do not argue that respondent used the custodial funds to reimburse himself for expenses paid within the normal support obligations of parenthood. N.C. Gen. Stat. § 33A-14(c) (2013). Instead, petitioners argue that respondent's reimbursement for these expenses he had paid out of pocket was a per se breach of his fiduciary duty.

Petitioners correctly note this Court has not interpreted the Uniform Transfers to Minors Act in this specific context: whether it is permissible

for a custodian to pay expenses of the minor out of his pocket and later reimburse himself from the custodial funds.

Although our Uniform Trust Code does not apply to Chapter 33A for custodial accounts, we find its provisions, as well as case law involving trusts, to be persuasive to resolve issues regarding custodial accounts under the UTMA. *See Belk v. Belk*, 221 N.C. App. 1, 728 S.E.2d 356 (2012) (applying trust law principles in determining appropriate remedy when a custodian misappropriates UTMA account funds).

In the context of a trustee, our Supreme Court adhered as follows:

> The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.

Woodard v. Mordecai, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (citing Restatement of the Law of Trusts, section 187; *Carter v. Young*, 193 N.C. 678, 137 S.E. 875 (1927)). We apply this reasoning to a custodian under the Uniform Transfers to Minors Act.

The uncontested evidence shows that respondent paid expenses for the benefit of Ainsley and Vince from personal funds, and later reimbursed himself from their UTMA accounts. No evidence tends to show respondent reimbursed more than he expended or incurred expenses or took funds unrelated to the benefit of the children. Nothing on the record tends to show respondent acted with a dishonest purpose or a lack of reasonable judgment in managing and dispersing the funds in the UTMA accounts.

In opposing respondent's claim that the withdrawals were reimbursements for out-of-pocket expenses he paid for the benefit of the minors, petitioners note respondent paid two of Ainsley's college tuition payments after withdrawing $5,000.00 from the account. Those tuition payments were made near the time of the withdrawal.

Ainsley was enrolled in college and the record shows tuition payments were due periodically. While respondent may have refrained from paying himself from Ainsley's account prior to paying the tuition, the evidence before the trial court fails to show respondent acted dishonestly or unreasonably as custodian in managing and dispersing the

funds in the UTMA accounts, or otherwise breached his fiduciary duty. Petitioners' arguments are overruled. The order of the trial court denying petitioners' motion for summary judgment and granting summary judgment in favor of respondent is affirmed.

III. Conclusion

The superior court correctly held no genuine issue of material fact exists, and properly granted summary judgment in favor of respondent and denied petitioners' motion for summary judgment. The uncontroverted evidence showed respondent paid reasonable expenses for the benefit of the minors out of his personal funds and reimbursed himself from the custodial accounts. The trial court's order is affirmed.

Affirmed.

Judges ELMORE and DAVIS concur.

IN THE MATTER OF H.D., K.R.

No. COA14-589

Filed 17 February 2015

1. Child Abuse, Dependency, and Neglect—change of permanent plan to adoption—order ceasing reunification orders included

In a child neglect and dependency proceeding, the Court of Appeals heard respondent's appeal from an order changing a permanent plan to adoption, which respondent addressed as an order ceasing reunification efforts, even though the order did not explicitly cease reunification efforts or require DSS to file a motion terminating parental rights. As a practical matter, the order ceased reunification efforts.

2. Appeal and Error—notice of appeal—termination of parental rights—order ceasing reunification order—not designated

In a child neglect and dependency proceeding, the Court of Appeals denied DSS's motion to dismiss the appeal and respondent's petition for a writ of certiorari where DSS contended that respondent had not designated the order ceasing reunification in her notice of appeal. Respondent's parental rights were terminated

in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was identified as an issue in the record on appeal.

3. Child Abuse, Dependency, and Neglect—continued reunification efforts futile—findings sufficient

The findings in a child neglect and dependency proceeding were sufficient where respondent contended that the court relieved DSS of its duty to seek reunification without first finding that continued efforts would be futile or inconsistent with the children's welfare. The findings, particularly the pending criminal charges, indicated repeated failures at creating an acceptable and safe living environment.

4. Child Abuse, Dependency, and Neglect—adjudication—findings—sufficient

The unchallenged findings were sufficient in a child dependency and neglect proceeding to support the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2).

5. Termination of Parental Rights—best interests of children—likelihood of adoption considered

The trial court did not abuse its discretion in concluding that termination of parental rights was in the best interests of the children when it failed to consider the likelihood that the children would be adopted by their new pre-adoptive caregiver. The enumerated findings demonstrate the trial court did consider the girls' likelihood of adoption.

Appeal by respondent from orders entered on or about 16 November 2012 by Judge F. Warren Hughes and 11 February 2014 by Judge Ted McEntire in District Court, Madison County. Heard in the Court of Appeals 9 December 2014.

Leake & Stokes, by Larry Leake, for petitioner-appellee Madison County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Tobias R. Coleman, for guardian ad litem.

Mark Hayes, for respondent-appellant mother.

STROUD, Judge.

Respondent seeks review of three orders: an order which changed the permanent plan for the children to adoption and the adjudication and disposition orders terminating respondent's parental rights to her daughters. Madison County Department of Social Services filed a motion to dismiss respondent's appeal from the order adopting a permanent plan of adoption, and respondent then filed a petition for a writ of certiorari requesting this Court to hear her appeal on the contested order. For the following reasons, we deny Madison County Department of Social Services's motion to dismiss and respondent's petition for certiorari and affirm the three orders.

I. Background

On 6 April 2010, the Madison County Department of Social Services ("DSS") filed juvenile petitions seeking adjudications of neglect and dependency for respondent's two daughters. The petitions alleged that respondent admitted to DSS that she and her husband were drinking alcohol while supervising the children in April of 2010, in violation of a safety plan established in response to prior incidents. DSS alleged that "the family continues to be in constant crisis and the parents are unable to provide for the supervision and care of the juvenile[s] and lack appropriate alternative child care arrangement." On 23 November 2010, the district court entered an order adjudicating the girls dependent juveniles.

Over the next two years, DSS made several attempts to return the girls to the care of respondent but each time eventually had to intervene again. On 12 July 2012, the district court amended the girls' permanent plan of reunification with respondent by adding a concurrent plan of adoption. On or about 16 November 2012, the district court signed an order changing the permanent plan for the girls to adoption. On 11 February 2014, the trial court entered adjudication and disposition orders terminating respondent's parental rights to the children based on her lack of reasonable progress. Respondent appeals.

II. Permanency Planning Order

[1] Respondent purports to appeal from the 16 November 2012 order changing the permanent plan to adoption. Respondent addresses the order changing the permanent plan to adoption as an order ceasing reunification efforts though the order does not explicitly cease reunification efforts or require DSS to file a motion seeking termination of respondent's parental rights. But even without any explicit language directing cessation of reasonable efforts to achieve reunification or requiring

termination of parental rights, as a practical matter the order does cease reunification efforts. Here, the trial court found that "Respondent Mother fails to attend visits or complete her case plan" and "has pending criminal charges and has not been participating in drug screens[,]" and as such the girls "will be unable to go home within six months[;]" "[i]t is proper to change the plan for the girls to one of adoption[;]" and "[v]isits with the Respondent Mother are hereby terminated due to her failure to attend and her non-compliance." In addition to these findings, the court made uncontested findings regarding DSS's several failed attempts to return the girls to respondent's care. "While these findings of fact do not quote the precise language of subsection 7B–507(b) [regarding ceasing reunification efforts], the order embraces the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. N.C.G.S. § 7B–507(b)(1)." *In re L.M.T.*, ___ N.C. ___, ____, 752 S.E.2d 453, 456 (2013) (quotation marks omitted).

A. Appeal of 16 November 2012 Order

[2] Nonetheless, respondent failed to designate the 16 November 2012 order ceasing reunification in her notice of appeal, and due to this failure, DSS moved to dismiss respondent's appeal of the 16 November 2012 order or in the alternative, sought sanctions for the error. Thereafter, respondent petitioned this Court to review the 16 November 2012 order by writ of certiorari. Again we turn to *In re L.M.T.*, which provided:

> Parents may seek appellate review of cease reunification orders only in limited circumstances. In this case, respondent appealed under subsection 7B–1001(a)(5)(a), which provides that
>
> a. The Court of Appeals shall review an order entered under section 7B–507 to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
>
> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

> In other words, if a termination of parental rights order is entered, the appeal of the cease reunification order is combined with the appeal of the termination order.

Id. at ___, 752 S.E.2d at 456 (citation and quotation marks omitted).

Here, respondent's parental rights were terminated in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was "identified as an issue in the record on appeal" in the list of respondent's "Proposed Issues[.]" Id. We therefore deny DSS's motion to dismiss respondent's appeal and respondent's petition for writ of certiorari, and we consider respondent's appeal because "the appeal of the cease reunification order is combined with the appeal of the termination order." *Id.*

B. Respondent's Argument Regarding the 16 November 2012 Order

[3] Respondent contends that "the court relieved DSS of its duty to seek reunification of the family, without first finding that continued efforts would be futile or inconsistent with the children's welfare." (Original in all caps.)

> All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.

In re Weiler, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citations omitted). North Carolina General Statute § 7B-507(b) provides that

> [i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and

> need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2011).

We first note that

> [w]hile trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns, but need not quote its exact language.

In re L.M.T., ___ N.C. at ___, 752 S.E.2d at 455 (quotation marks omitted). In *In re L.M.T.*, the Court stated by way of "example" that

> the trial court's finding that the environment that the Respondent Mother and her husband have created is injurious indicates that further reunification efforts would be inconsistent with the juveniles' health and safety. Likewise, the trial court's findings of fact related to respondent's drug abuse, participation in domestic violence, deception of the court, and repeated failures at creating an acceptable and safe living environment certainly suggest that reunification efforts would be futile. Moreover, these findings clearly support the trial court's conclusions that return of the juveniles is contrary to the welfare and best interest of the juveniles[.]

Id. at ___, 752 S.E.2d at 456 (citation, quotation marks, ellipses, and brackets omitted).

As we have already stated, the 16 November 2012 order found unchallenged and thus binding that "Respondent Mother fails to attend visits or complete her case plan" and "has pending criminal charges and has not been participating in drug screens" and as such the girls "will be unable to go home within six months[.]" *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (Unchallenged findings "are deemed to be supported by sufficient evidence and are binding on appeal."). These findings, particularly the pending criminal charges, all indicated "repeated

failures at creating an acceptable and safe living environment certainly suggest that reunification efforts would be futile." *Id.* Even without the benefit of hindsight regarding what happened after reunification efforts had ceased, as permitted by *In re L.M.T.*, the findings in the cease reunification order standing alone "*suggest* that reunification efforts would be futile." *Id.* (emphasis added). This argument is overruled.

III. Termination Orders

[4] Respondent challenges (1) the district court's determination under North Carolina General Statute § 7B-1111(a)(2) that she willfully left the girls in foster care for more than twelve months without making reasonable progress to correct the conditions leading to their placements and (2) that it was in the best interests of the girls for her parental rights to be terminated when the trial court did not consider whether they would be adopted by their current caregiver.

> The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. Once a trial court has determined that at least one ground exists for termination, the trial court then decides whether termination of parental rights is in the best interest of the child.

In re S.R.G., 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (citations and quotation marks omitted), *disc. review denied and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010).

A. Findings of Fact

> [T]o find grounds to terminate a parent's rights under G.S. § 7B–1111(a)(2), the trial court must perform a two part analysis. The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of reasonable

progress may parallel or differ from that which supports the determination of willfulness in leaving the child in placement outside the home.

A finding of willfulness does not require a showing of fault by the parent. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.

With respect to the requirement that the petitioner demonstrate that the parent has not shown reasonable progress, we conclude that, under the applicable, amended statute, evidence supporting this determination is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights. Our Supreme Court, in In re Pierce, 356 N.C. 68, 565 S.E.2d 81 (2002), recognized this when it observed:

> During the 2001 session of the General Assembly, the legislature struck the within 12 months limitation from the existing statute detailing the requirements for establishing grounds for the termination of parental rights. Thus, under current law, there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's reasonable progress or lack thereof.

In re O.C., 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (citations, quotation marks, and brackets omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

While respondent-mother challenges particular portions of numerous findings made by the district court, the following findings are unchallenged:

i. The child[ren have] been in the custody of DSS for well over three and one-half years now.

ii. . . . Respondent Mother was given a case plan with tasks to complete that she never completed. Even after some early success on her part that resulted in

placement of the juveniles with her, there was a subsequent disruption that results from additional substantiation by Buncombe County DSS. Respondent Mother's visits were ceased with the juveniles in October 2012 . . . .

iii. During the trial home placement . . . there were repeated problems of getting the juveniles to school on time and the respondent mother failing to take the children to their therapy appointments. Since the trial home placement ended [she] . . . has had [an] additional drug conviction[] for violation of the criminal law, was incarcerated in 2013 as a result of conviction and had inconsistency showing up late for visitation late or not at all until [DSS] . . . was relieved of reunification efforts.

iv. While the children were in the custody of [DSS] . . ., the respondent mother was evicted from her residence, served time in custody for [a] criminal conviction[] and required additional inpatient substance abuse treatment for the continued use of controlled substances . . . . [This] occurred after the respondent mother had received 60 hours of substance abuse treatment as part of her initial case plan that was completed in April 2011. . . .

v. Since the respondent mother's visitations were ceased in October 2012 [she] . . . has written one letter to these juveniles and the children have responded with one letter. . . .

. . . .

viii. The Court finds credible the testimony of Faith Ashe, the social worker who has spent more than two years working on this case who has been able to observe that respondent mother does not have the ability to properly care for these minor children.

Unchallenged findings "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009), and we conclude that these binding findings support the district court's adjudication under North Carolina General

Statute § 7B-1111(a)(2). *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2013). *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995) ("It is clear that respondent has not obtained positive results from her sporadic efforts to improve her situation."). As such, this argument is overruled.

B. Best Interests

Respondent contends that "the court abused its discretion in concluding that termination was in the best interests of the children, when it failed to consider the likelihood that the children would be adopted by their new pre-adoptive caregiver." (Original in all caps.) Once a district court has found grounds for termination of parental rights under North Carolina General Statute § 7B-1111(a), it must then "determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2013).

> 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.

Id.

North Carolina General Statute § 7B-1110(a) "requires the trial court to consider all six of the listed factors," but does not require "written findings with respect to all six factors; rather, . . . the court must enter written findings in its order concerning only those factors that are relevant." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 735 (2014) (citations and quotation marks omitted). In this situation, a factor is "relevant" if there is "conflicting evidence concerning" the factor, such that it is "placed in issue by virtue of the evidence presented before the trial court[.]" *Id.* at ___ n.3, 753 S.E.2d at 735 n.3.

The dispositional order makes it clear that the district court considered the likelihood that the girls would be adopted:

> 9. . . . The juveniles had previously been placed in a pre-adoptive home for two years which placement [was] disrupted on the day of the adjudication hearing in January 2014. . . . The children ha[ve] been in [a new] pre-adoptive placement since January 29, 2014. The pre-adoptive placement is suitable to meet the needs of the juveniles and at this time the placement is going well. . . .
>
> 10. . . . The court received evidence that adoption would not happen immediately but was likely to occur . . . [within a] reasonable period of time.
>
> 11. The juveniles are currently 11 years old and 10 years old and at times have displayed negative behaviors. These behaviors contributed to the disruption of the prior pre-adoptive placement but have not resulted in the children requiring a higher level of care rather continued therapy to deal with previous trauma in their lives.
>
> 12. . . . [Therapist Sheila McKeon] expressed the opinion that the girls['] negative behaviors were learned and observed from their biological parents and that the extended length of this case contributed to their regression. The children are described as friendly, social, intelligent and capable of having relationships and connecting with others. The therapist supports adoption of these juveniles and believes the children are very adoptable.
>
> 13. . . . The Guardian ad litem has expressed . . . that there remains a strong likelihood of adoption in the future and that he believes that it's in the best interest of the juveniles that parental rights be terminated.
>
> . . . .
>
> 15. The court considered whether there was any bond with the new adoptive placement and finds credible evidence that the placement while limited in time is going well and that the children are fully capable of bonding with a permanent placement provider.

The enumerated findings demonstrate the trial court did consider the girls' likelihood of adoption. This argument is overruled.

V. Conclusion

For the foregoing reasons, we deny DSS's motion to dismiss respondent's appeal as to the 16 November 2012 order and respondent's petition for certiorari as to the 16 November 2012 order and affirm the 16 November 2012 order and the 11 February 2014 orders.

AFFIRMED.

Judges Dillon and Dietz concur.

IN THE MATTER OF O.J.R., A MINOR CHILD

No. COA14-858

Filed 17 February 2015

Termination of Parental Rights—trial court order—insufficient findings and conclusions

The trial court erred by terminating the parental rights of respondent father. The trial court's order failed to indicate the grounds under which it terminated respondent's parental rights, and it failed to make findings and conclusions that would support any of the statutory grounds under N.C.G.S. § 7B-1111. The Court of Appeals reversed and remanded for further proceedings on the matter.

Appeal by Respondent from order entered 24 March 2014 by Judge Robert J. Stiehl, III, in District Court, Cumberland County. Heard in the Court of Appeals 26 January 2015.

The Law Offices of Martin J. Horn, PLLC, by Martin J. Horn, for Petitioner-Appellee Mother.

Mary McCullers Reece for Respondent-Appellant Father.

McGEE, Chief Judge.

Because the findings of fact and conclusions of law in support of the trial court's ruling terminating Respondent's parental rights are insufficient for appellate review, we remand for further action.

I. Facts

Petitioner-Appellee Mother ("Petitioner") filed a petition to terminate the parental rights of Respondent-Appellant Father ("Respondent") concerning their child, O.J.R. ("the Child"), on 26 July 2013. Petitioner alleged dependency and willful abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) & (7), as grounds for termination of Respondent's parental rights. The petition alleged Respondent had no contact with the Child and had provided no support.

The Child was born to Petitioner and Respondent in January 2009. Petitioner and Respondent were unmarried, but had been living together for approximately eight months at the time the Child was born. Petitioner testified that Respondent was in the hospital room with Petitioner when the Child was born, and that Respondent worked and helped support the Child following the birth. Approximately four months after the birth of the Child, Respondent was incarcerated due to probation violations related to several 2007 convictions. Respondent's projected release date from prison was in 2014. Before Respondent returned to prison, he signed over the title of his car to Petitioner to assist in child care expenses. Petitioner sold the car for approximately $3,000.00. Petitioner testified that, after Respondent returned to prison, they talked on the phone and corresponded through letters. Petitioner testified she took the Child to visit Respondent, stating: "I want to say, at the most, three times[.]"

Respondent, with the assistance of a church program, sent the Child a present for Christmas in 2009. Petitioner testified that the Child received a gift from Respondent, sent by Respondent's mother, in 2010. Petitioner testified there were letters and cards from Respondent to the Child that Petitioner had thrown away when she moved residences. Petitioner testified that she intentionally withheld her address from Respondent and his family "[b]ecause I felt, at the time, it was in my child's best interest not to be subject to that."

A guardian *ad litem* was appointed for the Child, and the guardian *ad litem* signed an affidavit on 9 September 2013 concerning interviews she had conducted with Petitioner and Respondent. The guardian *ad litem's* affidavit included the following: Petitioner told the guardian *ad litem* that Respondent "got upset when she did not bring [the Child]" to visit him. Petitioner stated that she "decided the relationship was not going to work and told [Respondent]. [Petitioner] indicated [Respondent] was 'okay with it, but wanted the name of the person she would be dating if it was going to get serious so he would know who was raising his child.' " Petitioner deleted Respondent's mother from her

Facebook account because Petitioner and Respondent's mother were arguing. Petitioner stated that Respondent's mother wanted Petitioner's new address, but Petitioner refused to give it to her, telling Respondent's mother that she could send any correspondence to Petitioner's mother. Respondent told the guardian *ad litem* that Petitioner sent him a letter in late 2009 indicating that Petitioner no longer wanted Respondent in the child's life "because of his lifestyle." Respondent told the guardian *ad litem* that he did not want his parental rights terminated.

Petitioner married another man ("Petitioner's husband") in May 2010, and they had a child together in December 2011. Petitioner sent Respondent a letter in May 2012, included in the record, in which she states that the Child "is doing great in the environment she is in[,]" that Petitioner's husband gives the Child everything she needs, and that Petitioner's husband "would like to adopt [the Child] so he can legally provide [the Child] with everything [the Child] could ever need." Petitioner included in that letter an agreement, handwritten by her, for Respondent to sign agreeing to give consent for Petitioner's husband to adopt the Child. Petitioner then stated: "I will let you know that if you deny the adoption, paperwork will be filed [and] you will be served with child support orders. As of now you are behind about $10,000." There was never any order for child support entered against Respondent, and Petitioner testified that Respondent was never behind in child support. Respondent did not reply to the letter containing the handwritten agreement.

Respondent sent Petitioner a letter in January 2013 and included a birthday card for the Child. In that letter, Respondent stated: "I really want to be a part of [the Child's] life." Respondent indicated his desire that Petitioner would forgive him for his prior failings, and that they could be friends for the Child's sake. He indicated that he had felt shut out of the Child's life, but he believed it had more to do with Petitioner's husband than with Petitioner. Respondent asked Petitioner to respond, and that if she did not want to write him a long response, she could just write back with her phone number and he would call her at his own expense. Petitioner did not respond.

Respondent accepted service of a summons and complaint in this matter on 30 May 2013. Petitioner voluntarily dismissed the original complaint and filed a second complaint on 26 July 2013. Respondent again accepted service. Respondent sent the Child two more cards in 2013, one for Halloween and one for Thanksgiving. Included with the Halloween card was a letter to Petitioner stating: "If you don't mind I would like it if you would write me and let me know how [the Child] is doing." Respondent wanted to know specifics about the Child's

personality and how she was doing in school. Respondent concluded the letter:

> I really want to be part of her life. I wish you would let me do that. If not let me in b/c I'm in here at least keep me informed on how she is plus maybe a few new pics of her would be great. All I'm asking is to please let me be in [the Child's] life. P.S. please let [the Child] get this card. Thank you.

Petitioner is the party who filed the petition for termination of Respondent's parental rights. No county department of social services was ever involved in the Child's life, and there have been no prior accusations or adjudications of neglect, dependency, or abuse. A termination hearing in this matter was begun on 10 September 2013. However, the trial court declared a mistrial at the first termination hearing. The trial court did this after reading the affidavit of the guardian *ad litem* and concluding that Petitioner had been untruthful in her testimony. The matter came on for a second termination hearing on 3 December 2013. Petitioner and Respondent testified at both hearings. Following the 3 December 2013 hearing, the trial court concluded that "grounds exist[ed] to terminate the parental rights of the Respondent father" and that termination of Respondent's parental rights was in the Child's best interests. Respondent appeals.

II. Analysis

In his two arguments on appeal, Respondent contends the trial court's findings of fact describing his lack of contact with the Child were not supported by the evidence, and that the remaining findings of fact did not support termination of his parental rights. We remand for further action by the trial court.

At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1109(f) (2013); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Review in the appellate courts is limited to determining whether clear, cogent, and convincing evidence was presented to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000).

We are unable to adequately review the termination order because it lacks sufficient findings of fact and conclusions of law. The trial court

must make adequate findings of fact to support every necessary ultimate finding or conclusion of law:

> (e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.
> . . . .
>
> (f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. The rules of evidence in civil cases shall apply.

N.C. Gen. Stat. § 7B-1109(e) and (f) (2013).

Findings of Fact

Respondent alleges that parts of the following findings of fact are not supported by the evidence. We agree in part.

> 4. That the Respondent Father in this case has engaged in no level of communication and effort as the father of this child. Specifically, at trial the Respondent Father attempts to blame the lack of possible address communication with the minor child. Clearly, Respondent Father's family members had open abilities to provide him with points of communication. Indeed, at one point, the Respondent Father's own brother was assigned to a duty station in Kansas in a similar locale to the duty station of the stepfather.
>
> . . . .
>
> 10. The [c]ourt finds by clear, cogent and convincing evidence that the statutory grounds as to neglect as it relates to the Respondent Father failing to provide support, failing to maintain contact or a relationship with the minor child by not acknowledging the minor child for holidays and birthdays, and by clearly failing to maintain regular correspondence within his means. Further, the [c]ourt has received into evidence three (3) cards, such three cards being lines of communication in writing Respondent Father to Petitioner Mother or from Respondent Father

> to the minor child from Father/Respondent to the Mother/Petitioner, or minor child. Specifically, 2 of the 3 measures of correspondence took place in the October/November 2013 timeframe. Both of those cards, the Respondent Father admits, were written by somebody else within the Department of Corrections and that he did not take the effort to write in his own words how he feels or what he wishes to communicate to his own daughter. The third piece of correspondence, postmarked January 24, 2013, the Respondent Father sent a birthday card to the minor child. In the birthday card, a handwritten letter is contained. In that letter the Respondent Father devotes an extraordinary amount of space discussing more with the Petitioner Mother than attempting to communicate with or receive information about the minor child. In it he admits that he "had a big part in shutting himself out of [the child's] life," and additionally "I don't think you shut me out."

Initially, the part of finding four stating that Respondent "has engaged in no level of communication and effort as the father of this child" is not supported by the evidence. According to the trial court's own findings of fact, Respondent gave Petitioner his car, which Petitioner sold for approximately $3,000.00. Further, the trial court acknowledged that Respondent sent some cards to the Child. The trial court made dispositional findings that Respondent sent the Child a Christmas gift in 2009, and that there was a "face-to-face" meeting with the Child early in Respondent's incarceration.

In addition, uncontroverted evidence shows that, before Respondent was incarcerated, he was living with Petitioner and the Child; he was working and taking care of the Child; he was in the delivery room when Petitioner gave birth to the Child; after Respondent was incarcerated, he sent additional letters and cards that Petitioner threw away; that Petitioner did not want Respondent to communicate with or have any relationship with the Child; that Petitioner "intentionally withheld" her contact information from Respondent and Respondent's family; and that Respondent participated in both termination hearings and testified concerning his desire to be a part of the Child's life. These facts evince some level of "communication and effort as the father of [the Child]." We are uncertain what the second sentence in finding four is meant to communicate; however, the remainder of finding four is supported by competent evidence.

The first sentence of finding ten is an ultimate finding of fact. Evidence supports that two of the cards Respondent sent to the Child were physically written by another inmate. However, Respondent did not admit that "he did not take the effort to write in his own words how he feels or what he wishes to communicate to his own daughter." Respondent testified that the sentiments in the cards were his, but he had his friend write the cards because his friend had better penmanship.

Concerning the third piece of correspondence — the January 2013 card and letter — it is true that Respondent sent a birthday card to the Child, and a letter to Petitioner. It is also true that, in the card, Respondent is communicating directly to the Child, whereas in the letter Respondent is communicating directly to Petitioner. We do not find support for the trial court's characterization of Respondent as "devot[ing] an extraordinary amount of space to discussing more with the Petitioner Mother than attempting to communicate with or receive information about the minor child." We do not find it extraordinary that Respondent discussed "more with . . . Petitioner" in a letter to Petitioner. Though Respondent was not attempting to communicate directly with the Child in that letter, and was not asking for information about the Child, the entire letter is devoted to trying to convince Petitioner to allow Respondent back into the Child's life, including requests that he and Petitioner try to improve their relationship for the sake of the Child. Respondent does request specific information about the Child in a subsequent letter.

There is not competent evidence to support the trial court's finding that, in the January 2013 letter, Respondent "admit[ted] that he 'had a big part in shutting himself out of [the Child's] life,' and additionally "I don't think you [Petitioner] shut me out." What Respondent actually stated in that letter was the following: "I don't think you [Petitioner] shut me out[,] I think that 'D' [Petitioner's husband] had the big part in shutting me out of [the Child's] life. Am I right?"

Sufficiency of the Findings and Conclusions

N.C. Gen. Stat. § 7B-1111 provides the exclusive grounds for terminating a parent's parental rights. *In re C.W.*, 182 N.C. App. 214, 218, 641 S.E.2d 725, 728-29 (2007). The trial court may only terminate a parent's parental rights if the petitioner proves at least one ground pursuant to N.C. Gen. Stat. § 7B-1111 by clear, cogent, and convincing evidence, and the trial court enters sufficient findings of fact to support a conclusion of law that at least one of the grounds alleged by the petitioner exists. N.C. Gen. Stat. § 7B-1109(e) and (f); *In re C.W. & J.W.*, 182 N.C. App. at 219, 641 S.E.2d at 729.

In this case, the trial court has failed to properly indicate the grounds pursuant to which it terminated Respondent's parental rights, or to make sufficient findings and conclusions to support any of the potential grounds. We first note that Petitioner's petition to terminate Respondent's parental rights only included two grounds for termination: willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). Petitioner did not allege neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) as a ground for terminating Respondent's parental rights. In addition, it is not clear from the transcript that Petitioner was arguing neglect at the termination hearing.

However, because Respondent did not argue this issue on appeal, we do not decide whether there were sufficient allegations in the petition to put Respondent on notice that Petitioner might proceed on the ground of neglect as well. *See In re C.W.*, 182 N.C. App. at 228-29, 641 S.E.2d at 735 ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.").

The termination order does not mention willful abandonment nor dependency. The order does not specifically mention N.C. Gen. Stat. § 7B-1111, though it does intimate in finding of fact ten that it is proceeding pursuant to neglect as defined in N.C. Gen. Stat. § 7B-1111(a)(1). Finding of fact ten states in relevant part:

> The Court finds by clear, cogent and convincing evidence that the statutory grounds as to neglect as it relates to the Respondent Father failing to provide support, failing to maintain contact or a relationship with the minor child by not acknowledging the minor child for holidays and birthdays, and by clearly failing to maintain regular correspondence within his means.

As written, this finding does not actually state that the trial court is making an ultimate finding of neglect. However, this may simply be an issue of incomplete wording. There are no additional findings of fact referencing neglect.

The only conclusion of law relevant to N.C. Gen. Stat. § 7B-1111 was the following: "That by clear, cogent and convincing evidence grounds exist to terminate the parental rights of the Respondent Father." This

conclusion of law is insufficient to indicate the specific ground or grounds found by the trial court to terminate Respondent's parental rights, and is insufficient for appellate review.

Furthermore, in order to adjudicate based on neglect, Petitioner must prove, and the trial court must find, that the Child is a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15):

> Neglected juvenile. – A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Because there has been no prior adjudication of neglect involving Respondent, and because Respondent is incarcerated and has had no physical contact with the Child since his incarceration, the only potential grounds to prove neglect were either abandonment of the Child, or having failed to provide proper care, supervision, or discipline for the Child. There are no findings or conclusions stating that Respondent had either abandoned the Child or failed to provide proper care, supervision, or discipline. It is possible the trial court was basing termination on abandonment, though it is unclear whether the termination was pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) or (7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). In the present case, the findings do not support a conclusion that Respondent had manifested "a willful determination to forego all parental duties and relinquish all parental claims to the child." *Id.*

Further, the order does not conclude that Respondent was neglecting the Child at the time of the hearing.

> [A]n adjudication that a child was neglected on a particular prior day does not bind the trial court with regard to the issues before it at the time of a later termination hearing, i.e., the then existing best interests of the child and fitness of the parent(s) to care for it in light of all evidence of neglect and the probability of a repetition of neglect.

> During a proceeding to terminate parental rights, the trial court must admit and consider evidence, find facts, make conclusions and resolve the ultimate issue of whether neglect authorizing termination of parental rights . . . is present at that time. The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that such neglect exists at the time of the termination proceeding.

In re Ballard, 311 N.C. 708, 715-16, 319 S.E.2d 227, 232 (1984) (citations omitted). In some instances, neglect can be proven by demonstrating a history of neglect and further proving that the neglect is likely to continue.

> In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child "at the time of the termination proceeding." . . . . Termination may not . . . be based solely on past conditions that no longer exist. Nevertheless, when, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." In those circumstances, a trial court may find that grounds for termination exist upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect."

In re L.O.K., *J.K.W.*, *T.L.W.*, *& T.L.W.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citations omitted).

The trial court's findings of fact indicate Respondent was initially more involved in the Child's life, essentially giving Petitioner $3,000.00 for the care of the Child, corresponding with the Child, having a visit with the Child, and giving several gifts to the Child. The trial court then found that Respondent ceased communicating with the Child for several years, but then sent the Child a birthday card and discussed the Child in a letter to Petitioner sent in January 2013. In this letter, which was admitted at trial, Respondent indicates multiple times that he would like to be a part of the Child's life, that he hoped he and Petitioner could be "friends" for the sake of the Child, and that he didn't "see why [he couldn't] start to see [the Child] some." Respondent concluded: "I'm going to end this now. If you don't want to write a letter just send me your # and I will

call you and talk about this. Plus will you please give [the Child] this b-day card for me and tell her who it's from." Respondent then requested that Petitioner "please" write him back, and he let Petitioner know that she would not have to pay for the phone call. Respondent sent this letter to Petitioner before she initiated this action for termination of Respondent's parental rights. Respondent sent a Halloween card to the Child in October 2013 and included a letter to Petitioner, again stating his desire to be in the Child's life, and asking for specific information about the Child; how she was doing in school, how she was getting along with other children, and other information. He also asked for some recent photographs of the Child. Respondent also sent a Thanksgiving card to the Child in November 2013.

The order does not indicate that the trial court, before making its ruling, considered any changes in Respondent's behavior, particularly leading up to the time of the hearing. In addition, the order contains no finding that there was a probability of a repetition of neglect moving forward. *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (citation omitted) ("We agree that the parents' fitness to care for their children should be determined as of the time of the hearing. The trial court must consider evidence of changed conditions. However, this evidence of changed conditions must be considered in light of the history of neglect by the parents and the probability of a repetition of neglect.").

We must reverse and remand. We hold that there was no evidence presented at trial that would have supported termination based upon N.C. Gen. Stat. § 7B-1111(a)(6), dependency. If Petitioner wishes to pursue this ground, a new termination hearing is required. If the trial court meant to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), willful abandonment, the trial court needs to provide both sufficient findings of fact and conclusions of law indicating that the trial court is proceeding pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and that Petitioner has proven that Respondent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. *Id.* Because "[t]ermination [based upon N.C. Gen. Stat. § 7B-1111(a)(1), neglect,] may not . . . be based solely on past conditions that no longer exist[,]" *In re L.O.K.*, 174 N.C. App. at 435, 621 S.E.2d at 242, if Petitioner contends that Respondent's parental rights should be terminated based upon neglect, a new termination hearing is required.

Reversed and remanded.

Judges STEELMAN and DAVIS concur.

IN RE V.B.

[239 N.C. App. 340 (2015)]

IN THE MATTER OF V.B.

No. COA14-812

Filed 17 February 2015

Child Abuse, Dependency, and Neglect—sufficiency of findings of fact

The trial court erred by adjudicating the minor daughter of petitioner as dependent and placing her in the custody of Youth and Family Services (YFS). YFS did not make any allegations or present any evidence that petitioner was unable to provide or arrange for the care of his daughter, and the trial court made no findings as to that issue.

Appeal by Respondent-Appellant Father from order entered 22 May 2014 by Judge Rickye McKoy-Mitchell in District Court, Mecklenburg County. Heard in the Court of Appeals 26 January 2015.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate County Attorney Kathleen M. Arundell, for Petitioner-Appellee.

Assistant Appellate Defender Annick Lenoir-Peek for Respondent-Appellant Father.

Steven S. Nelson for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Appellant Father ("Father") appeals from an adjudication and disposition order, which adjudicated his daughter, V.B. ("the Child"), as dependent and placed her in the custody of Petitioner Mecklenburg County Department of Social Services, Youth and Family Services ("YFS"). We reverse the order of the trial court.

I. Background

The Child was born on 8 February 2014. Three days later, on 11 February 2014, before the Child was discharged from the hospital, YFS filed a juvenile petition ("the petition") alleging that the Child was dependent and took the Child into nonsecure custody. The petition alleged that Respondent-Mother ("Mother") was, herself, a minor in the custody of YFS. Mother did not have independent housing, was

unemployed, and was living at Florence Crittenton, a residential program for pregnant girls. Father, also a minor, was served with the petition. The petition named Father as the Child's parent but, with respect to Father, the petition alleged only that his paternity had not been established. Father participated in a paternity test on 18 February 2014 and, six days later, on 24 February 2014, DNA testing confirmed that Father was the Child's biological father.

The trial court conducted a hearing on 1 April 2014 ("the hearing"). At the hearing, YFS submitted Father's paternity results and acknowledged that Father's paternity had been established. YFS declined to present any further evidence or witnesses, and purported to rely entirely on the verified petition to support its contention that the Child was dependent. Mother did not object and stipulated to the factual allegations in the petition. Father, however, did not stipulate to those allegations and contested the petition on the ground that it made no allegations as to his inability to care for the Child. The trial court concluded nonetheless that the Child was a dependent juvenile. The trial court then conducted a dispositional hearing. The trial court entered a corresponding written order on 22 May 2014, in which it adjudicated the Child dependent and ordered that she remain in YFS custody ("the order"). Father appeals.

II. Standard of Review

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

III. Analysis

Father challenges the adjudicatory order on the grounds that the order's conclusions of law are unsupported by its findings, and that its findings are not supported by clear and convincing evidence. We agree.

Adjudicatory hearings for dependency are limited to determining only "the existence or nonexistence of any of the conditions alleged in [the] petition." N.C. Gen. Stat. § 7B-802 (2013). The petitioner has the burden of proving by clear and convincing evidence that a child is

dependent. N.C. Gen. Stat. § 7B-805 (2013). In order to do so, pursuant to N.C. Gen. Stat. § 7B-101(9) (2013), in relevant part, the petitioner must prove that "the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007). Moreover, although N.C.G.S. § 7B-101(9) uses the singular word "the [] parent" when defining whether "the [] parent" can provide or arrange for adequate care and supervision of a child, our caselaw has held that a child cannot be adjudicated dependent where she has at least "a parent" capable of doing so. *See In re J.A.G.*, 172 N.C. App. 708, 716, 617 S.E.2d 325, 332 (2005) (emphasis added).

Our Juvenile Code mandates that "[t]he adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2013). "[T]he trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support [its] conclusions of law.' " *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation omitted). The findings "must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation and internal quotation marks omitted).

In the present case, the petition named Father as the Child's father and then alleged that (1) Mother was a minor who was unable to provide for the Child's care or supervision, (2) paternity had not been established, (3) there were "no known placements currently available for" the Child, and (4) the Child was "dependent" as defined by N.C.G.S. § 7B-101(9). In the adjudication order, the trial court made the following findings of fact:

> 2. YFS submitted the verified petition . . . as its showing of evidence as it relates to the juvenile and offered the [P]etitioner for cross-examination.
>
> The parties did not object.
>
> The parties did not cross-examine the [P]etitioner.
>
> The [c]ourt receives the verified petition into evidence. The verified petition forms the basis for the [c]ourt's finding of fact.

> 3. [] [F]ather contested the allegations of the petition and a hearing was held.
>
> . . . .
>
> 5. The [c]ourt further finds a factual basis for the submitted verified petition, and further finds that the facts have been proven by clear and convincing evidence.[1]

Finding of fact 10 in the adjudication order, in part, found that "[e]verything alleged in the petition still stands today with the exception of paternity being established at this time."[2]

We conclude that the findings of fact in the adjudication order are insufficient to sustain an adjudication of dependency. Notwithstanding that finding of fact 10 – that paternity had been established – directly contradicts one of the core allegations in the petition, the trial court's findings of fact do not fully address (1) whether either parent was capable of providing care and supervision for the Child; or (2) whether either parent had an appropriate alternative child care arrangement for the Child. Thus, the trial court failed to "find the ultimate facts essential to support [its] conclusions of law." *See In re O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853.

Father further contends that, even if we were to remand and instruct the trial court to make proper findings as to the unsupported allegations in the petition, the trial court still could not adjudicate the Child as dependent. Specifically, Father argues the Child could not be adjudicated dependent because the trial court found that paternity had been established, and the petition did not allege, and there were no findings made, that he could not provide or arrange for the care and supervision of the Child. Conversely, YFS contends that Father's paternity should have been "irrelevant" to the trial court's adjudication of the Child as dependent because, at best, Father's paternity was established after YFS filed the petition and, therefore, Father was not a "parent" recognized by the North Carolina Juvenile Code at the time of the hearing and was not a "proper party" in the present case.[3] We agree with Father.

---

1. These findings are "check the box" style findings.

2. The remainder of finding of fact 10 contains a summary of the arguments presented at the hearing, which do not constitute findings of fact. *See In re O.W.*, 164 N.C. App. 702-03, 596 S.E.2d at 854 (holding that findings of fact were not appropriate where they merely recited what an individual stated).

3. The term "parent" is not defined in the North Carolina Juvenile Code. *See* N.C. Gen. Stat. § 7B-101 (2013).

YFS is correct to point out that post-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect, or dependency. *See In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006). This is because the purpose of an adjudicatory hearing is to determine only "the existence or nonexistence of any of the conditions alleged in a petition." *See* N.C.G.S § 7B-802. However, this rule is not absolute. For instance, in *In re A.S.R.*, 216 N.C. App. 182, 716 S.E.2d 440, slip op. at 11 (2011) (unpublished), this Court allowed a post-petition psychological evaluation to be considered during a neglect adjudication hearing because, "[d]ue to the fact that mental illness is generally not a discrete event or one-time occurrence, . . . the psychological assessment was relevant to respondent's ability to care for her child, regardless of when it occurred."

Similarly, paternity is not a "discrete event or one-time occurrence." It is a fixed and ongoing circumstance, even more so than mental illness. In the present case, Father's paternity was extremely relevant to whether the Child had a parent who could provide or arrange for her care and supervision.

Moreover, YFS submitted Father's paternity results to the trial court and even acknowledged at the hearing that paternity had been established. The trial court made a finding that paternity had been established accordingly. Father does not challenge this finding on appeal. While YFS does challenge this finding in its brief, YFS did not preserve this issue by objecting during the hearing, nor has it brought a cross-appeal from the trial court's order for us to review. Therefore, the finding that paternity has been established is binding on this Court. *See* N.C. R. App. P. 3(a) ("Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal[.]"); N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); N.C. R. App. P. 28(a) ("Issues not [properly] presented and discussed in a party's brief are deemed abandoned.").

In light of this finding, the trial court erred by adjudicating the Child dependent because YFS made no allegations, and presented no evidence, that Father was unable to provide or arrange for the care and supervision of the Child, and the trial court made no findings to that effect. Because we find that the trial court erred in its adjudication of the

Child as dependent, we need not review Father's additional arguments regarding the trial court's dispositional order.

Reversed.

Judges STEELMAN and DAVIS concur.

EVERETTE E. KIRBY AND WIFE, MARTHA KIRBY; HARRIS TRIAD HOMES, INC.; MICHAEL HENDRIX, AS EXECUTOR OF THE ESTATE OF FRANCES HENDRIX; DARREN ENGELKEMIER; IAN HUTAGALUNG; SYLVIA MAENDL; STEVEN DAVID STEPT; JAMES W. NELSON AND WIFE, PHYLLIS H. NELSON; AND REPUBLIC PROPERTIES, LLC, A NORTH CAROLINA COMPANY (GROUP 1 PLAINTIFFS), PLAINTIFFS

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA14-184

Filed 17 February 2015

1. Appeal and Error—interlocutory orders—substantial right—just compensation—inverse condemnation

Because the Court of Appeals has previously held that an order granting partial summary judgment on the issue of North Carolina Department of Transportation's liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right, it considered the merits of the issues on appeal.

2. Eminent Domain—inverse condemnation—takings—ripeness

The trial court erred by determining that plaintiffs' claims for inverse condemnation were not yet ripe because plaintiffs' respective properties had not yet been taken. The takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in 1997 and 2008, respectively. The case was remanded to the trial court to consider evidence concerning the extent of the damage suffered by each plaintiff as a result of the respective takings and concerning the amount of compensation due to each plaintiff.

Appeal by Plaintiffs and Cross-Appeal by Defendant from orders entered 8 January 2013 and 20 June 2013 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 12 August 2014.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, and Kenneth C. Otis, III, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury and Assistant Attorney General John F. Oates, Jr., for Defendant.

McGEE, Chief Judge.

Everette E. and Martha Kirby ("Mr. and Mrs. Kirby"), Harris Triad Homes, Inc. ("Harris Triad"), Michael Hendrix, as Executor of the Estate of Frances Hendrix ("the Hendrix Estate"), Darren Engelkemier ("Mr. Engelkemier"), Ian Hutagalung ("Mr. Hutagalung"), Sylvia Maendl ("Ms. Maendl"), Steven David Stept ("Mr. Stept"), James W. and Phyllis H. Nelson ("Mr. and Mrs. Nelson"), and Republic Properties, LLC ("Republic") (collectively "Plaintiffs") appeal from: (1) the trial court's 8 January 2013 order granting Defendant North Carolina Department of Transportation's ("NCDOT") motions to dismiss Plaintiffs' claims alleging violations of the Constitutions of the United States and of the State of North Carolina; and (2) the trial court's 20 June 2013 order granting NCDOT's summary judgment motion on (a) Plaintiffs' inverse condemnation claims under N.C. Gen. Stat. § 136-111, and (b) Plaintiffs' — excluding Harris Triad's — claims seeking declaratory judgments. NCDOT cross-appeals from the same orders. For the reasons stated, we reverse the orders of the trial court and remand this matter for further proceedings consistent with this opinion.

I. Factual Background and Procedural History

This case concerns, in broad terms, challenges to the constitutionality and propriety of legislation related to the proposed development of a thirty-four-mile highway that would loop around the northern part of the City of Winston–Salem ("the Northern Beltway" or "the Northern Beltway Project") in Forsyth County, North Carolina. Plaintiffs Mr. and Mrs. Kirby, the Hendrix Estate, Mr. Engelkemier, Mr. Hutagalung, Ms. Maendl, Mr. Stept, and Republic own real property located in the section of the Northern Beltway that would extend from U.S. Highway 52 to U.S. Highway 311 in eastern Forsyth County ("the Eastern Loop"). Plaintiffs Harris Triad and Mr. and Mrs. Nelson own real property located in the section of the Northern Beltway that would extend from U.S. Highway 158 to U.S. Highway 52 in western Forsyth County ("the Western Loop").

Before Plaintiffs filed their respective complaints with the trial court, our Court considered a separate case brought by several plaintiffs who owned real property in both sections of the proposed Northern Beltway Project, and who alleged almost identical claims against NCDOT as those alleged by Plaintiffs in the present case. *See Beroth Oil Co. v. N.C. Dep't of Transp.* (*Beroth I)*, 220 N.C. App. 419, 420, 423–24, 725 S.E.2d 651, 653, 655 (2012), *aff'd in part*, *vacated in part*, *and remanded*, 367 N.C. 333, 757 S.E.2d 466 (2014). Because the challenged legislation and general factual background of the present case are the same as those underlying this Court's and our Supreme Court's respective decisions in the *Beroth* case — which we will discuss in further detail later in this opinion — we rely on those decisions to recount the relevant background of the case now before us.

In *Beroth I*, this Court stated: "In 1989, our General Assembly established the North Carolina Highway Trust Fund to finance the construction of 'urban loops' around designated urban areas." *Id.* at 420 n.1, 725 S.E.2d at 653 n.1. "The Northern Beltway Project has been in the works for more than two decades," *id.*, and "[t]he area encompassed by the Northern Beltway Project was and remains designated for development." *Id.* Pursuant to the Transportation Corridor Official Map Act ("the Map Act"), *see* N.C. Gen. Stat. §§ 136-44.50 to -44.54 (2013), NCDOT "recorded corridor maps with the Forsyth County Register of Deeds on 6 October 1997 and 26 November 2008 identifying transportation corridors for the construction of . . . the Northern Beltway." *Beroth Oil Co. v. N.C. Dep't of Transp.* (*Beroth II*), 367 N.C. 333, 334, 757 S.E.2d 466, 468 (2014).

Pursuant to the Map Act, after a transportation corridor official map is filed with the register of deeds and other notice provisions are met, *see* N.C. Gen. Stat. §§ 136-44.50(a1), 136-44.51(a) (2013), "the Map Act imposes certain statutory restrictions on landowners within the corridor." *Beroth I*, 220 N.C. App. at 421, 725 S.E.2d at 654. Specifically, N.C. Gen. Stat. § 136-44.51(a) provides that "no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision . . . be granted with respect to property within the transportation corridor." N.C. Gen. Stat. § 136-44.51(a).

The Map Act provides three potential avenues of relief from the statutory restrictions imposed upon affected property located within a transportation corridor. First, as we said in *Beroth I*, the Map Act provides a maximum three-year limit on the building permit issuance restrictions set forth in N.C. Gen. Stat. § 136-44.51(a). *See id.* § 136-44.51(b). If an

application for a building permit is still being reviewed three years after the date of the original submittal to the appropriate local jurisdiction, the entity responsible for adopting the transportation corridor official map affecting the issuance of building permits or subdivision plat approval "shall issue approval for an otherwise eligible request or initiate acquisition proceedings on the affected properties," *id.*, or "an applicant within the corridor may treat the real property as unencumbered and free of any restriction on sale, transfer, or use established by [the Map Act]." *Id.*

Second, in accordance with the procedures set forth in N.C. Gen. Stat. § 136-44.52, the Map Act allows property owners within the transportation corridor to petition for a variance from the Map Act's restrictions, which may be granted upon a showing that, as a result of the Map Act's restrictions, "no reasonable return may be earned from the land," N.C. Gen. Stat. § 136-44.52(d)(1) (2013), and such requirements "result in practical difficulties or unnecessary hardships." *Id.* § 136-44.52(d)(2).

Finally, the Map Act provides that, once a transportation corridor official map is filed, a property owner "has the right of petition to the filer of the map for acquisition of the property due to an imposed hardship [('the Hardship Program')]." N.C. Gen. Stat. § 136-44.53(a) (2013). Upon such petition, the entity that initiated the transportation corridor official map "may make advanced acquisition of specific parcels of property when that acquisition is determined by the respective governing board to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner." *Id.* The Map Act further provides that this same entity is tasked with the responsibility of "develop[ing] and adopt[ing] appropriate policies and procedures to govern the advanced acquisition of right-of-way and . . . assur[ing] that the advanced acquisition is in the best overall public interest." *Id.* § 136-44.53(b).

According to an affidavit by NCDOT's Right-of-Way Branch Manager, Virgil Ray Pridemore, Jr. ("Mr. Pridemore") — who is responsible for the implementation of right-of-way policies and administration of all phases of NCDOT acquisition work in the NCDOT Raleigh central office — he makes his decisions with respect to the Hardship Program applications by relying on "the criteria and regulations in the NCDOT Right[]of[]Way Manual, the [Code of Federal Regulations], and input and recommendations from various NCDOT staff members from the preconstruction and roadway design branches, NCDOT Advance Acquisition Review Committee members, and representatives from [the Federal Highway Administration]." The Map Act further provides that "[a]ny decision"

made with respect to a Hardship Program petition "shall be final and binding." *Id.* § 136-44.53(a).

Between October 2011 and April 2012, Plaintiffs separately filed complaints against NCDOT alleging that NCDOT's actions "placed a cloud upon title" to Plaintiffs' respective properties, rendered Plaintiffs' properties "unmarketable at fair market value, economically undevelopable, and depressed Plaintiff[s'] property values." Plaintiffs' complaints also alleged that NCDOT treated similarly situated property owners differently by "depriving Plaintiff[s] of the value of their Properties, . . . substantially interfering with the Plaintiff[s'] elemental and constitutional rights growing out of the ownership of the Properties, and . . . restricting the Plaintiff[s'] capacity to freely sell their Properties." Plaintiffs further alleged that the administrative remedies offered by NCDOT were "inadequate and unconstitutional," and, thus, "futile" and not subject to exhaustion. Finally, Plaintiffs alleged that the Hardship Program was "unequal in its treatment of similarly situated persons in the Northern Beltway in that physically unhealthy or financially distressed owners are considered for acquisition yet healthy and financially stable owners are not."

Plaintiffs' complaints set forth the following claims for relief: a taking through inverse condemnation pursuant to N.C. Gen. Stat. § 136-111; a taking in violation of the Fifth Amendment of the United States Constitution, as applied to NCDOT through the Fourteenth Amendment; a violation of the Equal Protection Clause of the Fourteenth Amendment; a taking in violation of Article I, Section 19 (the "Law of the Land" Clause) of the North Carolina Constitution; and a declaration that the Map Act and, specifically, the Map Act's Hardship Program are unconstitutional and "invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners." NCDOT answered and moved to dismiss each of Plaintiffs' respective complaints with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (b)(2), and (b)(6), asserting various affirmative defenses, including sovereign immunity, statutes of limitation and repose, failure to exhaust administrative remedies, and lack of standing and ripeness.

Given "the identical nature of the causes of action and legal theories, similarity of the subject matter, need for similar discovery, expert testimony, and other factual issues" of the parties in the present action and in a series of companion cases that were or were soon-to-be filed, counsel for Plaintiffs and NCDOT filed a joint motion pursuant to Rule 2.1 of North Carolina's General Rules of Practice for the Superior and District

Courts Supplemental to the Rules of Civil Procedure on 27 July 2012. In this joint motion, the parties requested that the trial court recommend to the Chief Justice of our State's Supreme Court that these cases be designated as "exceptional." In an order entered 31 July 2012, the Chief Justice granted the parties' joint motion pursuant to Rule 2.1. For case management purposes, in a subsequent order entered 8 January 2013, the trial court ordered that these exceptional cases be split into three groups. Plaintiffs in the present case were designated by the trial court as "Group 1" Plaintiffs and are the only plaintiffs who are parties to this appeal.

The trial court heard NCDOT's motions to dismiss the complaints of Group 1, Group 2, and Group 3 Plaintiffs, and entered an order on 8 January 2013 disposing of the motions concerning all three groups as follows:

> 1. Defendant's motions to dismiss with prejudice are DENIED regarding the claims for inverse condemnation, under N.C. Gen. Stat. § 136-111; . . . and claims seeking Declaratory Judgments as to the constitutionality of the Hardship Program and the "Map Act," statutes N.C. Gen. Stat. §§ 136-44.50, 136-44.51, 136-44.52 and 136-44.53.
>
> 2. Defendant's motions to dismiss with prejudice are GRANTED regarding all remaining claims, including a taking under N.C. Const. art. I, § 19, Law of the Land; a taking under the Fifth Amendment of the United States Constitution, as applied to Defendant through the Fourteenth Amendment; and claims for Equal Protection violations under the Fourteenth Amendment of the United States Constitution.

Group 1 Plaintiffs — who are Plaintiffs in the present case — and NCDOT filed cross-motions for summary judgment with respect to the remaining claims for inverse condemnation under N.C. Gen. Stat. § 136-111 and for declaratory judgments as to the constitutionality of the Map Act and the Map Act's Hardship Program; NCDOT additionally moved to exclude Plaintiffs' affidavits and exhibits submitted in support of Plaintiffs' motion for summary judgment. Over NCDOT's objections, Plaintiffs also moved to amend their complaints, pursuant to N.C. Gen. Stat. § 1A-1, Rule 15, to include allegations in support of Plaintiffs' contention that "the taking is presently occurring and did occur at an earlier date upon any of the[] events in time" that Plaintiffs sought to incorporate into their respective complaints.

The trial court entered its order on the parties' cross-motions for summary judgment on 20 June 2013. With respect to Plaintiffs' inverse condemnation claims, the trial court first concluded that Plaintiffs' claims were not yet ripe. Citing Beroth I, the trial court determined that the purported takings at issue were exercises of the State's police power rather than exercises of the State's power of eminent domain, and that an "ends–means" analysis was the proper method to determine whether the exercise of that police power, in fact, resulted in the purported takings.

The trial court reasoned that, in their original complaints, Plaintiffs alleged only that the effective dates of NCDOT's purported takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in the Forsyth County Register of Deeds in 1997 and 2008, respectively. The trial court stated that "it is established North Carolina law that mere recording of project maps do not constitute a taking," and found that all Plaintiffs "claim the date of the taking occurred when the maps were published, and do not claim the taking took place on any other dates." Thus, the trial court granted NCDOT's motion for summary judgment with respect to Plaintiffs' inverse condemnation claims, and denied Plaintiffs' motion for the same.[1]

With respect to Plaintiffs' claims for declaratory judgments as to the constitutionality of the Map Act and the Map Act's Hardship Program, the trial court determined that all such claims, except for those by Harris Triad, were not ripe and were "subject to dismissal due to a lack of standing to bring a declaratory action." The trial court noted that, with the exception of Harris Triad, no Group 1 Plaintiffs applied for variances, permits, or the Hardship Program, or accepted any offers from NCDOT to purchase their respective properties. Although Plaintiffs in the present case asserted that such applications would be futile, the trial court reasoned that challenges under the Declaratory Judgment Act necessitated a showing that each Plaintiff did, or soon would, sustain an injury as a result of a final determination by NCDOT concerning how each may "be permitted" to use his or her own property. Thus, the trial court granted NCDOT's motion for summary judgment with respect to all Plaintiffs' equal protection claims, except for those brought by Harris Triad, and denied those Plaintiffs' motion for the same.

---

1. The trial court also rejected Plaintiffs' argument that they suffered "*de facto* taking[s]" by NCDOT. While Plaintiffs asserted that NCDOT's actions resulted in "*de facto* taking[s]" in their motion for summary judgment, Plaintiffs articulated no such allegation or claim in their respective complaints. Therefore, we decline to consider Plaintiffs' argument on appeal asserting that NCDOT's actions resulted in "*de facto* taking[s]."

With respect to Harris Triad's claim for a declaratory judgment as to the constitutionality of the Map Act and the Map Act's Hardship Program, because Harris Triad had applied for the Hardship Program and was denied, the trial court determined that Harris Triad was "cur[ed]" of the "standing problems that beset the remaining Plaintiffs." The trial court then undertook a rational basis review of Harris Triad's equal protection claim and, after finding that the evidence showed "unequal application of the [H]ardship [P]rogram" and "puzzling decisions that emanated from the NCDOT regional office regarding the [P]rogram," the trial court concluded that Harris Triad "successfully presented evidence that [its] company was denied a [H]ardship [P]rogram offer while other similarly-situated parties were accepted and were paid a fair price for their land and improvements." Thus, the trial court denied NCDOT's motion for summary judgment with respect to Harris Triad's equal protection claim, and concluded that Harris Triad could "go forward in an attempt to prove [an as-applied] claim that [the] company's rights ha[d] been violated," and that the scope of such review "must encompass the entire history of hardship purchases for this particular Forsyth County project," and should not be limited by time or geography — i.e., the review should examine "the entire history of" NCDOT's Hardship Program decisions as to both Western and Eastern Loop purchases.

Plaintiffs appealed from the trial court's 8 January 2013 order granting NCDOT's motions to dismiss Plaintiffs' claims, and from the trial court's 20 June 2013 order on the cross-motions for summary judgment. NCDOT cross-appealed from the same orders.

Because all parties urge this Court to examine the *Beroth I* and *Beroth II* decisions as we undertake our analysis of the issues presented on appeal in the present case, we first examine the questions presented and answered by our appellate Courts' decisions in *Beroth I* and *Beroth II*. In *Beroth I*, as in the present case, the trial court had entered an order denying NCDOT's motion to dismiss the plaintiffs' claims for inverse condemnation and the plaintiffs' requests for a declaratory judgment that the Map Act and the Map Act's Hardship Program were unconstitutional. *See Beroth I*, 220 N.C. App. at 424, 725 S.E.2d at 656. However, unlike the present case, the *Beroth I* plaintiffs did not appeal from that order. *See id.* at 425, 725 S.E.2d at 656. Instead, in *Beroth I*, the question before this Court was whether the trial court had erred by entering a separate order denying the plaintiffs' motion for class certification of their inverse condemnation claims. *Id.* at 425–26, 725 S.E.2d at 656–57. Although this Court did declare that the plaintiffs and "all owners of real property located within the corridor have

sustained the effects of government action," *id.* at 430, 725 S.E.2d at 659, we maintained that "[w]hether this action constitutes a taking . . . [wa]s not the question before this Court," *id.*, and that we were not expressing any opinion on that issue. *See id.*

Nevertheless, to answer the question presented, this Court undertook an extensive review of "takings" law and examined whether the trial court erred by employing an ends–means analysis to conclude that the plaintiffs' individual issues would predominate over their common issues, if any. *See id.* at 431–37, 725 S.E.2d at 660–63. This Court then concluded that "the distinguishing element in determining the proper takings analysis [wa]s not whether police power or eminent domain power [wa]s at issue, but whether the government act physically interfere[d] with or merely regulate[d] the affected property," *id.* at 437, 725 S.E.2d at 663, and determined that the trial court correctly relied on the ends–means analysis because the alleged takings were "regulatory in nature." *Id.* This Court also determined that the property interest at issue was "in the nature of an easement right," *id.* at 438, 725 S.E.2d at 664, because the plaintiffs had "relinquished their right to develop their property without restriction." *Id.* This Court then upheld the trial court's denial of the plaintiffs' request for class certification because we determined: "[w]hile the Map Act's restrictions may be common to all prospective class members, liability can be established only after extensive examination of the circumstances surrounding each of the affected properties," *id.* at 438–39, 725 S.E.2d at 664; and "[w]hether a particular property owner has been deprived of all practical use of his property and whether the property has been deprived of all reasonable value require case-by-case, fact-specific examinations regarding the affected property owner's interests and expectations with respect to his or her particular property." *Id.* at 439, 725 S.E.2d at 664. Finally, although this Court "stress[ed]" that our holding had "no bearing on [the plaintiffs'] declaratory judgment claim[s]," *id.* at 442, 725 S.E.2d at 666, we recognized that the plaintiffs did not need to be members of a class in order to obtain a declaration that the Hardship Program and the Map Act were unconstitutional and invalid exercises of legislative power and were unequal in their application to property owners, because "[i]f the Map Act [wa]s declared unconstitutional to one, it [wa]s unconstitutional to all." *Id.*

Our Supreme Court later affirmed this Court's holding in *Beroth I* that the trial court "did not abuse its discretion in denying plaintiffs' motion for class certification because individual issues predominate over common issues." *Beroth II*, 367 N.C. at 347, 757 S.E.2d at 477. However, our Supreme Court also determined that the trial court and our Court

"improperly engaged in a substantive analysis of plaintiffs' arguments with regard to the nature of NCDOT's actions and the impairment of their properties." *Id.* at 342, 757 S.E.2d at 474. Our Supreme Court then "expressly disavow[ed]" the portion of this Court's opinion that stated: " '[t]he trial court correctly relied upon the ends[–]means test in the instant case, as the alleged taking is regulatory in nature and as [the trial court] ha[s] specifically held this analysis applicable outside the context of zoning-based regulatory takings.' " *Id.* at 342–43, 757 S.E.2d at 474 (first and fourth alterations in original) (quoting *Beroth I*, 220 N.C. App. at 437, 725 S.E.2d at 663).

[1] As we noted above, in the present case, the trial court's 20 June 2013 summary judgment order determined all of Plaintiffs' claims, except for Harris Triad's declaratory judgment claim, which renders the appeals before us interlocutory. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) ("[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes."); *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Amer. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "[n]otwithstanding this cardinal tenet of appellate practice, . . . immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right.' " *Sharpe v. Worland*, 351 N.C. 159, 161–62, 522 S.E.2d 577, 579 (1999) (citations omitted); *see* N.C. Gen. Stat. § 1-277(a) (2013) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding[.]"); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2013) ("Appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which . . . [a]ffects a substantial right."). Because this Court has previously held that an order granting partial summary judgment on the issue of NCDOT's liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right, *see Nat'l Adver. Co. v. N.C. Dep't of*

Transp., 124 N.C. App. 620, 623, 478 S.E.2d 248, 249 (1996) (citing *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 106–07, 338 S.E.2d 794, 797 (1986)), we will consider the merits of the issues on appeal that are properly before us.

II. Analysis

A. Power of Eminent Domain and Police Powers

[2] Plaintiffs first contend the trial court erred when it determined their claims for inverse condemnation were not yet ripe because Plaintiffs' respective properties had not yet been taken. Plaintiffs assert the trial court erred because the takings occurred when the transportation corridor maps for the Western and Eastern Loops were recorded in 1997 and 2008, respectively. Plaintiffs further urge that the takings were either an exercise of the State's power of eminent domain, for which they are due just compensation, or were an improper exercise of the State's police powers.

"[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation," *Finch v. City of Durham*, 325 N.C. 352, 362–63, 384 S.E.2d 8, 14, *reh'g denied*, 325 N.C. 714, 388 S.E.2d 452 (1989), our Supreme Court has "inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Id.* at 363, 384 S.E.2d at 14.

"The legal doctrine indicated by the term, 'inverse condemnation,' is well established in this jurisdiction," *City of Charlotte v. Spratt*, 263 N.C. 656, 663, 140 S.E.2d 341, 346 (1965), and provides that, where private property is "*taken* for a public purpose by a[n] . . . agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an actio*n to obtain just compensation therefor." *Id.* Inverse condemnation is "a term often used to designate a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Id.* at 662–63, 140 S.E.2d at 346 (internal quotation marks omitted); *see Ferrell*, 79 N.C. App. at 108, 338 S.E.2d at 798 ("Inverse condemnation is a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." (internal quotation marks omitted)). The remedy allowed by inverse condemnation,

which is now codified in N.C. Gen. Stat. § 136-111, *see Ferrell*, 79 N.C. App. at 108, 338 S.E.2d at 798, provides, in relevant part:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court . . . alleg[ing] with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken.

N.C. Gen. Stat. § 136-111 (2013).

"An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose." *Adams Outdoor Adver. of Charlotte v. N.C. Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). "In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental[.]" *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982). Because "[t]he question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain," *see Barnes v. N.C. State Highway Comm'n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737–38 (1962) (internal quotation marks omitted), in order to address whether Plaintiffs' respective properties have been taken pursuant to the Map Act, and, thus, whether the trial court erred by dismissing as unripe Plaintiffs' claims for inverse condemnation, we consider whether the Map Act confers upon the State the right to exercise its power of eminent domain or to exercise its police power.

"Eminent domain means the right of the [S]tate or of the person acting for the [S]tate to use, alienate, or destroy property of a citizen for the ends of public utility or necessity." *Griffith v. S. Ry. Co.*, 191 N.C. 84, 89, 131 S.E. 413, 416 (1926). "This power is one of the highest attributes of sovereignty, and the extent of its exercise is limited to the express terms or necessary implication of the statute delegating the power."

Id.; *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 533, 112 S.E.2d 111, 113 (1960) ("The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty."). "The right of eminent domain which resides in the State is defined to be [t]he rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common," *Spencer v. R.R.*, 137 N.C. 107, 121, 49 S.E. 96, 101 (1904) (internal quotation marks omitted), "and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience or welfare may demand." *Id.* at 121–22, 49 S.E. at 101 (internal quotation marks omitted). "This right or power is said to have originated in State necessity, and is inherent in sovereignty and inseparable from it." *Id.* at 122, 49 S.E. at 101.

In *Wissler v. Yadkin River Power Co.*, 158 N.C. 465, 74 S.E. 460 (1912), our Supreme Court recognized that the phrase "eminent domain" "originated in the writings of an eminent publicist, Grotius, in 1625," *id.* at 466, 74 S.E. at 460, who wrote:

> The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.

Id. (internal quotation marks omitted). Thus, "[t]he right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged." *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451, 455–56 (2 Dev. & Bat.) (1837) (per curiam).

> [W]hen the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied, that the power to have things before appropriated to individuals again dedicated to the service of the [S]tate, is a power useful and necessary to every body politic.

Id. at 456.

"A familiar instance of the exercise of th[is] power . . . is that of devoting private property to public use as a highway. A nation could not exist without these powers, and they involve also the welfare of each citizen individually." *Id.*; *see Nichols on Eminent Domain* § 1.22[1], at 1-78 (rev. 3d ed. 2013) [hereinafter *Nichols*] ("The primary object for the exercise of eminent domain in any community is the establishment of roads."). "An associated people cannot be conceived, without avenues of intercommunication, and therefore the public must have the right to make them without, or against, the consent of individuals." *Raleigh & Gaston R.R. Co.*, 19 N.C. at 456. "[I]t is a power founded on necessity. But it is a necessity that varies in urgency with a population and production increasing or diminishing, and demanding channels of communication, more or less numerous and improved, and therefore to be exercised according to circumstances, from time to time." *Id.* at 458.

However, "[o]ur Constitution, Art. I, sec. 17, requires payment of fair compensation for the property so taken [pursuant to the State's power of eminent domain]. This is the only limitation imposed on sovereignty with respect to taking." *Hutton & Bourbonnais Co.*, 251 N.C. at 533, 112 S.E.2d at 113. "The taking must, of course, be for a public purpose, but the sovereign determines the nature and extent of the property required for that purpose." *Id.* "It may take for a limited period of time or in perpetuity." *Id.* "It may take an easement, a mere limited use, leaving the owner with the right to use in any manner he may desire so long as such use does not interfere with the use by the sovereign for the purpose for which it takes," *id.*, "or it may take an absolute, unqualified fee, terminating all of defendant's property rights in the land taken." *Id.*

"What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest." *Nichols* § 1.42, at 1-132 to 1-133 (footnote omitted). "The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." *Id.* § 1.42, at 1-133, 1-142. "The police power is inherent in the sovereignty of the State. It is as extensive as may be required for the protection of the public health, safety, morals and general welfare." *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979) (citation omitted); *Skinner v. Thomas*, 171 N.C. 98, 100–01, 87 S.E. 976, 977 (1916) ("It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens,

the power to govern men and things by any legislation appropriate to that end." (internal quotation marks omitted)). "Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property." *Skinner*, 171 N.C. at 101, 87 S.E. at 977 (internal quotation marks omitted).

> [T]he police power[] [is] the power vested in the Legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

Durham v. Cotton Mills, 141 N.C. 615, 639–40, 54 S.E. 453, 462 (1906).

"Laws and regulations of a police nature . . . do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." *Nichols* § 1.42, at 1-145 to 1-146, 1-148. " 'Regulation' implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the property subject to the regulation." *Id.* § 1.42, at 1-145.

"[T]here is a considerable resemblance between the police power and the power of eminent domain in that each power recognizes the superior right of the community against . . . individuals," *id.* § 1.42, at 1-153, "the one preventing the use by an individual of his own property in his own way as against the general comfort and protection of the public," *id.*, "and the other depriving him of the right to obstruct the public necessity and convenience by obstinately refusing to part with his property when it is needed for the public use." *Id.* § 1.42, at 1-153 to 1-154. "Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain," *id.* § 1.42, at 1-157, "but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain." *Id.*

"In the exercise of eminent domain[,] property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public." *Id.* § 1.42[2], at 1-203. "In the exercise of the police power[,] the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment

of such property is injurious to the public welfare." *Id.* "Under the police power the property is not generally appropriated to another use, but is destroyed or its value impaired, while under the power of eminent domain it is transferred to the [S]tate to be enjoyed and used by it as its own." *Id.* § 1.42[2], at 1-203, 1-212, 1-214 (footnote omitted).

Police powers are "established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety." *Cotton Mills*, 141 N.C. at 638–39, 54 S.E. at 461. "They are a just restraint of an injurious use of property, which the Legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom, where it is not controlled by fundamental law." *Id.* at 639, 54 S.E. at 461.

> It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.

Id. (internal quotation marks omitted). "Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative action to declare what general regulations shall be deemed expedient." *Id.* "This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor." *Id.* at 639–40, 54 S.E. at 461–62.

The State's police power "prescribe[s] regulations to promote the health, peace, morals, education, and good order of the people, and . . . legislate[s] so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." *Id.* at 641, 54 S.E. at 462 (internal quotation marks omitted). "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 642, 54 S.E. at 462 (internal quotation marks omitted); *Brewer v. Valk*, 204 N.C. 186, 189–90, 167 S.E. 638, 639–40 (1933) ("The police power is an attribute of sovereignty, possessed by every sovereign state, . . . [whereby e]ach State has the power . . . to regulate the relative rights and duties of all persons, individuals and corporations, within its

jurisdiction, for the public convenience and the public good."). Such legislation "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." *Cotton Mills*, 141 N.C. at 642, 54 S.E. at 462 (internal quotation marks omitted).

In order to determine whether the Map Act in the present case is an exercise of the State's power of eminent domain or police powers, we find persuasive and instructive the Florida Supreme Court's approach to a comparable question concerning the constitutionality of a similar state statute in *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). In *Joint Ventures*, the court considered the constitutionality of a Florida statute that prohibited the development of property subject to a map of reservation recorded by the Florida Department of Transportation ("the Florida DOT"). *Joint Ventures*, 563 So. 2d at 623. The Florida statute provided that, with limited exception, properties subject to the map of reservation could not develop the land for a minimum of five years, which period could be extended for an additional five years. *Id.* The Florida DOT, like NCDOT in the present case, argued that the legislature "did not 'take' but merely 'regulated' " the plaintiff's property "in a valid exercise of the police power." *Id.* at 624. The court's inquiry thus concerned whether the statute was "an appropriate regulation under the police power, as [the Florida] DOT assert[ed], or whether the statute [wa]s merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain." *Id.* at 625.

The Florida DOT suggested that the statute was "a permissible regulatory exercise of the state's police power because it was necessary for various economic reasons." *Id.* ("[W]ithout a development moratorium, land acquisition costs could become financially infeasible. If landowners were permitted to build in a transportation corridor during the period of [the Florida] DOT's preacquisition planning, the cost of acquisition might be increased."). However, the Florida Supreme Court determined that, "[r]ather than supporting a 'regulatory' characterization," *id.*, the circumstances showed the statutory scheme to be an attempt to acquire land by sidestepping the protections of eminent domain. *See id.* The court reasoned: "[T]he legislative staff analysis candidly indicate[d] that the statute's purpose [wa]s not to prevent an injurious use of private property, but rather to reduce the cost of acquisition should the state later decide to condemn the property." *Id.* at 626. Because the court "perceive[d] no valid distinction between 'freezing' property in this

fashion and deliberately attempting to depress land values in anticipation of eminent domain proceedings," *id.*, the court determined that "the state exercised its police power *with a mind toward property acquisition.*" *Id.* at 627 (emphasis added). Thus, although the court "d[id] not question the reasonableness of the state's goal to facilitate the general welfare," *id.* at 626, it was concerned "with the means by which the legislature attempt[ed] to achieve that goal," *id.*, when such means were "not consistent with the constitution." *Id.* Because "[a]ssuring highway safety and acquiring land for highway construction are discrete state functions," *id.* at 627, the court held that the statute was unconstitutional, since it permitted the Florida DOT to take the plaintiff's private property without just compensation or the procedural protections of eminent domain. *See id.* at 627–28.

In the present case, when the General Assembly enacted the Map Act, it stated that the enabling legislation was "an act *to control the cost of acquiring rights-of-way for the State's highway system*." 1987 N.C. Sess. Laws 1520, 1520, 1538–42, ch. 747, § 19 (emphasis added). NCDOT argues that its use of the Map Act is for "corridor protection," which is "a planning tool NCDOT uses in designing and building highways because it allows the highway's proposed location to fit into the long-range plans a community has for its future development," and that corridor protection "accomplish[es] more than merely 'saving taxpayers money.' "

According to an affidavit from Calvin William Leggett ("Mr. Leggett") — the manager of NCDOT's Program Development Branch who is responsible for managing the official transportation corridor map program and is "familiar with NCDOT's corridor protection process and why NCDOT utilizes the Map Act to accomplish corridor protection" — corridor protection generally, and the Map Act specifically: "facilitate[] orderly and predictable development;" "enable[] NCDOT to preserve the ability to build a road in a location that has the least impact on the natural and human environments;" "can minimize the number of businesses, homeowners, and renters who will have to be relocated once the project is authorized for right[-]of[-]way acquisition and construction;" and "protect[] the planned highway alignment by limiting future development within the corridor" and, thus, "reduc[e] future right[-]of[-]way acquisition costs for the proposed highway," which "represent the single largest expenditure for a transportation improvement, particularly in growing urbanized areas where transportation improvements needs are the greatest." In other words, NCDOT asserts that the restrictions of the Map Act are intended to facilitate a less disruptive and lower cost migration of residents and businesses "if or when" the Northern Beltway

Project is sufficiently funded and is under construction, and that, without such restrictions, "proposed urban loop routes could be jeopardized due to increased development, disruption related to relocations, property access issues, and future right[]of[-]way acquisition costs."

Nonetheless, these detriments or harms to the public welfare that are purportedly prevented or averted as a result of the Map Act's restrictions are *only* injurious to the public welfare if the Northern Beltway Project is constructed and NCDOT condemns the properties within the transportation corridor. Effectively, NCDOT urges that "proposed urban loop routes could be jeopardized" due to these "harms," but none of these issues cause harm to the public welfare unless the Northern Beltway Project is built and unless NCDOT has to acquire the affected properties. Thus, there is no detriment to the public interest that the Map Act's purported "regulations" will prevent unless NCDOT needs to condemn Plaintiffs' respective properties to build the Northern Beltway. Therefore, we conclude that the Map Act is a cost-controlling mechanism, and, "[b]y recording a corridor map, [NCDOT] is able to foreshadow which properties will eventually be taken for roadway projects and in turn, decrease the future price the State must pay to obtain those affected parcels." *See Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part). Because the power exercised through this legislation is one "with a mind toward property acquisition," *see Joint Ventures*, 563 So. 2d at 627, we conclude that the Map Act empowers NCDOT with the right to exercise the State's power of eminent domain to take private property of property owners affected by, and properly noticed of, a transportation corridor official map that was recorded in accordance with the procedures set forth in N.C. Gen. Stat. § 136-44.50, which power, when exercised, requires the payment of just compensation. *See*, *e.g.*, *Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 407, 14 S.E.2d 252, 256 (1941) ("If the land is needed for a public use, the law provides a way for acquiring it, and the Constitution prohibits its appropriation for such a use without compensation." (internal quotation marks omitted)).

B. Filing of Transportation Corridor Maps as an Exercise of Power of Eminent Domain

We next examine whether NCDOT exercised its power of eminent domain by filing the transportation corridor maps in accordance with the provisions of the Map Act. Specifically, we consider whether NCDOT exercised its powers of eminent domain under the Map Act against Plaintiffs' respective properties located in the Western Loop when it filed the transportation corridor map for the Western Loop in

1997, and against Plaintiffs' respective properties located in the Eastern Loop when it filed the transportation corridor map for the Eastern Loop in 2008, and whether the filing of these transportation corridor maps provide the basis for Plaintiffs' takings claims. We begin where the trial court ended, by considering whether Plaintiffs' claims for inverse condemnation were not yet ripe because Plaintiffs "claim[ed] the date of the taking occurred when the maps were published," Plaintiffs "d[id] not claim the taking took place on any other dates,"[2] and "it is established North Carolina law that mere recording of project maps do not constitute a taking."

"The United States Supreme Court has recognized that a 'nearly infinite variety of ways [exist] in which government actions or regulations can affect property interests.' " *Beroth II*, 367 N.C. at 341, 757 S.E.2d at 473 (alteration in original) (quoting *Ark. Game & Fish Comm'n v. United States*, __ U.S. __, __, 184 L. Ed. 2d 417, 426 (2012)). "Short of a permanent physical intrusion, . . . no set formula exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property." *Beroth II*, 367 N.C. at 341, 757 S.E.2d at 473 (alteration in original) (internal quotation marks omitted). Thus, while our Supreme Court recognized that "the goal of inverse condemnation here is relatively straightforward: to compensate at fair market value those property owners whose property interests have been taken by the development of the Northern Beltway," *id.*, "[d]etermining whether there has been a taking in the first place . . . is much more complicated." *Id.*

"The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Long*, 306 N.C. at 201, 293 S.E.2d at 110 (internal quotation marks omitted). "The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use." *Id.* (internal quotation marks omitted).

---

2. Plaintiffs moved to amend their complaints pursuant to N.C. Gen. Stat. § 1A-1, Rule 15, to include additional allegations that the taking of their respective properties was "presently occurring" and "did occur at an earlier date upon any of" the twenty-three dates further alleged in the motion to amend. Plaintiffs' motion was denied by the trial court on 26 July 2013 — nine days after Plaintiffs filed their notice of appeal with this Court from the 8 January 2013 and 20 June 2013 orders. Plaintiffs did not seek to appeal from the trial court's order denying their motion to amend the complaints. Accordingly, we consider only the allegations in Plaintiffs' original complaints, which alleged that Plaintiffs suffered their respective takings when the transportation corridor maps were filed for the Western and Eastern Loops.

A "taking" has been defined as " 'entering upon private property for more than a momentary period, and under warrant or color of legal authority,' " *id.* at 199, 293 S.E.2d at 109 (quoting *Penn v. Carolina Va. Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)), " 'devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.' " *Id.* (quoting *Penn*, 231 N.C. at 484, 57 S.E.2d at 819). "Modern construction of the 'taking' requirement is that an actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of the property." *Id.* at 198–99, 293 S.E.2d at 109. Thus, " 'taking' means the taking of something, whether it is the actual physical property or merely the right of ownership, use or enjoyment." *Tel. Co. v. Hous. Auth.*, 38 N.C. App. 172, 174, 247 S.E.2d 663, 666 (1978) ("[P]roperty itself need not be taken in order for there to be a compensable taking."), *disc. review denied*, 296 N.C. 414 (1979); *see also Beroth II*, 367 N.C. at 351–52, 757 S.E.2d at 479 (Newby, J., dissenting in part and concurring in part) ("A substantial interference with a single fundamental right inherent with property ownership may be sufficient to sustain a takings action; wholesale deprivation of all rights is not required."). "[T]here is a taking when the act involves an actual interference with, or disturbance of property rights, resulting in injuries which are not merely consequential or incidental." *Penn*, 231 N.C. at 484–85, 57 S.E.2d at 820 (internal quotation marks omitted). "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 318 (1945).

"[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ark. Game & Fish Comm'n*, __ U.S. at __, 184 L. Ed. 2d at 426. Nonetheless, the Supreme Court "has recognized few invariable rules in this area." *Id.* at __, 184 L. Ed. 2d at 426. Aside from the cases that involve "a permanent physical occupation of property authorized by government" or "a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land, . . . most takings claims turn on situation-specific factual inquiries." *Id.* at __, 184 L. Ed. 2d at 426 (citation omitted).

"It is the general rule that a mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected." *Browning v. N.C. State Highway Comm'n*, 263 N.C. 130, 135,

139 S.E.2d 227, 230 (1964) (internal quotation marks omitted). "Thus, the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof." *Id.* at 135–36, 139 S.E.2d at 230–31 (internal quotation marks omitted); *id.* at 138, 139 S.E.2d at 232 ("[T]he mere laying out of a right[-]of[-] way is not in contemplation of law a full appropriation of the property within the lines." (internal quotation marks omitted)). "No damages are collectible until a legal opening occurs by the actual taking of the land. When the appropriation takes place, any impairment of value from such preliminary steps becomes merged, it is said, in the damages then payable." *Browning*, 263 N.C. at 136, 139 S.E.2d at 231 (internal quotation marks omitted); *id.* at 138, 139 S.E.2d at 232 ("Complete appropriation occurs when the property is actually taken for the specified purpose after due notice to the owner; and the owner's right to compensation arises only from the actual taking or occupation of the property by the Highway Commission. When such appropriation takes place, the remedy prescribed by the statute is equally available to both parties." (internal quotation marks omitted)). "A threat to take, and preliminary surveys, are insufficient to constitute a taking on which a cause of action for a taking would arise in favor of the owner of the land." *Penn*, 231 N.C. at 485, 57 S.E.2d at 820 (citation omitted).

In the present case, this Court must consider whether the restrictions of the Map Act that were applicable to Plaintiffs at the time the maps were filed substantially interfered with the elemental rights growing out of Plaintiffs' ownership of their properties so as to have effected a taking and provided grounds for the trial court to consider Plaintiffs' claims for inverse condemnation as ripe.

Upon the filing with the register of deeds of a permanent, certified copy of the transportation corridor official map and the filing of "[t]he names of all property owners affected by the corridor," *see* N.C. Gen. Stat. § 136-44.50(a1)(2), (a1)(3), the statutory restrictions of N.C. Gen. Stat. § 136-44.51(a) are applicable to each "affected" owner noticed pursuant to N.C. Gen. Stat. § 136-44.50(a1). These restrictions prohibit the issuance of building permits "for any building or structure or part thereof located within the transportation corridor," N.C. Gen. Stat. § 136-44.51(a), and "the[se] restrictions imposed by [S]tate law never expire," *Beroth II*, 367 N.C. at 349, 757 S.E.2d at 478 (Newby, J., dissenting in part and concurring in part), and are absolute. NCDOT urges that the statutory restrictions of the Map Act cannot be deemed a taking

because the Map Act merely "creates a temporary three-year restriction on new improvements to properties located within the mapped corridor," (emphasis in original omitted), which restrictions "are lifted, i.e. sunset, three years from when the property owner first submits a permit request to the local government," and that such restrictions "do not affect current property uses." However, the restrictive provisions of the Map Act do not independently or uniformly "sunset" at any time following the date of the filing of a transportation corridor map pursuant to the Map Act. Rather, as the Map Act was written and enacted by the General Assembly, NCDOT was granted the right to exercise its power of eminent domain at any time after the transportation corridor maps for the Northern Beltway Project were filed and the environmental impact statements were completed in accordance with N.C. Gen. Stat. § 136-44.50(d). *See* N.C. Gen. Stat. § 136-44.51(a).

Further, the record includes a letter sent by NCDOT's Chief Operating Officer Jim Trogdon ("Mr. Trogdon") in response to a request for information following a 2010 public meeting concerning the status of the Northern Beltway Project. In the course of his effort to "improve communication regarding advanced acquisition hardship requests and procedures for requesting property improvements within the protected corridor," Mr. Trogdon indicated that NCDOT "will still be constructing existing urban loops in our [S]tate for at least 60 years." Thus, based on our review of the statutory language and based on the evidence in the record before us, the restrictions of the Map Act could quite possibly continue to bind "affected" property owners for "at least 60 years," if the Northern Beltway Project is not completed before then.

Therefore, with potentially long-lasting statutory restrictions that constrain Plaintiffs' ability to freely improve, develop, and dispose of their own property, we must conclude that the Map Act is distinguishable from the cases that established the rule that "the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof." *See Browning*, 263 N.C. at 135–36, 139 S.E.2d at 230–31 (internal quotation marks omitted). In the case before us, NCDOT has not merely "made initial alternative planning proposals" that "contemplate ultimate acquisition of certain lands" owned by Plaintiffs for the purpose of constructing the Northern Beltway. *Cf. Barbour v. Little*, 37 N.C. App. 686, 691, 247 S.E.2d 252, 255, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978). Rather, between 1996 and 2012, NCDOT acquired at least 454 properties located in the

transportation corridor for the Northern Beltway Project. This Court understands that NCDOT's acquisition of these and other properties located within the Western and Eastern Loops of the Northern Beltway Project does not guarantee that the State has the funds necessary to begin or complete construction of the Northern Beltway. However, this has no bearing on the perpetual applicability of the restrictions of the Map Act upon Plaintiffs' properties, or upon our determination that, without a specified end to the restrictions on development or improvement, NCDOT exercised its power of eminent domain when it filed the transportation corridor maps for the Western and Eastern Loops. Since "[t]he courts have no jurisdiction to determine matters purely speculative, . . . deal with theoretical problems, give advisory opinions, . . . adjudicate academic matters, . . . or give abstract opinions," *see Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960), we decline to consider whether our holding would have been different had the General Assembly imposed time limitations upon the restrictions affecting Plaintiffs' properties pursuant to N.C. Gen. Stat. § 136-44.51.

Further, "[w]hile NCDOT's generalized actions [pursuant to the Map Act] may be common to all, . . . liability can be established only after extensive examination of the circumstances surrounding each of the affected properties." *See Beroth II*, 367 N.C. at 343, 757 S.E.2d at 474 (internal quotation marks omitted). "This discrete fact-specific inquiry is required because each individual parcel is uniquely affected by NCDOT's actions. The appraisal process contemplated in condemnation actions recognizes this uniqueness and allows the parties to present to the fact finder a comprehensive analysis of the value of the land subject to the condemnation." *See id.* These issues should be among the trial court's considerations on remand.

III. Conclusion

Accordingly, we hold the trial court erred when it concluded Plaintiffs' claims for inverse condemnation were not yet ripe based on its determination that Plaintiffs did not suffer a taking at the time NCDOT filed the transportation corridor maps for the Western and Eastern Loops. We remand this matter to the trial court to consider evidence concerning the extent of the damage suffered by each Plaintiff as a result of the respective takings and concerning the amount of compensation due to each Plaintiff for such takings. In light of our disposition that the trial court erred by dismissing Plaintiffs' claims for inverse condemnation, we need not consider NCDOT's issue on appeal concerning

whether the trial court erred by failing to dismiss Plaintiffs' claims for inverse condemnation with prejudice, rather than without prejudice.

Additionally, we note that the relief sought by Plaintiffs in their respective complaints was: for the recovery of damages suffered when NCDOT exercised its power of eminent domain against their properties by recording the transportation corridor maps pursuant to the Map Act; for NCDOT to be compelled to purchase Plaintiffs' properties; and for recovery of fees, costs, taxes, and interest. Plaintiffs' challenge to the constitutionality of the Hardship Program was one of five alternative claims alleged in order to obtain this relief. Because our disposition allows the trial court, upon consideration of evidence to be presented by Plaintiffs, to award Plaintiffs the relief they sought in their respective complaints, we decline to consider the arguments presented on appeal concerning the constitutionality of the Hardship Program as applied to Plaintiffs. Therefore, we decline to further address the arguments presented for this issue on appeal. We also decline to address NCDOT's suggestion that Plaintiffs' claims for inverse condemnation are barred by the statute of limitations because, as NCDOT concedes, construction on the Northern Beltway Project has not been completed. *See* N.C. Gen. Stat. § 136-111 ("Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of the [NCDOT] and no complaint and declaration of taking has been filed by [NCDOT] may, *within 24 months of the date of the taking* of the affected property or interest therein or the *completion of the project involving the taking, whichever shall occur later*, file a complaint[.]" (emphases added)). We further decline to address any remaining assertions for which Plaintiffs and NCDOT — as appellants and cross-appellants, respectively — have failed to present argument supported by persuasive or binding legal authority.

Reversed and remanded.

Judges BRYANT and STROUD concur.

MICHAEL RAY PATTON, Administrator of the Estate of THURMAN FRANKLIN PATTON, Deceased Employee, Plaintiff
v.
SEARS ROEBUCK & CO., Employer, SPECIALTY RISK SERVICES, Carrier, Defendants

No. COA14-955

Filed 17 February 2015

1. Workers' Compensation—sufficiency of findings—exposure to asbestos

The Industrial Commission did not err in a workers' compensation case by finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. Findings of fact #3, #7, and #14 supported it.

2. Workers' Compensation—asbestos—occupational exposure—significant contributing factor in death

The Industrial Commission did not err in a workers' compensation case by finding that the decedent's occupational exposure to asbestos was a significant contributing factor in decedent worker's death. Competent evidence showed that decedent's exposure to asbestos contributed to his disease and the occupational disease of asbestosis significantly contributed to his death.

Appeal by defendants from Opinion and Award entered 27 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 January 2015.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff.

Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for defendants.

ELMORE, Judge.

Sears Roebuck & Co. ("defendant-employer") and Specialty Risk Services (collectively "defendants") appeal from the North Carolina Industrial Commission's ("the Commission" or "the Full Commission") Opinion and Award. After careful review, we affirm.

I. Facts

Thurman Franklin Patton (the decedent) originally brought a claim for asbestosis against defendants in 2003. The decedent's claim was

resolved through a compromise settlement agreement approved by the Commission on 27 April 2009. On 10 February 2010, the decedent passed away. The decedent's surviving spouse, Artie Patton, passed away on 29 August 2011. As such, the named plaintiff in this action is Michael Ray Patton, the decedent's son and the administrator of his estate.

On 27 June 2014, the Full Commission entered an Opinion and Award reversing the Deputy Commissioner's decision and concluding that the decedent's death was compensable under the North Carolina Workers' Compensation Act. The Commission awarded plaintiff, in relevant part, 400 weeks of compensation benefits at the weekly rate of $400.01 and ordered defendants to pay plaintiff a burial fee of $3,500.00.

The evidence before the Commission tended to show that the decedent worked for defendant-employer from 1958-1995 as a service technician. The decedent developed an expertise in the repair, installation, and maintenance of home heating, ventilation, and air conditioning (HVAC) units.

Johnny Carroll, the decedent's co-worker, testified on behalf of plaintiff before the Commission. Defendant-employer employed Mr. Carroll as a service technician for approximately twenty-four years beginning in 1972. Mr. Carroll testified that he was the decedent's primary working partner from 1978-1995. The pair worked together approximately two days per week. On the other days, they worked on separate, but similar service calls. On average, each would respond to six to ten service calls per day.

Mr. Carroll testified that he and the decedent repaired furnaces between October and March on almost a daily basis. Prior to 1978, most of the decedent's work also involved furnace installations. Mr. Carroll stated that the furnaces contained asbestos materials, including asbestos rope gaskets, asbestos tape, and asbestos cement.

Jerry Dean Davis, a retired employee of defendant-employer, testified that he worked as a service technician for thirty-eight years beginning in August 1971. Mr. Davis testified that he likely went on service calls with the decedent. Mr. Davis recalled that the only time an employee would work on a furnace call would be "in the wintertime." He also testified that he reasonably believed the decedent would have been exposed to asbestos for thirty days in a seven-month period while working for defendant-employer. However, he clarified that he assumed the decedent would have been exposed to asbestos insulation, but he was unsure of whether the decedent was actually exposed to asbestos at that frequency.

Dr. Marc Guerra, the decedent's treating physician, testified it was his understanding that the decedent was exposed to asbestos while doing appliance repairs for defendant-employer. Dr. Guerra treated the decedent for lung problems, shortness of breath, and heart issues. Dr. Guerra testified that asbestosis was a major contributing factor in the decedent's death. When he signed the decedent's death certificate, he listed the decedent's cause of death as asbestosis and chronic obstructive pulmonary disease (COPD).

Plaintiff tendered Dr. Jill Ohar as an expert in pulmonology, internal medicine, and asbestosis-related disease. Dr. Ohar reviewed the decedent's medical records and concluded that he had "clear pathological and radiographic evidence of asbestosis."

On appeal, defendants neither contend that the decedent was not exposed to asbestos at work nor do they deny that he had asbestosis. Instead, they argue that the decedent was not entitled to compensation for this disease because his exposure was not great enough to maintain a claim for benefits and because it is unclear whether his exposure to asbestos caused or significantly contributed to his death. As such, defendants now appeal the Commission's Opinion and Award.

II. Analysis

a.) Asbestos Exposure

[1] Defendants argue that the Commission erred in finding that the decedent was exposed to asbestos for thirty days within a consecutive seven-month period. We disagree.

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

For an injury or death to be compensable under the North Carolina Workers' Compensation Act "it must be either the result of an accident arising out of and in the course of the employment or an occupational disease." *Keel v. H & V Inc.*, 107 N.C. App. 536, 539, 421 S.E.2d 362, 365 (1992) (citations and quotation marks omitted).

N.C. Gen. Stat. § 97–57 provides, in relevant part, that "[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97–57 (2013). "Under the statute, with respect to asbestosis or silicosis, the worker must have been exposed for 30 working days within seven consecutive months in order for the exposure to be deemed injurious." *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 509, 616 S.E.2d 356, 365 (2005).

Defendants argue that the only evidence that the decedent was exposed to asbestos came from Mr. Carroll, who worked with the decedent approximately twice per week. Defendants calculated that at a rate of twice per week over the six-month winter season, the decedent and Mr. Carroll would have worked together between 48-52 days. Except for when the decedent worked with Mr. Carroll, defendants contend that there is no evidence that the decedent was exposed to asbestos.

Defendants argue that it was faulty for the Commission to assume that each of the 48-52 days involved exposure to asbestos: "There is no reliable way to discern . . . from [the testimony], how many of those calls would have involved exposure to asbestos." Therefore, defendants contend that the record is devoid of competent evidence showing that the decedent was exposed to asbestos for thirty days within a seven-month period.

Defendants' argument is misguided. In the instant case, findings #3, #7, and #14 show that plaintiff was exposed to asbestos for thirty days within a seven-month period:

> 3. Furnace repairs and maintenance were primarily done from October to March. Decedent worked on furnaces almost every day during those months. Most of Decedent's work involved maintenance on older furnaces; however, prior to 1978, Decedent performed many furnace installations for Defendant-Employer.
>
> . . .
>
> 7. Evidence was presented that Decedent worked around asbestos products during his employment with [Defendant-Employer]. During the 1970s and 1980s, Decedent worked with or around asbestos products a minimum of five or six

> times a month. Therefore, in the typical October to March period when furnaces were installed, repaired or maintained, Decedent was exposed to asbestos at a minimum of thirty to thirty-six days.
>
> . . .
>
> 14. The Full Commission finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent had exposure to asbestos fibers for at least thirty days within a seven consecutive month period while in the employ of Defendant-Employer. The Full Commission also finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent's last injurious exposure to asbestos fibers occurred while he was in the employ of Defendant-Employer. The Full Commission further finds as fact based upon the preponderance of evidence in view of the entire record, that Decedent did, in fact, have asbestosis.

These findings of fact are supported by competent evidence in the record.

Mr. Davis testified that defendant-employer's furnaces contained asbestos in the 1960's and 1970's "until the asbestos . . . scare started." He further testified that furnace repair primarily occurred in the winter months. When asked whether it was reasonable to conclude that the decedent would have worked with furnaces and other appliances that had asbestos on them for at least thirty days in a seven-month period, he replied, "yeah, that would sound reasonable, yeah."

Mr. Carroll testified that he and the decedent would respond to three or four furnace calls per week. Of the furnace calls in the 1970's and 1980's between October and March, they would work with asbestos products at a minimum of five or six times per month. Therefore, plaintiff provided evidence that the decedent was exposed to asbestos between thirty and thirty-six times within a consecutive six-month period.

In sum, Mr. Davis' testimony coupled with other competent testimony to show that the decedent was exposed to asbestos for at least thirty days within six consecutive months necessarily support the Commission's finding that the decedent was exposed to asbestos for a minimum of thirty days within a seven-month period.

b.) Contributing Factor

[2] Defendants also contend that the Full Commission erred in finding that the decedent's occupational exposure to asbestos was a significant contributing factor in his death. We disagree.

Pursuant to N.C. Gen. Stat. § 97-38, death resulting from a disease is compensable only when "the disease is an occupational disease, or is aggravated or accelerated by" conditions and causes specific to a claimant's employment. *Walston v. Burlington Industries*, 304 N.C. 670, 679-80, 285 S.E.2d 822, 828 (1982). Asbestosis may be an occupational disease provided that the worker's exposure to substances peculiar to the occupation in question "significantly contributed to, or was a significant causal factor in," the development of the disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983).

> In determining whether exposure to an occupational substance significantly contributed to, or was a significant causal factor in, [a] disease, the Commission may consider medical testimony as well as other factual circumstances in the case, including the extent of the worker's exposure to the substance, the extent of non-occupational but contributing factors, and the manner of development of the disease as it relates to the claimant's work history. The burden of proving the existence of a compensable claim is upon the claimant.

Goodman v. Cone Mills Corp., 75 N.C. App. 493, 497, 331 S.E.2d 261, 264 (1985) (citations omitted).

As to the decedent's cause of death, the Commission made the following findings of fact:

> 11. The death certificate for Decedent lists asbestosis and COPD as the causes of death. Dr. Guerra signed the death certificate. Dr. Guerra opined that asbestosis significantly contributed to Decedent's death and that Plaintiff died 'secondary to respiratory failure related to his restrictive lung disease/asbestosis and COPD.'
>
> . . .
>
> 12. Dr. Ohar testified that the most likely cause of death was arrhythmia or irregular heart beat caused by a lack of oxygen getting to the heart but that 'asbestosis certainly was a contributing cause" to Decedent's death and

> that 'terminal lung disease drove the train to his death.' Dr. Ohar testified that the arrthymia [sic] would be most likely traced back to the COPD and asbestosis and that the autopsy confirmed the presence of asbestosis.
>
> . . .
>
> 16. Prior to his death, Decedent was suffering from asbestosis caused by his exposure to asbestos while working for Defendant-Employer.
>
> 17. Based upon a preponderance of evidence in view of the entire record, the Full Commission finds that Decedent's work-related asbestosis condition was a significant contributing and causal factor in his death.

The evidence supports each of the Commission's findings relating to causation. Specifically, in support of finding #11, the record contains a copy of the decedent's death certificate signed by Dr. Guerra that clearly lists asbestosis as a cause of death. In addition, the record shows that Dr. Guerra did in fact testify that the decedent died "secondary to respiratory failure related to his restrictive lung disease/asbestosis and COPD[,]" as the Full Commission found. In support of findings #12, and #16, and #17, Dr. Ohar testified to a reasonable degree of medical certainty that the decedent "had a history of asbestos exposure and had evidence of asbestosis. And the asbestosis certainly was a contributing cause to his death." Moreover, both Mr. Carroll and Mr. Davis, the decedent's co-workers, testified that the decedent was exposed to asbestos while working for defendant-employer.

Accordingly, competent evidence shows that 1.) the decedent's exposure to asbestos contributed to his disease and 2.) the occupational disease of asbestosis significantly contributed to the decedent's death. Thus, defendants' argument fails.

III. Conclusion

In sum, the findings of fact that 1.) plaintiff was exposed to asbestos for a minimum of thirty days within a consecutive seven-month period and 2.) the decedent's occupational exposure to asbestos was a significant contributing factor in his death are both supported by competent evidence. Thus, we affirm the Commission's Opinion and Award.

Affirmed.

Judges DAVIS and TYSON concur.

RATLEDGE v. PERDUE

[239 N.C. App. 377 (2015)]

JONATHAN RATLEDGE, PLAINTIFF
v.
PHILLIP S. PERDUE, JR., M.D. AND ORTHOPAEDICS EAST AND SPORTS MEDICINE CENTER, INC., DEFENDANTS

No. COA14-500

Filed 17 February 2015

Medical Malpractice—Rule 9(j) certification—dismissal without prejudice and refiling—original certification not valid

The trial court did not err by dismissing a medical malpractice complaint for failure to satisfy the requirements of N.C.G.S. § 1A-1, Rule 9(j) where plaintiff sent unverified responses to interrogatories from defendant seeking to discover the basis for plaintiff's Rule 9(j) certification, a voluntary dismissal without prejudice was filed, plaintiff refiled his complaint with the same allegations after the running of the statute of limitations, and defendants moved to dismiss. Compliance with Rule 9(j) must be established as of the filing of an original medical malpractice complaint where the second complaint is outside the statute of limitations, but plaintiff never received any definitive confirmation that his witness either believed that plaintiff's treatment fell below the applicable standard of care or that his witness would testify to that effect.

Appeal by plaintiff from order entered 19 December 2013 by Judge W. Russell Duke in Pitt County Superior Court. Heard in the Court of Appeals 8 October 2014.

Asbill Stiles, LLC, by Graham Stiles, for plaintiff-appellant.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Robert D. Walker, Jr. and Ashley H. Rodriguez, for defendant-appellees.

CALABRIA, Judge.

Jonathan Ratledge ("plaintiff") appeals from the trial court's order dismissing his medical malpractice complaint against Phillip S. Perdue, Jr., M.D. ("Dr. Perdue") and Orthopaedics East and Sports Medicine Center, Inc. (collectively "defendants") for failure to comply with N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013) ("Rule 9(j)"). We affirm.

On 15 August 2008, plaintiff, a baseball player at East Carolina University, visited Dr. Perdue to seek treatment for pain in his left hand.

Dr. Perdue determined that plaintiff had a fractured hamate hook, which would require surgery to repair. Dr. Perdue performed the surgery on 29 August 2008. During the procedure, Dr. Perdue severed plaintiff's ulnar nerve.

After the operation, Dr. Perdue continued to see plaintiff in order to monitor his progress. Plaintiff complained of ulnar pain and had difficulty moving portions of his hand. Dr. Perdue advised plaintiff that these complications from surgery could take 9-12 months to completely resolve. Plaintiff's last appointment with Dr. Perdue occurred on 19 March 2009.

On 29 May 2009, plaintiff visited Glen Gaston, M.D. ("Dr. Gaston") to seek a second opinion on his symptoms. Dr. Gaston determined that plaintiff's ulnar nerve had been severed and attempted to correct it via surgery. Dr. Gaston performed multiple procedures, but was ultimately unable to reattach the nerve and return functionality to plaintiff's hand.

Plaintiff retained the services of an attorney, who sent plaintiff's medical records to the CorVel Corporation ("CorVel"), a company which performs reviews of potential medical malpractice claims and provides referrals to expert witnesses. The claim was reviewed by Robert Pennington, M.D. ("Dr. Pennington"). CorVel provided plaintiff's counsel with a "Peer Review by a North Carolina Licensed Board Certified Orthopedic Surgeon" which purported to be Dr. Pennington's review of the case.

Based upon Dr. Pennington's review, plaintiff initiated a medical malpractice action against Dr. Perdue in Pitt County Superior Court on 16 March 2012. After receiving the complaint, defendants' counsel sent interrogatories to plaintiff's counsel seeking to discover the basis for plaintiff's Rule 9(j) certification. In response, plaintiff sent unverified answers to the interrogatories. Defendants then filed a motion to compel verified answers as required by Rule 9(j). On 20 December 2012, the trial court entered a consent order whereby plaintiff would provide verified responses to the interrogatories within 15 days of the entry of the order. Plaintiff failed to comply with the consent order. As a result, defendants filed a motion to dismiss on 8 February 2013. On 14 March 2013, plaintiff filed a voluntary dismissal without prejudice. On 30 September 2013, plaintiff refiled his complaint, including the same allegations of medical malpractice from the original complaint.

On 23 October 2013, defendants filed a motion to dismiss on the basis that plaintiff had not fully complied with Rule 9(j) before the

expiration of the statute of limitations. After a hearing, the trial court granted the motion on 19 December 2013. Plaintiff appeals.

Plaintiff's sole argument on appeal is that the trial court erred by dismissing his complaint for failure to satisfy the requirements of Rule 9(j). We disagree.

Rule 9(j) states, in relevant part:

> Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013). Moreover, "it is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

When ruling upon a motion to dismiss for failure to comply with Rule 9(j), "a court must consider the facts relevant to Rule 9(j) and apply the law to them. Thus, a plaintiff's compliance with Rule 9(j) requirements clearly presents a question of law to be decided by a court, not a jury. A question of law is reviewable by this Court *de novo*." *Phillips v. Triangle Women's Health Clinic, Inc.*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citations omitted), *aff'd per curiam*, 357 N.C. 576, 597 S.E.2d 669 (2003).

> When a trial court determines a Rule 9(j) certification is not supported by the facts, "the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination."

Estate of Wooden v. Hillcrest Convalescent Ctr., Inc., ___ N.C. App. ___, ___, 731 S.E.2d 500, 506 (2012) (quoting *Moore v. Proper*, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012)).

Initially, we note that our Courts have held that compliance with Rule 9(j) must be established as of the time of the filing of the medical malpractice complaint.

> Because Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing. The Court of Appeals has held that when conducting this analysis, a court should look at "the facts and circumstances known or those which should have been known to the pleader" at the time of filing. We find this rule persuasive, as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances. As a result, the Court of Appeals has correctly asserted that a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable.

Moore, 366 N.C. at 31-32, 726 S.E.2d at 817 (2012) (internal quotations and citations omitted).

> Our appellate courts have also addressed the situation in which a Rule 41(a)(1) voluntary dismissal was taken after the filing of a complaint lacking any Rule 9(j) certification. The courts have held that if (1) the initial complaint does not contain a Rule 9(j) certification; (2) the required certification is not filed prior to the expiration of the statute of limitations and the 120-day extension permitted by Rule 9(j); and (3) the plaintiff takes a voluntary dismissal under Rule 41, then a re-filed complaint – even though containing a Rule 9(j) certification – must be dismissed . . . .

Ford, 192 N.C. App. at 671, 666 S.E.2d at 156-57.

In the instant case, plaintiff was required to obtain a valid Rule 9(j) certification before he filed his original complaint on 16 March 2012. *See id.* Plaintiff subsequently filed a voluntary dismissal without prejudice of that complaint on 14 March 2013 and a new complaint on 30 September

2013, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2013). However, 16 March 2012 remains the relevant date from which to determine plaintiff's Rule 9(j) compliance, because the new complaint was filed after the expiration of the statute of limitations. *See McKoy v. Beasley*, 213 N.C. App. 258, 263, 712 S.E.2d 712, 716 (2011) (A "defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations."). Therefore, in order to survive defendants' motion to dismiss, plaintiff's 16 March 2012 complaint must have included a valid Rule 9(j) certification.

The trial court's findings of fact indicate that, prior to filing the 16 March 2012 complaint, plaintiff's counsel contacted CorVel, and that CorVel provided him with a "Peer Review by a North Carolina Licensed Board Certified Orthopedic Surgeon" regarding plaintiff's surgery that was purported to be from Dr. Pennington. However, the review was not signed or otherwise formally verified by Dr. Pennington. Moreover, the review never stated that Dr. Perdue's actions during plaintiff's surgery fell below the applicable standard of care or that Dr. Pennington would testify to that effect. Finally, the trial court found that the email correspondence between plaintiff's counsel and CorVel personnel did not include any competent evidence that Dr. Pennington was willing to testify in the instant case that Dr. Perdue's treatment of plaintiff fell below the applicable standard of care.

The trial court's findings, which are supported by competent evidence submitted to the trial court at the Rule 9(j) compliance hearing, establish that plaintiff never received any definitive confirmation that Dr. Pennington either believed that plaintiff's treatment by Dr. Perdue fell below the applicable standard of care or that Dr. Pennington would testify to that effect. Thus, the court's findings support its conclusion of law that plaintiff failed to comply with Rule 9(j) prior to the expiration of the statute of limitations, because, at the time of the filing of the original complaint, "the exercise of reasonable diligence would have led [plaintiff] to the understanding that [his] expectation [that Dr. Pennington would testify] was unreasonable." *Moore*, 366 N.C. at 32, 726 S.E.2d at 817. Accordingly, the trial court properly dismissed plaintiff's complaint. *See id.* at 31-32, 726 S.E.2d at 817. The trial court's order is affirmed.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
TERRY LEE BROUSSARD, JR.

No. COA14-984

Filed 17 February 2015

1. Homicide—jury instruction—imperfect self-defense

In a murder prosecution, the trial court did not err by denying defendant's request for a jury instruction on voluntary manslaughter based on imperfect self-defense. The evidence did not show that defendant reasonably believed it was necessary to stab the unarmed victim in order to escape death or great bodily harm.

2. Homicide—evidence of firearms not used in crime—relevant to show flight

In a murder prosecution, the trial court did not err by admitting evidence of firearms and ammunition found in defendant's car when he was arrested in South Carolina because it was relevant to show that he was in flight. Even assuming that admission of the evidence was erroneous, the trial court gave the jury a limiting instruction, and defendant failed to show any prejudicial error.

Appeal by defendant from judgment entered 5 September 2013 by Judge James G. Bell in Cumberland County Superior Court. Heard in the Court of Appeals 7 January 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

David L. Neal for defendant.

TYSON, Judge.

Defendant appeals from his conviction of second degree murder. We find no error.

I. Facts

Defendant and Ronnell Wright were next-door neighbors. An altercation between defendant and Wright ended when defendant fatally stabbed Wright in the chest. On the evening of 29 August 2009, defendant's half-brother, Ronald Jackson, accused Wright of breaking

his sliding glass door. An argument ensued between Jackson and Wright. Wright called the police. Fayetteville police officers arrived at the residence, spoke with Jackson and Wright, and left about twenty minutes later.

Defendant was in the company of his friends, Marqui Gerald and James Williams, when his mother called and told him to come home. Someone had tried to break in the house. Defendant drove home and parked in the driveway. Gerald and Williams arrived in a separate vehicle and parked at Gerald's aunt's house across the street.

Wright was standing in his driveway with his fiancée, his mother, and his two-year old son. Defendant and Wright began shouting at each other. A physical altercation ensued between the two men in Wright's yard. Wright's mother, Aurelia Wright, and his fiancée, Shonda Cromartie, both witnessed the fight. They testified the fight began by defendant punching Wright. According to Ms. Wright and Ms. Cromartie, Wright's two year-old son came near him while he was fighting with defendant. Wright turned away from defendant to move his son out of the way. He picked up the child and moved him one or two feet. As Wright turned back toward defendant, defendant stabbed him in the chest with a knife. Wright did not possess a weapon during the fight.

Defendant is smaller in height and weight than Wright. According to the medical examiner, Wright was five feet, nine inches tall and weighed 164 pounds. Defendant's mother testified that defendant's height is five feet, two inches tall and he weighs about 120 pounds.

James Williams witnessed the fight and testified on behalf of defendant. Because of the size difference between Wright and defendant, Williams testified that it looked as though Wright was fighting with a "kid." He stated that Wright grabbed defendant and defendant's feet were dangling "like a cartoon character." Williams further testified that he was unsure whether Wright and defendant were "locked up" together when defendant stabbed Wright. Williams realized Wright had been stabbed when he lifted up his arm and stated that defendant had stabbed him.

Defendant's half-brother, Ronald Jackson, also witnessed the fight. Jackson testified Wright had punched defendant first and initiated the fight. Wright held defendant in a headlock and the two wrestled. They bounced off a tree, disengaged, and Jackson saw that Wright had been stabbed. Marqui Gerald was inside his aunt's house and did not witness the fight. He testified that defendant always carried a pocketknife on his belt. He believed the knife had a folding blade four inches long.

Defendant put forth evidence of a dispute that occurred a few days before the fight between Wright and Jackson. A group of people, including Wright and Jackson, were socializing under Wright's carport. Before the day was over, Wright's fiancée's cell phone went missing. Wright went next door to Jackson's house and demanded that Jackson tell his friend, "Squid," to return the phone. He told Jackson there were "going to be some problems." Wright went to the high school that Jackson and Squid attended and told Squid he was going to "beat his ass."

Defendant ran from the scene immediately after he stabbed Wright. Wright walked towards the house and his mother called 911. When police officers arrived, Wright was bleeding badly and losing consciousness. The officers were able to speak briefly with Wright. He told them that he had been involved in an altercation with the neighbor and the neighbor had stabbed him. Wright told the officers that the neighbor said he was going to kill him. Soon thereafter, Wright died of a single stab wound to the left chest.

Defendant was apprehended three days later during a traffic stop in South Carolina. Several firearms were found inside the car. Defendant possessed a passport bearing the name of Shamsiddeen Muhammmand Rasheed in his pocket. A piece of paper was also found inside the car containing the directions to a mosque in Laredo, Texas.

Defendant was indicted on the charge of first degree murder. He was tried capitally before a jury at the 12 August 2013 criminal session of Cumberland County Superior Court. The jury convicted defendant of second degree murder and he was sentenced to a term of 220 to 273 months in prison. Defendant appeals.

II. Issues

Defendant argues the trial court erred in: (1) denying his request for a jury instruction on voluntary manslaughter based on the theory of imperfect self-defense; and, (2) admitting into evidence weapons and ammunition found in the car with him when he was apprehended in South Carolina.

III. Jury Instruction

[1] Defendant argues the trial court erred in denying his request to instruct the jury on voluntary manslaughter based on imperfect self-defense. We disagree.

a. Standard of Review

Whether the evidence is sufficient to warrant defendant's requested jury instruction is a question of law. Our standard of review is *de novo*. *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995). In determining whether the trial court should have instructed the jury on self-defense, we view the facts in the light most favorable to defendant. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889-90 (1993).

b. Imperfect Self-Defense

The trial court instructed the jury on first degree murder, second degree murder and voluntary manslaughter. The voluntary manslaughter instruction was based on the theory of heat of passion. During the charge conference, defendant requested the trial court to also instruct the jury on voluntary manslaughter based on the theory of imperfect self-defense.

"A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998). Our Supreme Court has explained:

> There are two types of self-defense: perfect and imperfect. Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. In addition, defendant's belief must be reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (internal quotation marks and citations omitted).

A defendant cannot benefit from perfect self-defense and can only claim imperfect self-defense, if he was the aggressor or used excessive force. *State v. Bush*, 307 N.C. 152, 158-59, 297 S.E.2d 563, 568 (1982). "Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974).

The evidence, viewed in the light most favorable to defendant, showed that defendant and Wright engaged in a physical altercation in Wright's yard. Conflicting evidence was presented as to who dealt the first punch. Defendant's two eyewitnesses, Ronald Jackson and James Williams, testified that Wright initiated the fight. Other eye witnesses testified that defendant initiated the fight. Wright was five feet, nine inches tall and weighed 164 pounds, whereas defendant is five feet, two inches tall and weighs around 120 pounds. Jackson testified Wright held defendant in a headlock and defendant held Wright around the waist as they were fighting. They disengaged and Jackson heard Wright say that he had been stabbed.

Defendant's other eyewitness, James Williams, was unsure whether they were "locked up" when defendant stabbed Wright. Williams testified that during the fight, he saw defendant's feet leave the ground and dangle "like a cartoon character." No evidence was presented that Wright possessed a weapon during the altercation. Defendant elected not to testify at trial. A defendant is not required to testify regarding his state of mind for the trial court to determine sufficient evidence exists to instruct the jury on self-defense. *State v. Revels*, 195 N.C. App. 546, 551, 673 S.E.2d 677, 681, *disc. review denied*, 363 N.C. 379, 680 S.E.2d 204 (2009).

Defendant argues the evidence of his stature and weight compared with that of Wright, and the testimony that Wright held him in a headlock when the stabbing occurred, was sufficient to allow the jury to infer that he reasonably believed it was necessary to kill Wright to protect himself from death or great bodily harm. We are not persuaded.

Viewed in the light most favorable to defendant, the evidence is insufficient to support an instruction on imperfect self-defense. Ronald Jackson testified that Wright was holding defendant in a "headlock," and defendant was holding Wright around the waist when defendant stabbed Wright in the chest. Although defendant uses the term "choke hold" in his brief, our review found no testimony from any witness, which described him in a "choke hold," "choking" or held in a manner by the victim to impede his ability to breathe.

In support of his argument, defendant cites the case of *State v. Johnson*, 184 N.C. 637, 113 S.E.2d 617 (1922), in which our Supreme Court held a self-defense instruction was required. The evidence showed the defendant stabbed the victim while the victim held the defendant tight around his neck with the defendant's head under his arm. We distinguish this case from the facts presented in *Johnson*. In *Johnson*, the

evidence showed that the defendant was attempting to get away from the victim, while the victim struck him about the face and head. The stabbing occurred while the victim had the defendant pinned into a corner. A defendant's unsuccessful attempt to remove himself from the fight is circumstantial evidence that he believed it necessary to kill his adversary to save himself from death or great bodily harm.

Here, the uncontroverted evidence shows that defendant fully and aggressively participated in the altercation with Wright in the yard of Wright's home. No evidence was presented that defendant tried to get away from Wright or attempted to end the altercation. Where the evidence does not show that defendant reasonably believed it was necessary to stab Wright, who was unarmed, in the chest to escape death or great bodily harm, the trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based upon imperfect self-defense. Defendant's argument is overruled.

IV. Testimony About Defendant's Arrest

[2] Defendant argues the trial court erred in admitting irrelevant and prejudicial evidence of four firearms found in the car when he was arrested following a traffic stop in South Carolina. We disagree.

a. Standard of Review

Whether evidence is relevant is a question of law that we review *de novo*. *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 501 (2010). Our Supreme Court has stated, "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

b. Relevant Evidence of Flight

"Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013).

Defendant argues the testimony about weapons he possessed upon his arrest is irrelevant and inadmissible because there was no evidence connecting the weapons to the crime. In support of his argument,

defendant cites *State v. Patterson*, 59 N.C. App. 650, 297 S.E.2d 628 (1982) and *State v. Samuel*, 203 N.C. App. 610, 693 S.E.2d 662 (2010). In *Patterson*, the State introduced evidence of a sawed-off shotgun found in the defendant's car in addition to the pistol identified by the victim as the weapon used in the commission of the robbery.

This Court granted the defendant a new trial because no evidence connected the shotgun to the robbery and "there [was] a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant's conviction, particularly in light of the conflicting evidence regarding the identity of the defendant as the man who robbed [the victim]." *Id.* at 653-54, 297 S.E.2d at 630.

In *State v. Samuel*, also an armed robbery case, the trial court admitted evidence of two guns found in the defendant's home without any evidence linking the guns to the robbery. Like in *Patterson*, this Court awarded the defendant a new trial, noting "the weakness in the State's evidence that [the} [d]efendant was the assailant and the substantial evidence tending to show that [the] [d]efendant was not the assailant." *Samuel*, 203 N.C. App. at 624, 693 S.E.2d at 671.

We distinguish the facts of this case from those presented in *Patterson* and *Samuel*. In both of those cases, we acknowledged the weakness in the State's evidence that the defendant was the perpetrator of the crime. Here, the identity of defendant as the perpetrator was not in question. More significantly, in *Patterson* and *Samuel*, the State introduced the firearms as evidence the defendants perpetrated the robberies. Here, the State presented evidence of the weapons to show the circumstances surrounding defendant's flight.

Defendant ran away from the scene immediately after he stabbed Wright. Three days later, he was apprehended following a traffic stop in South Carolina. Defendant, who was riding as a passenger in another person's car, possessed a passport bearing a fictitious name. Also found in the car was a piece of paper with directions to a mosque located in Laredo, Texas. Four firearms were found inside the passenger compartment of the car: a loaded assault rifle, two sawed-off shotguns, and a loaded pistol.

The circumstances surrounding defendant's apprehension in South Carolina, the passport, the paper containing directions to a specific place in Texas, and the firearms are relevant evidence of flight. "An accused's flight is 'universally conceded' to be admissible as evidence of consciousness of guilt and thus of guilt itself." *State v. Jones*, 292 N.C. 513, 525, 234 S.E.2d 555, 562 (1977) (citation and quotation marks

omitted). We are not persuaded by defendant's argument that the State "did not need to introduce the guns in order to argue the flight issue."

Our Supreme Court has recognized that "the degree or nature of the flight is of great importance to the jury." *Id.* at 527, 234 S.E.2d at 562-63. The Court explained that the jury would likely attach a different significance where the defendant fled a short distance to a friend's house than where the defendant attempted to flee the state and assaulted a law enforcement officer in the process. *Id.* at 527, 234 S.E.2d at 563. "Flight is 'relative' proof which must be viewed in its entire context to be of aid to the jury in the resolution of the case." *Id.* The evidence of the firearms found in the car upon defendant's arrest, along with the passport and directions to Laredo, Texas were relevant to show the context of defendant's flight. Defendant's arguments are overruled.

Presuming *arguendo* that the admission of the evidence of the firearms was error, defendant has failed to show any prejudicial error. The trial court instructed the jury as follows:

> Evidence has been introduced that the state contends to show that the defendant was a passenger in a car driven and owned by another person. Firearms and other items of evidence were found in that car. These firearms were not used in the stabbing death of Ronnell Wright and you cannot consider the firearms as evidence of the defendant's intent to kill, malice, proximate cause, premeditation or deliberation. You may only consider the firearms as possible evidence of flight. It is for you, the jury, to determine whether the evidence found in the car is evidence of flight or not. (Emphasis supplied).

Jurors are presumed to have followed the instruction of the trial court. *State v. Hardy*, 353 N.C. 122, 138, 540 S.E.2d 334, 346 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56, 122 S. Ct. 96 (2001). Even if evidence of the firearms was improperly admitted, any resulting prejudice was cured by the court's limiting instruction. *See State v. Oliver*, 52 N.C. App. 483, 486, 279 S.E.2d 19, 21-22 (1981) (any prejudice to the defendant arising from witness testimony was cured and any error was rendered harmless by the issuance of an instruction to the jury to disregard the testimony).

V. Delay in Trial

Finally, our review of the record shows defendant was arrested on 1 September 2009 and was tried in August and September of 2013,

almost four years later. Defendant was given credit for 1,464 days spent in confinement awaiting trial. The record on appeal does not show any motions for speedy trial or arguments of prejudice from defendant.

While we are unaware of the circumstances surrounding the delay in bringing defendant to trial, it is difficult to conceive of circumstances where such delays are in the interest of justice for defendant, his family, or the victim's family, or in the best interests of our citizens in timely and just proceedings. *See State v. Spivey*, 150 N.C. App. 189, 192, 563 S.E.2d 12, 14 (2002) (Timmons-Goodson, J., dissenting), *aff'd*, 357 N.C. 114, 579 S.E.2d 251 (2003) ("This Court cannot continue to overlook such substantial delays because of congested dockets. Under our unified court system and the constitutional right to a speedy trial, the court's resources must not be viewed from the perspective of a single judicial district, but system-wide. A lack of personnel or court sessions in a single judicial district is not a sufficient reason to maintain a defendant who is presumed innocent, confined in jail for four and a half years awaiting his or her day in court.").

VI. Conclusion

The trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based on the theory of imperfect self-defense. The evidence failed to show defendant reasonably believed it was necessary to kill Wright to save himself from death or great bodily harm.

The trial court did not err in admitting evidence of multiple loaded firearms and other evidence found with defendant in the car upon his arrest in South Carolina. This evidence was relevant to flight. The trial court gave a proper limiting instruction to the jury concerning this evidence. Defendant received a fair trial, free from errors he preserved, assigned and argued.

No error.

Judges ELMORE and DAVIS concur.

STATE v. EDWARDS

[239 N.C. App. 391 (2015)]

STATE OF NORTH CAROLINA
v.
JAMEL RASHON EDWARDS

No. COA14-710

Filed 17 February 2015

Criminal Law—failure to give jury instruction—duress—necessity

A de novo review revealed that the trial court did not err in a possession of a firearm by a felon case by denying defendant's request for an instruction on duress or necessity as a defense. Defendant failed to establish any basis for the instruction.

Appeal by defendant from judgment entered 7 January 2014 by Judge Reuben F. Young in Wayne County Superior Court. Heard in the Court of Appeals 4 December 2014.

Attorney General Roy Cooper by Assistant Attorney General Ryan C. Zellar for the State.

Ryan McKaig for defendant-appellant.

STEELMAN, Judge.

The trial court did not err by denying defendant's request for an instruction on duress or necessity as a defense to possession of a firearm by a felon.

I. Factual and Procedural Background

Officers Anthony Ravine and Cornelius Crittendon of the Goldsboro Police Department were on duty on 24 May 2012. At about 6:00 p.m., they observed Jamel Edwards (defendant) standing with other persons in a vacant lot on the corner of Swan and E. John Streets in Goldsboro. When defendant saw the officers, he "hurriedly started walking away" and "reached into his waistband and pulled out a silver item which [the officers] immediately saw was a handgun[.]" "[Defendant] dropped the handgun" and "was walking away, but when he saw Officer Crittenden he turned and came back[.]" At that time, the officers placed defendant under arrest and took possession of the weapon, a 9 mm. "Smith & Wesson semiautomatic handgun." Following his arrest, defendant executed a written waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and was interviewed

by Officer Crittendon. Defendant's statement to Officer Crittendon is discussed below.

Defendant was indicted for possession of a firearm by a felon on 4 December 2012. This matter came on for trial at the 7 January 2014 criminal session of Superior Court in Wayne County. In addition to the testimony of Officers Ravine and Crittendon, the State presented evidence that defendant had been convicted of a felony prior to the date of his arrest. On 7 January 2014 the jury returned a verdict finding defendant guilty of possession of a firearm by a felon. The trial court imposed an active sentence of 14 to 26 months imprisonment.

Defendant appeals.

II. Instruction on Defense of Duress or Necessity

In his sole argument on appeal, defendant asserts that the trial court erred by denying his request for a jury instruction on duress or necessity as a defense to the charge of possession of a firearm by a felon. We disagree.

A. Standard of Review

"In North Carolina, requests for special jury instructions are allowable under N.C.G.S. § 1-181 and 1A-1, Rule 51(b) of the North Carolina General Statues. N.C. Gen. Stat. §§ 1-181, 1A-1, Rule 51(b) [(2013)]. It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. 'The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case.' " *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005) (citing *Roberts v. Young*, 120 N.C. App. 720, 726, 464 S.E.2d 78, 83 (1995), and quoting *State v. Scales*, 28 N.C. App. 509, 513, 221 S.E.2d 898, 901 (1976)).

Defendant contends that there is a "conflict in North Carolina law about whether a trial court's failure to give a jury instruction is reviewed under a *de novo* standard or an abuse of discretion standard." We disagree, and conclude that the conflict posited by defendant reflects the fact that the proper standard of review depends upon the nature of a defendant's request for a jury instruction.

Certain requests for jury instructions require the trial court to exercise its discretion. For example:

> "After the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court[.]" N.C. Gen. Stat.

> § 15A-1234(a)(1)[.] . . . "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." Thus, a trial court's decision to grant or deny the jury's request for additional instruction is reviewed by this Court only for an abuse of discretion.

State v. Guarascio, 205 N.C. App. 548, 563-64, 696 S.E.2d 704, 715 (2010) (quoting N.C. Gen. Stat. § 15A-1234(a)(1), and *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986)). In this regard, *State v. Jenkins*, 35 N.C. App. 758, 242 S.E.2d 505 (1978), which defendant argues is "controlling" on this issue, involved the trial court's discretionary determination of whether an instruction was warranted on the credibility of young children.

However, it is axiomatic that "[w]e review questions of law *de novo*." *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013) (citing *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). "Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*." *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (citing *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995)), *aff'd*, 364 N.C. 417, 700 S.E.2d 222 (2010). Similarly, the question of whether a defendant is entitled to an instruction on the defense of duress or necessity presents a question of law, and is reviewed *de novo*. We hold that where the request for a specific instruction raises a question of law, "the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted).

B. Analysis

Defendant contends that the trial court erred by denying his request that the jury be instructed on the defense of duress to the charge of possession of a firearm by a felon, and urges this Court to explicitly adopt the reasoning of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), an opinion that "recognized justification as an affirmative defense to possession of firearms by a felon." *Craig*, 167 N.C. App. at 795, 606 S.E.2d at 389. The test set out in *Deleveaux* requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Deleveaux, 205 F.3d at 1297.

"Consistent with the precedent from this Court, we assume *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for possession of a firearm by a felon. Nevertheless, the evidence in the present case, even when viewed in the light most favorable to Defendant, does not support a conclusion that Defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury." *State v. Monroe*, __ N.C. App. __, __, 756 S.E.2d 376, 380 (2014), *aff'd*, __ N.C. __, __ S.E.2d __, (23 January 2015) (2015 N.C. LEXIS 33).

In this case, defendant did not testify or present evidence. The defendant's statement to Officer Crittendon during a brief interview of defendant contains the only evidence pertinent to the circumstances under which defendant came to be in possession of a firearm. This interview contained the following:

> OFFICER CRITTENDON: . . . The first question: How long - how long you had the gun?
>
> DEFENDANT: An hour.
>
> OFFICER CRITTENDON: Next question: Who you get the gun from?
>
> DEFENDANT: A white boy.
>
> OFFICER CRITTENDON: Where did you meet at?
>
> DEFENDANT: From around the way.
>
> OFFICER CRITTENDON: Why did you have the gun?

> DEFENDANT: For protection.
>
> OFFICER CRITTENDON: What problems you having to have a gun?
>
> DEFENDANT: People threatening my life.

Defendant's statements to Officer Crittendon do not constitute evidence of any of the elements of the *Deleveaux* test. Notably, there is no indication of (1) the identity of the "people" who were "threatening [defendant's] life"; (2) the time or place of the threats; (3) the circumstances, if any, indicating that the threat presented an "imminent, and impending threat of death or serious bodily injury"; (4) the circumstances under which defendant was "in a situation where he would be forced to engage in criminal conduct"; (5) whether defendant had a reasonable alternative to violating the law; or (6) the existence of "a direct causal relationship between the criminal action and the avoidance of the threatened harm." We conclude that defendant failed to establish any basis for an instruction on duress or necessity as a defense to the charge of possession of a firearm by a felon, and that the trial court did not err by denying his counsel's request for this instruction.

We also observe that, in arguing for a contrary result, defendant's appellate counsel makes a number of assertions that are not supported by the evidence before the trial court. As discussed above, defendant's statement does not identify or describe the people who threatened him, indicate when the threats were issued, or provide information about whether defendant was under an imminent threat of death or bodily harm. Nonetheless, in his appellate brief, defense counsel makes a number of unsupported assertions:

> [Defendant] "had just received death threats when he obtained a gun."
>
> [Defendant] "was in fear that a group of thugs would make good on their threats to kill him" and was "in mortal fear of being murdered by people who had recently threatened his life[.]"
>
> [Defendant] had "recently received death threats that he believed were credible and presented the possibility of imminent harm."
>
> "[T]he evidence showed that [defendant] was under the unlawful and present threat of imminently being murdered."

> [D]efendant, "in light of the death threats he faced, was justified in getting a gun to protect himself from being murdered."

We reiterate that the record contains no evidence that defendant had been recently threatened, that the threats were credible, that defendant was "in mortal fear," or that he was threatened by "a group of thugs." "On appeal, counsel has a duty to make a fair presentation of the case to the Court. *See* N.C.R. App. P. 34(a)(3). While counsel has the duty to zealously represent his or her client, the duty does not grant to counsel *carte blanche* to distort the facts of a case or to make misleading arguments. . . . [C]ounsel has a duty to apply the law to the facts of the case, not to twist the facts so that they fit a legal theory that will allow them to prevail in the case." *State v. Ward*, __ N.C. App. __, __, 742 S.E.2d 550, 554-55 (2013) (Steelman, J., concurring).

For the reasons discussed above, we conclude that defendant had a fair trial, free of error.

NO ERROR.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
SLADE WESTON HICKS, JR.

No. COA14-57

Filed 17 February 2015

1. Satellite-Based-Monitoring—appeal—civil proceeding—written notice of appeal required—appeal of underlying convictions—not sufficient

Satellite-based monitoring (SBM) orders are civil in nature and a written notice of appeal is required under N.C.R. App. P. 3(a). The Court of Appeals elected in its discretion to allow defendant's petition for certiorari to review a SBM order where defendant filed a written notice of appeal from the underlying convictions but not the SBM order.

2. Evidence—psychologist's testimony—molested child—reason treatment sought—not an opinion on veracity

A psychologist's testimony that a child sexual abuse victim "specifically came in because she had been molested by her older cousin" simply stated the reason why the victim sought treatment. A follow-up question clarified that the psychologist's statement referred to the victim's allegations, not to the psychologist's personal opinion as to veracity.

3. Evidence—psychologist's testimony—post-traumatic stress disorder—not substantive evidence of event

The trial court did not commit plain error in a prosecution for indecent liberties and sexual offense with a child by admitting a psychologist's testimony that she diagnosed the victim with post-traumatic stress disorder ("PTSD"). The evidence of PTSD in the State's redirect was not admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination.

4. Sexual Offenses—instruction of greater offense—plain error

A conviction for sexual offense with a child by an adult offender was remanded for resentencing where the trial court committed plain error by instructing the jury on the greater offense of sexual offense with a child. The jury charge resulted in a conviction that was not supported by the indictment.

5. Sexual Offenses—instruction on greater offense—not a dismissal of lesser offense

The trial court's failure to instruct the jury on the elements of first degree sexual offense under N.C.G.S. § 14-27.4(a)(1) did not constitute a dismissal of the charge as a matter of law where the indictment alleged all the essential elements of a violation of the statute and the trial court did not omit any of these essential elements from its jury instructions. Rather, the trial court instructed the jury on all the essential elements of the indicted offense plus an additional element of a greater offense. The judgement was vacated and remanded for resentencing. An SBM order based upon a finding that defendant was convicted of sexual offense with a child, N.C.G.S. § 14-27.4A, was error.

6. Sexual Offenses—confusing statutory scheme—call for revision

It was noted that the various sexual offenses in North Carolina are often confused with one another, leading to defective indictments. Given the frequency with which these errors arise, the Court of Appeals strongly urged the General Assembly to consider

reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another.

Appeal by defendant from judgment entered 14 August 2013 by Judge William R. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 7 May 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Belinda A. Smith, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

GEER, Judge.

Defendant Slade Weston Hicks, Jr. appeals from a judgment entered on his convictions of sexual offense with a child and indecent liberties with a child. On appeal, defendant primarily argues that the trial court committed plain error by instructing the jury on sexual offense with a child under N.C. Gen. Stat. § 14-27.4A (2013) instead of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1), the charge for which he was indicted. A conviction must be supported by an indictment that alleges all the elements of the offense. Because the indicted charge, N.C. Gen. Stat. § 14-27.4(a)(1), is a lesser included offense of N.C. Gen. Stat. § 14-27.4A, the indictment did not allege all the elements of the crime set out in § 14-27.4A, the crime of which defendant was convicted. Accordingly, we vacate the judgment.

However, the indictment sufficiently alleges the lesser included offense of first degree sexual offense under § 14-27.4(a)(1), and the jury's verdict on the greater offense of sexual offense with a child necessarily included a determination by the jury that the defendant was guilty of that lesser included offense. We, therefore, remand for entry of judgment and resentencing on the charge of first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1).

Facts

The State's evidence tended to show the following facts. Defendant was born in 1985 and is 11 years older than his cousin "Sally" who was born in 1996.[1]

1. To protect the identity of the minor child and for ease of reading we use the pseudonym "Sally" throughout this opinion.

Around 2007, while at a relative's house in Gaston County, North Carolina, defendant asked Sally to go into a walk-in closet. After she went in, defendant closed the closet door, grabbed her shoulder, and told her to get on her knees. He pulled his penis out of his pants so that it was level with her nose. Sally ran out of the closet when she heard her mother calling her name. She did not tell anyone what happened.

In March 2008, when Sally was 11 years old and defendant was 22 years old, Sally went to defendant's father's house in Lincoln County, North Carolina, for a family gathering. Defendant offered to take Sally to his hiding place in the woods. Once there, defendant grabbed Sally's shoulder and asked her to suck his penis, but she refused. At that point, Sally's brother and defendant's sister, who had been sent by Sally's mom to find her, were coming down the trail. Defendant told Sally to tell them something to make them go away, so Sally told her brother that she and defendant were watching the deer.

After Sally's brother and defendant's sister left, defendant picked Sally up and stood her on a tree stump. He pulled Sally's jeans and underwear down to her ankles and began touching, licking, and inserting his fingers into her vagina. He then lifted her off the log, placed her on top of him, and started humping her. Sally pushed away but did not say anything because defendant had shown her a knife and told her not to tell anyone.

In August 2011, when Sally was 16, she told her mother about the incident in the woods and her mother contacted the police. Sally went with her mother to the Gaston County Police Department and told Detective William Sampson what happened in 2007 at her relative's house in the walk-in closet and what happened in 2008 in the woods. Defendant was charged in Gaston County with indecent liberties with a child as a result of the 2007 Gaston County incident and pled guilty to that charge pursuant to an *Alford* plea on 4 April 2013.

With respect to the 2008 incident, defendant was indicted in Lincoln County for indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 and for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1). Defendant was tried on these charges at the 12 August 2013 Criminal Session of Lincoln County Superior Court, and the jury found defendant guilty of both charges. The trial court consolidated the offenses into a single judgment and sentenced defendant to a presumptive-range term of 300 to 369 months imprisonment.

In a separate order entered the same day, the trial court found that defendant had been convicted of a reportable conviction under N.C. Gen.

Stat. § 14-208.6, specifically "sexual offense with a child, G.S. 14-27.4A," and ordered defendant to register as a sex offender upon release from prison for his natural life and to enroll in satellite-based monitoring ("SBM") for his natural life.

Discussion

[1] As an initial matter, we must address our jurisdiction over defendant's appeal. Although defendant filed a timely written notice of appeal of his underlying convictions, he did not file written notice of appeal from the 14 August 2013 SBM order. Because SBM orders are civil in nature, written notice of appeal is required under N.C.R. App. P. 3(a). *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). Nevertheless, defendant filed a petition for writ of certiorari to review the SBM order, and we decide, in our discretion, to allow defendant's petition and to review the merits of his appeal of the SBM order.

I

[2] Defendant first argues that the trial court erred by admitting certain testimony of Frieda Bellis, a psychologist who treated Sally after she told her mother about the sexual abuse. Because defendant did not object to the testimony at trial, he contends that this constituted plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

At trial, Ms. Bellis testified that she is a psychologist who works at New Directions, a facility that provides psychological testing, therapy, and counseling. Although Ms. Bellis was not tendered as an expert witness by the State, she testified that she has a masters degree in clinical psychology, is licensed to practice psychology, and has attended symposiums regarding treating children, two of which addressed sexual abuse and trauma in children.

On direct examination, the State asked Ms. Bellis about her treatment of Sally:

> Q. Okay. Now, have you ever been contacted with regard to [Sally] pursuant to a request to treat?
>
> A. Yes.
>
> Q. And would you describe that initial meeting with [Sally]?
>
> A. Yes. I first saw her on August 1st, 2011. *They specifically came in because she had been molested by her older cousin.*
>
> Q. Okay. Was there an allegation of molestation?
>
> A. Yes.
>
> Q. And did they discuss with you a goal, a treatment goal regarding why she was there?
>
> A. Yes, to help her with the symptoms of trauma that she was experiencing and help her cope with those.
>
> Q. Do you recall from that meeting the symptoms that she was experiencing?
>
> A. Yes. She was having a hard time falling asleep. Once she fell asleep she would wake up because she would have nightmares concerning the trauma. She was having a hard time paying attention in school, because when she would think about the trauma it would make her feel anxious.
>
> Q. And did you base this conclusion on disclosures from [Sally]?
>
> A. Yes.

(Emphasis added.)

Ms. Bellis testified that she saw Sally about once every two weeks from 1 August 2011 until March 2012. Her direct examination was very brief and closed with the following exchange:

> Q. Do you recall during the course of your meeting with [Sally] the nature of the allegations of molestation? Do you remember if she disclosed any details to you?

A. I believe she did.

Q. And during the course of your treatment, did you discuss those details?

A. We did.

Q. And do you recall if -- whether or not [Sally] remained consistent in those details?

A. She was.

On cross-examination, defense counsel asked Ms. Bellis if "the appointments and treatment evolve[d] shortly into dealing with the death of [Sally's] dog." Ms. Bellis acknowledged that the dog's death was one of the issues that they dealt with, but she was unsure when that issue came up or how long they addressed it. Defense counsel also elicited from Ms. Bellis that she diagnosed Sally with ADHD.

On re-direct, the State asked Ms. Bellis whether ADHD was the only diagnosis made during Sally's treatment:

Q. Besides the diagnosis of ADHD, did you make any official diagnosis that you recollect or that you recall?

A. Yes, post-traumatic stress disorder.

Q. And how do you -- what's the basis of that diagnosis generally speaking, not as it applies to [Sally]?

A. There are many symptoms of PTSD. Some of those can be when you recollect the trauma you feel very fearful, or if there's something that triggers that you feel very afraid, nightmares, certainly, a hard time sleeping, hard time concentrating. It can affect your school performance, or if you're an adult, your job performance.

Q. Based upon those indicators, are you the one that made the diagnosis?

A. Yes.

Defendant first argues that Frieda Bellis' testimony that Sally "specifically came in because she had been molested by her older cousin" amounted to expert testimony that Sally had, in fact, been sexually molested by defendant and impermissibly vouched for Sally's credibility. We disagree.

It is well established that "a witness may not vouch for the credibility of a victim" because it constitutes an impermissible opinion on the guilt of the defendant. *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). Accordingly, our Supreme Court has held that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* at 267, 559 S.E.2d at 789. Nevertheless, an expert opinion that a victim was sexually abused *by the defendant* amounts to an impermissible expert opinion as to the defendant's guilt. *State v. Figured*, 116 N.C. App. 1, 8, 446 S.E.2d 838, 842 (1994).

In support of his argument, defendant cites a number of cases in which our courts have applied this principle to hold that the expert testimony was admitted in error. In the cases cited by defendant, the experts clearly and unambiguously either testified as to their opinion regarding the victim's credibility or identified the defendant as the perpetrator of the sexual abuse. *See, e.g.*, *State v. Kim*, 318 N.C. 614, 620, 350 S.E.2d 347, 351 (1986) (new trial granted where doctor testified that victim had " 'never been untruthful with [him]' "); *State v. Heath*, 316 N.C. 337, 340, 341 S.E.2d 565, 567 (1986) (expert responded negatively to question whether victim suffered from mental condition that caused her to lie about sexual assault); *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508 (child protective services investigator for DSS testified that DSS had " 'substantiated' " defendant as perpetrator of sexual abuse based on evidence investigator had gathered); *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (new trial granted where expert testified that prosecuting witness was truthful); *Figured*, 116 N.C. App. at 8, 446 S.E.2d at 842 (physician testified that in his opinion children were sexually abused by defendant).

Here, in contrast, Ms. Bellis was never specifically asked to give her opinion as to the truth of Sally's allegations of molestation or whether she believed that Sally was credible. When reading Ms. Bellis' testimony as a whole, it is evident that when Ms. Bellis stated that "[t]hey specifically came in because [Sally] had been molested by her older cousin[,]" Ms. Bellis was simply stating the reason why Sally initially sought

treatment from Ms. Bellis. Indeed, Ms. Bellis' affirmative response to the State's follow-up question whether there was "an allegation of molestation" clarifies that Ms. Bellis' statement referred to Sally's allegations, and not Ms. Bellis' personal opinion as to their veracity.

Because Ms. Bellis' testimony, when viewed in context, does not express an opinion as to Sally's credibility or defendant's guilt, we hold that the trial court did not err in admitting it. *See State v. O'Hanlan*, 153 N.C. App. 546, 562, 570 S.E.2d 751, 761 (2002) (rejecting defendant's argument that detective's testimony that had victim not positively identified her attacker, he would have conducted more thorough investigation " 'because [he] wouldn't have known who done it' " impermissibly bolstered victim's testimony, because "[t]he context in which this testimony was given makes it clear [the detective] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case").

[3] Defendant next argues that the trial court committed plain error by admitting Ms. Bellis' testimony that she diagnosed Sally with post-traumatic stress disorder ("PTSD"). Our Supreme Court has held "[i]n no case may [evidence of PTSD] be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *State v. Hall*, 330 N.C. 808, 822, 412 S.E.2d 883, 891 (1992). The Court identified two primary problems with admitting evidence of a PTSD diagnosis as substantive evidence:

> First, the psychiatric procedures used in developing the diagnosis are designed for therapeutic purposes and are not reliable as fact-finding tools to determine whether a rape has in fact occurred. Second, the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact-finding devices.

Id. at 820, 412 S.E.2d at 889.

Nevertheless, evidence of PTSD may be admitted for certain corroborative purposes. *Id.* at 821, 412 S.E.2d at 890. Evidence that the victim suffers from PTSD may "cast light onto the victim's version of events and other, critical issues at trial. For example, testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent." *Id.* at 822, 412 S.E.2d at 891.

The Supreme Court explained:

> This list of permissible uses is by no means exhaustive. The trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under Evidence Rule 403. It should also determine whether admission of this evidence would be helpful to the trier of fact under Evidence Rule 702. If the trial court is satisfied that these criteria have been met on the facts of the particular case, then the evidence may be admitted for the purposes of corroboration. If admitted, the trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted.

Id.

This Court applied the rule set forth in *Hall* in *O'Hanlan*. In *O'Hanlan*, the State's expert witness, a physician, testified regarding her treatment of the victim after she had been sexually abused by the defendant. 153 N.C. App. at 555-56, 570 S.E.2d at 758. On cross-examination, "defendant asked questions pertaining to the victim's mental treatment, in particular, a psychiatric evaluation of the victim. This line of questioning elicited responses that could have given the jury the impression that the victim was mentally unstable prior to the time of the assault. On redirect examination, the State introduced the rest of the report to put the evidence introduced by defendant into context, namely that the victim only began suffering such mental problems after that attack." *Id.* at 560, 570 S.E.2d at 760. The report included a diagnosis of PTSD and the physician testified that the victim suffered from PTSD as a result of the sexual assault. *Id.* at 559, 570 S.E.2d at 760. The trial court did not give a limiting instruction. *Id.*

On appeal, the defendant argued that because a limiting instruction was not given, the evidence was admitted for the sole purpose of proving that the rape took place. This Court disagreed and reasoned instead:

> The reference to PTSD was being used to rebut the inference by defendant that the victim was mentally unstable prior to the assault and rape rather than to prove the assault and rape happened. Therefore, the evidence was admissible, but not as substantive evidence. Defendant would have been entitled to request the *Hall/Chavis* limiting instruction. However, since he did not, "[t]he admission of evidence which is competent for a restricted

> purpose will not be held error in the absence of a request by the defendant for limiting instructions."

Id. at 560-61, 570 S.E.2d at 760 (quoting *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988)).

Additionally, the Court noted that "evidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant" and "where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State's rebuttal or explanatory evidence about the matter." *Id.* at 561, 570 S.E.2d at 761. Therefore, this Court held that the defendant's cross examination of the State's expert opened the door for admission of the PTSD diagnosis as admissible rebuttal evidence.

We find the facts of this case analogous to the facts of *O'Hanlan*. On cross-examination of Ms. Bellis, defense counsel asked about treatment for the death of Sally's dog and about Ms. Bellis' diagnosing Sally with ADHD. This line of questioning elicited responses that raised an inference favorable to defendant -- that Sally's psychological problems were caused by something other than having been sexually assaulted. The State's introduction of evidence of PTSD on re-direct examination was not, therefore, admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination. Although defendant could have requested a limiting instruction, he did not do so. We, therefore, hold that the trial court did not commit plain error in admitting this testimony.

II

[4] Defendant next argues that the trial court committed plain error by instructing the jury on "sexual offense with a child," under N.C. Gen. Stat. § 14-27.4A, a crime for which defendant was not indicted. We agree.

Defendant was indicted for first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1), which is a lesser included offense of "sexual offense with a child; adult offender" under N.C. Gen. Stat. § 14-27.4A. *See* N.C. Gen. Stat. § 14-27.4A(d). While both offenses require the State to prove that the defendant engaged in a sexual act with a victim who was a child under the age of 13 years, sexual offense with a child under N.C. Gen. Stat. § 14-27.4A has a greater requirement with respect to the age of a defendant at the time of the act. For first degree sexual offense, N.C. Gen. Stat. § 14-27.4(a)(1), the State must prove only that the defendant was at least 12 years old and at least four

years older than the victim, whereas for N.C. Gen. Stat. § 14-27.4A, the State must prove that the defendant was at least 18 years old.

Here, rather than instruct the jury on first degree sexual offense -- the indicted offense -- the trial court instructed the jury on the greater offense of sexual offense with a child. In essence, the trial court submitted to the jury an additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense.

"It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986). Correspondingly, "the failure of the allegations [of the indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support [the] resulting conviction." *Id.* at 631, 350 S.E.2d at 357.

In this case, the jury charge on the elements of sexual offense with a child resulted in a conviction that is not supported by the indictment on the lesser included offense of first degree sexual offense. Specifically, the indictment does not allege an essential element of the resulting conviction: that defendant was at least 18 years old. We must, therefore, vacate the judgment.

Nevertheless, this Court has held that "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002). In such a case, a new indictment is not required because "[a] verdict of guilty of [a greater offense] necessarily includes the jury's determination that the defendant is guilty of each element of . . . [the] lesser-included offense." *State v. Perry*, 291 N.C. 586, 591, 231 S.E.2d 262, 266 (1977) (internal quotation marks omitted) (where indictment was sufficient to charge defendant with second degree rape, vacating judgment on conviction of first degree rape and remanding for entry of judgment on conviction of lesser included offense of second degree rape). *See also Bullock*, 154 N.C. App. at 244-45, 574 S.E.2d at 24 (arresting judgment on conviction for attempted first degree murder where indictment did not allege essential element of "malice aforethought" and remanding for sentencing and entry of judgment on lesser included offense of voluntary manslaughter, which was sufficiently alleged in indictment).

It is undisputed that the indictment in this case was sufficient to support a conviction of the lesser included offense of first degree sexual

offense under N.C. Gen. Stat. § 14-27.4(a)(1). Furthermore, the verdict of guilty of sexual offense with a child under N.C. Gen. Stat. § 14-27.4A necessarily includes the jury's determination that the defendant is guilty of each element of the lesser included offense of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1). Therefore, pursuant to *Bullock* and *Perry*, we vacate the judgment entered on defendant's conviction under N.C. Gen. Stat. § 14-27.4A and remand for resentencing and entry of judgment on the lesser included offense of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1).

[5] Defendant, however, relying primarily upon *Williams*, *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000), and *State v. Mille*r, 159 N.C. App. 608, 583 S.E.2d 620 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004), contends that the *t*rial court's failure to instruct the jury on the elements of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1) constituted a dismissal of the charge as a matter of law. We disagree.

In *Williams* and *Bowen*, the trial court, in each case, declined to instruct the jury on an essential element of the indicted offense and instead instructed the jury on a separate theory of the offense not alleged in the indictment. *See Williams*, 318 N.C. at 628, 350 S.E.2d at 356 (trial court declined to instruct jury on element of force, an essential element of indicted offense of first degree rape by use of force in violation of N.C. Gen. Stat. § 14-27.2(a)(2)); *Bowen*, 139 N.C. App. at 24-25, 533 S.E.2d at 252-53 (trial court declined to instruct jury on element of force, an essential element of indicted offense of first degree sexual offense by force in violation of N.C. Gen. Stat. § 14-27.4(a)(2)). By declining to instruct the jury on all the essential elements of the indicted offense, the trial courts, in effect, dismissed the charges.

In *Miller*, the indictment for statutory sexual offense cited N.C. Gen. Stat. § 14-27.7A(a) (2001), but the defendant was tried and convicted for first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1). This Court held that the trial court erred in denying the defendant's motion to dismiss because the indictment was fatally defective in that the factual allegations in the indictment were "sufficient to satisfy *some* elements contained in each of these statutes to the exclusion of the other, but the[] averments [we]re insufficient to satisfy *all* of the elements contained in either statute." 159 N.C. App. at 614, 583 S.E.2d at 623. In other words, the factual allegations of the indictment were insufficient to support a conviction for *either* offense.

In contrast, in this case, the indictment alleges all the essential elements of a violation of N.C. Gen. Stat. § 14-27.4(a)(1), and the trial court did not omit any of these essential elements from its jury instructions. Rather, the trial court instructed the jury on all the essential elements of the indicted offense plus an additional element of a greater offense. Under these circumstances, the resulting conviction is not supported by the indictment and judgment on that conviction must be vacated, but the rationale for dismissal of the *indicted* charge -- failure to instruct on all the essential elements thereof -- does not apply. Accordingly, we vacate the judgment on defendant's conviction under N.C. Gen. Stat. § 14-27.4A and remand for resentencing and entry of judgment on the offense of first degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1).

The trial court additionally entered an SBM order based upon a finding that defendant was convicted of "sexual offense with a child, G.S. 14-27.4A." The State concedes, and we hold, that this was error. We vacate the SBM order and hold that defendant is entitled to a new SBM determination hearing on remand.

[6] This case illustrates a significant ongoing problem with the sexual offense statutes of this State: the various sexual offenses are often confused with one another, leading to defective indictments. *See*, *e.g. Miller*, 159 N.C. App. at 614, 583 S.E.2d at 623 (vacating convictions where defendant was indicted under statute governing first degree sexual offense but convicted under statutory rape statute, and indictment mixed elements of both offenses); *State v. Hill*, 185 N.C. App. 216, 220, 647 S.E.2d 475, 478 (2007) (indictment purportedly charged defendant with statutory rape but alleged elements of first degree sexual offense), *rev'd per curiam for reasons stated in dissent*, 362 N.C. 169, 655 S.E.2d 831 (2008).

Given the frequency with which these errors arise, we strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. For example, because "first degree sexual offense" encompasses two different offenses, a violation of N.C. Gen. Stat. § 14-27.4(a)(1) is often referred to as "first degree sexual offense with a child" or "first degree statutory sexual offense" to distinguish the offense from "first degree sexual offense by force" under N.C. Gen. Stat. § 14-27.4(a)(2). "First degree sexual offense with a child," in turn, is easily confused with "statutory sexual offense" which could be a reference

to a violation of either N.C. Gen. Stat. § 14-27.4A (officially titled "[s]exual offense with a child; adult offender") or N.C. Gen. Stat. § 14-27.7A (2013) (officially titled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old"). Further adding to the confusion is the similarity in the statute numbers of N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.4A. We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses.

Vacated and remanded.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
JOSHUA WILFORD HOUSER

No. COA14-973

Filed 17 February 2015

1. Evidence—defendant's account inconsistent—not commentary on truthfulness

In a trial for felony child abuse inflicting serious bodily injury, the trial court did not err or commit plain error by admitting an investigating officer's testimony that the existence of a blonde hair in the sheetrock of a bathroom was inconsistent with defendant's account of why there was a hole in the sheetrock. The officer's testimony was not commentary on the truthfulness of defendant's statements. Rather, the testimony explained why the officers returned to defendant's home to collect the hair from the sheetrock.

2. Appeal and Error—failure to raise constitutional issue at trial—no plain error review

The Court of Appeals dismissed defendant's argument that the trial court committed plain error by admitting a video recording containing defendant's request for a lawyer. Constitutional issues not raised at trial may not be raised for the first time before the Court of Appeals—even for plain error review.

3. Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—jury instruction—especially

heinous, atrocious, or cruel aggravating factor—no plain error

In a trial for felony child abuse inflicting serious bodily injury, the trial court erred by failing to provide an adequate instruction on the "especially heinous, atrocious, or cruel" aggravating factor. However, the error did not amount to plain error in light of evidence supporting the existence of excessive brutality and physical pain, psychological suffering, and dehumanizing aspects not normally present in the offense of felony child abuse inflicting serious injury.

4. **Child Abuse, Dependency, and Neglect—felony child abuse inflicting serious bodily injury—charge conference—no material prejudice**

In a trial for felony child abuse inflicting serious bodily injury, the trial court's failure to comply fully with N.C.G.S. § 15A-1231(b) in conducting the charge conference did not materially prejudice defendant's case. Defense counsel had the opportunity to correct the inadequate aggravating factor instruction after the jury had been charged, and there was overwhelming evidence in support of the aggravating factor.

Appeal by defendant from judgment entered 27 February 2014 by Judge Tanya T. Wallace in Union County Superior Court. Heard in the Court of Appeals 21 January 2015.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

INMAN, Judge.

Joshua Wilford Houser ("defendant") appeals from judgment entered after a jury found him guilty of felony child abuse inflicting serious bodily injury. The jury also found the existence of two aggravating factors—that the crime was especially heinous, atrocious, or cruel ("EHAC") and that the victim was very young—and the trial court sentenced defendant in the aggravated range. On appeal, defendant argues that: (1) the trial court committed plain error in allowing an investigating officer to testify as to his opinion of defendant's guilt; (2) the trial court committed plain error in admitting evidence showing that defendant asserted his right to counsel during an interrogation; (3) the trial court committed

plain error by failing to give a full jury instruction on the aggravating factor of EHAC; and (4) the trial court reversibly erred by failing to conduct a charge conference during the penalty phase of the trial.

After careful review, we find no error in the guilt-innocence phase of the proceedings, no plain error in the trial court's EHAC instruction, and no material prejudice in the trial court's failure to fully comply with the statutory mandate to conduct a charge conference.

Background

Defendant lived with his wife, Kirbi Davenport ("Ms. Davenport"), and Ms. Davenport's three-year-old daughter from a previous relationship, K.D.,[1] in a mobile home in Indian Trail near Ms. Davenport's parents.

On 16 May 2012, defendant stayed home to watch K.D. while Ms. Davenport was at work. Ms. Davenport called at 2:30 p.m. and spoke with K.D., who sounded normal and said she was having a good day. Ms. Davenport's mother called and spoke with K.D. at 5:30 p.m.; K.D. said she had eaten, taken a bath, and was waiting for her mother to come home.

At 6:07 p.m. defendant called 911. Defendant told the dispatcher that K.D. had urinated in her clothes, fallen from a standing position, and injured her head. Defendant said he picked her up and shook her but she was nonresponsive. The 911 dispatcher alerted the Union County Sheriff's department because defendant's "extremely hectic and excited" demeanor made the dispatcher uncomfortable and raised his suspicion that a crime may have occurred.

Emergency personnel arrived at 6:17 p.m. K.D. was in the front seat of a truck parked outside the home. EMTs noticed that she was not breathing properly and that her eyes had rolled toward the top of her head. In a statement prepared approximately an hour after arriving at the scene, emergency rescue volunteer Robert Holloway wrote that defendant told him that K.D. had fallen and hit her chin.

Defendant told Ms. Davenport on the phone that he heard a thud when K.D. went into the bathroom to clean herself up after urinating in her pants. He said that K.D. was getting up off the floor when he walked

1. In its brief on appeal, the State included a footnote explaining why it referred to the minor victim by her full name. Defendant filed a motion to strike this footnote, which we allow. This Court's policy is to use initials or pseudonyms when referring to minor victims of abuse to protect the privacy and identity of the child. *See*, *e.g.*, *State v. Ridgeway*, 185 N.C. App. 423, 426, n.1, 648 S.E.2d 886, 889, n.1 (2007). The State's arguments against following this policy here refer to matters outside the record and are irrelevant to our analysis in this case.

into the bedroom. When defendant scooped her up and took her pants off, K.D. keeled backward and defecated on herself. Defendant claimed that he punched a hole in the wall because the 911 dispatcher could not understand him when he was trying to give his address. Volunteers thought defendant seemed calm and detached until he spoke on the phone to his wife, at which time he raised his voice to seem anxious and nervous. Ms. Davenport's mother also testified that defendant exhibited no emotion later at the hospital.

K.D. arrived at the hospital in a coma. The attending neurosurgeon noted that internal blood visible on the CT scan reflected a recent injury, not one days or weeks old. The doctor noticed two types of skull fractures, the first being a diastatic fracture on the suture line in the skull that grows and molds together by the time the child is 18 months old. The suture line had been broken apart, an injury which the doctor testified required significant force. The second fracture was a crack running through the hard portion of the skull. K.D. also had bleeding on both sides of her head, in between the lobes of her brain, and under the lining of the brain.

Immediate surgery was needed to remove blood clots, stop bleeding, and treat the swelling in K.D.'s brain. After removing a portion of K.D.'s skull, the doctor removed blood clots and blood that had soaked in between the lobes of K.D.'s brain. During the procedure, K.D.'s brain swelled outward between one half of an inch to an inch beyond her skull. The continued swelling required further cutting from the skull, but even then, K.D.'s brain was so swollen that the doctors had difficulty replacing K.D.'s scalp after surgery.

K.D. was in the hospital for a total of 65 days. Due to the injuries to her brain, she was no longer able to walk, stand up on her own, hold up her head, or feed herself, and she became incontinent. For six months after surgery, K.D. required a tracheotomy tube in her neck to help her breathe. She required around the clock care, which her mother and grandmother provided. The neurosurgeon testified that K.D.'s brain injuries were of the most severe kind, resembling those that can be inflicted by ejection from a car, war wounds, or a fall from a significant height.

Shortly after riding with K.D. to the hospital, defendant returned to his home with Lieutenant Brian Helms of the Union County Sheriff's Department ("Lt. Helms") and Special Agent Brandon Blackman of the State Bureau of Investigation ("Special Agent Blackman"). They photographed the interior of the home, including the hole in the sheetrock of the master bedroom next to the master bathroom door. After being

asked about the hole in the sheetrock by the officers, defendant said he had punched it in frustration when the 911 operator couldn't understand what he was saying over the telephone. Defendant asked the officers to leave when they intimated a belief that he had hurt K.D.

Later, Special Agent Blackman reviewed the photographs and saw what appeared to be blonde hair in the hole of the sheetrock. He testified that this was inconsistent with defendant's statement that defendant had created the hole with his fist, causing the officers to seek consent from Ms. Davenport to search the home and collect the hair. Lt. Helms and Special Agent Blackman went back to the home with Crime Scene Investigator Chris McTeague ("McTeague"). McTeague removed two head hairs from the sheetrock, which he testified were not laying on top of the rock but were partially embedded and provided resistance when he tried to pull them from the damaged area. Subsequent DNA analysis showed that the hairs belonged to K.D. Both hairs were anagen phase hairs, meaning that they were actively growing when they were removed and would have required force to be pulled from K.D.'s head.

Defendant was arrested following the collection of the hairs. He waived his *Miranda* rights and agreed to give a recorded interview to detectives with the Union County Sheriff's Office. When officers accused him of hurting K.D., he asserted his right to counsel and ended the interview.

Defendant testified at trial that while he was cooking dinner on the night in question, K.D. told him that she needed to "pee." Defendant saw that her pants were already wet, so he "popped" her on the "butt" and told her to go into the master bathroom to wash up. He then heard a thud from the bathroom, and when he looked in, he saw K.D. trying to get up from her hands and knees. Defendant tried to hold her up, but K.D. went stiff and defecated on herself. Defendant then cleaned K.D. and called 911. He claimed that he punched the wall in frustration when the 911 dispatcher couldn't understand him, causing the hole in the sheetrock.

The jury found defendant guilty of felony child abuse inflicting serious bodily injury. The trial court then proceeded with a separate penalty phase necessary for the jury to determine the existence of aggravating factors alleged by the State.[2] After the jury found beyond a reasonable doubt that the crime was especially heinous, atrocious or cruel and that the victim was very young, the trial court sentenced defendant in the

2. The jury was not informed that the State sought to pursue aggravating factors until after it returned its guilty verdict.

aggravated range to 92 to 123 months imprisonment. Defendant gave notice of appeal in open court.

Discussion

I. Officer Testimony

[1] Defendant first argues that the trial court committed plain error by admitting testimony from Lt. Helms that the existence of K.D.'s hairs in the sheetrock of the home was inconsistent with defendant's account of the incident. After careful review, we find no error.

Because defendant did not object to the admission of Lt. Helms's testimony, we review for plain error. *See State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007). "To show plain error, the defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result; or we must be convinced that any error was so fundamental that it caused a miscarriage of justice." *State v. Elkins*, 210 N.C. App. 110, 119, 707 S.E.2d 744, 751-52 (2011) (citation and quotation marks omitted); *see also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Lay witness testimony in the form of opinions or inferences "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C, Rule 701 (2013). Thus, when police officers testify as lay witnesses, they are not permitted to invade the province of the jury by commenting on the credibility of the defendant. *See*, *e.g.*, *State v. Lawson*, 159 N.C. App. 534, 542, 583 S.E.2d 354, 360 (2003).

This Court's reasoning in *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), is persuasive. In *O'Hanlan*, the Court hold there was no error in the admission of a police officer's testimony that he did not fully investigate a rape with forensic analysis because the victim positively identified the defendant as the perpetrator. *Id.* at 562-63, 570 S.E.2d at 761-62. Specifically, the officer testified as follows:

> Q. There was a lot of questions here from counsel for the defendant about the fact that you didn't send this off, you didn't send that off, you didn't do this or that check. What can you tell this jury about why you didn't have these things checked?
>
> A. I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died--

> [Defense Counsel]: Objection, Your Honor, speculative.
>
> [Court]: Overruled.
>
> Q. Go ahead?
>
> A. . . . I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn't have known who done it. But she positively told me who done it and I arrested him.

Id. at 562, 570 S.E.2d at 761. Although defendant argued on appeal that the officer's statements were tantamount to expert testimony that the defendant committed the crime, the Court rejected that argument based on the context of the testimony and the fact that the officer was not tendered as an expert:

> The context in which this testimony was given makes it clear [the officer] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant. His testimony was rationally based on his perception and experience as a detective investigating an assault, kidnapping, and rape. His testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process.

Id. at 562-63, 570 S.E.2d at 761-62. Accordingly, the Court held that the officer's testimony was permissible as lay opinion testimony under Rule 701. *Id.*

Here, defendant challenges the admission of the following testimony provided by Lt. Helms:

> Q: Lieutenant Helms, what else did you do with Special Agent Blackman after reviewing the 911 call?
>
> A: We began – or I say we, Special Agent Blackman began reviewing the photographs I had taken the night before. And in doing so, he asked me to step into his office to show me something.
>
> Q: Okay, what did he show you?

A: One of the pictures that we had looked at earlier, and that's in the photographs is when we first saw that hair.

Q: Okay. And what did you note about the hair in that photograph?

A: That it appeared to be blonde.

Q: And why was that significant noting the hair in this photograph?

A: Because [K.D.] was – had blonde hair.

. . .

Q: Lieutenant Helms, as a trained investigator and detective, in your opinion was the hair being in that sheetrock wall consistent with the version of the defendant's as to how that hole got there?

A: No.

Q: What did you do after you made that discovery?

A: I got a hold of a couple of other detectives . . . and asked them to locate [Ms. Davenport] at the hospital and try to obtain consent for us to go back into the home to collect the hair.

Like the officer in *O'Hannon*, Lt. Helms was not invading the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, he was explaining the investigative process that led the officers to return to the home and collect the hair sample. Contrary to defendant's arguments, Lt. Helms's testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. Lt. Helms's testimony served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. Like the testimony in *O'Hannon*, these statements were rationally based on Lt. Helms's experience as a detective and were helpful to the jury in understanding the investigative process in this case. Accordingly, pursuant to *O'Hannon*, we reject defendant's assertion that Lt. Helms's statements were tantamount to expert testimony or impermissible opinion testimony, and we hold that the trial court's admission of this testimony was not error, let alone plain error. *See Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751.

II. Invocation of the Right to Counsel

[2] Defendant next argues that the trial court committed plain error by admitting evidence that, during the interrogation following his arrest, defendant invoked his right to counsel. With no objection from defendant at trial, the State offered and the trial court admitted into evidence a video recording of the post-arrest interrogation showing that the officers stopped their questioning when defendant said "I want a lawyer."

The invocation of the right to counsel is a constitutional privilege that cannot be admitted into evidence to be used against a defendant. *State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983). However, failure to raise this constitutional issue before the trial court bars appellate review. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) (dismissing the contention on appeal that the trial court committed plain error by admitting evidence of the defendant's invocation of the right to counsel because the issue had not been raised at trial). Here, defendant failed to object to the admission of the video showing his invocation of the right to counsel and did not raise this constitutional issue presented on appeal to the trial court. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Global*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (internal citations omitted). Accordingly, we dismiss this assignment of error.[3]

III. Especially Heinous, Atrocious or Cruel Instruction

[3] Defendant next argues that the trial court committed plain error by failing to provide an adequate instruction on the EHAC aggravating factor.

Although defendant does not specifically state the basis for this contention in his brief on appeal, we believe that this issue is whether the trial court's instruction regarding EHAC was unconstitutionally vague. We base this determination on defendant's citation to and reliance on cases from both the North Carolina Supreme Court and United States Supreme Court that assessed whether similar instructions in capital cases violated those defendants' constitutional rights. *See*, *e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398 (1980); *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913 (1976); *Walton v. Arizona*, 497 U.S. 639,

3. We decline to exercise our discretionary authority under Rule 2 of the North Carolina Rules of Appellate Procedure to address this issue. *See* N.C. R. App. P. 2 (2015) ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]").

111 L. Ed. 2d 511 (1990); *State v. Syrian*i, 333 N.C. 350, 428 S.E.2d 118 (1993); *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004). Defendant argues that "[j]ust as proper definition of the terms is required in capital sentencing to narrowly channel jury discretion, an instruction must be given in non-capital jury proceedings to ensure the return of a reliable verdict."

Defendant failed to raise this constitutional argument before the trial court, failed to offer any argument regarding this issue in the trial court, and did not object at all to the trial court's instructions during the penalty phase. In *State v. Anderson*, 350 N.C. 152, 186, 513 S.E.2d 296, 317 (1999), our Supreme Court declined to reach the issue defendant now asks us to consider based on that same failure:

> Next, defendant argues that the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague and overbroad, both on its face and as applied, and thus the trial court's instruction to the jury regarding the aggravator was unconstitutional. Defendant, however, failed to object to this instruction at trial. Thus, pursuant to N.C. R. App. P. 10(b)(1), she has not properly preserved the issue for review by this Court. Likewise, defendant made no constitutional claims at trial regarding this instruction and will not be heard on any constitutional grounds now. *State v. Benson*, 323 N.C. 318, 321–22, 372 S.E.2d 517, 519 (1988).

However, because we believe that the trial court erred in failing to define EHAC in its instructions to jurors, we will exercise our discretion under Rule 2 to reach this issue. *See State v. Elam*, 302 N.C. 157, 161, 273 S.E.2d 661, 664 (1981) (noting that this Court may "pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction" pursuant to Rule 2).

Because defendant did not object to the trial court's instruction on EHAC, our standard of review remains plain error. *See State v. Lemons*, 352 N.C. 87, 92, 96-96, 530 S.E.2d 542, 545, 547-48 (2000) (reviewing an unpreserved constitutional argument for plain error where the Court exercised its discretionary authority under Rule 2 to reach the issue).

The North Carolina Pattern Jury Instruction regarding the EHAC aggravating factor in the capital context provides as follows:

> In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile;

> and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

N.C.P.I. Crim.—150.10(9). There is no separate pattern instruction defining this aggravating factor in non-capital cases. However, our Supreme Court has held that "it is instructive to turn to our capital cases for a definition of an especially heinous, atrocious, or cruel offense." *State v. Blackwelder*, 309 N.C. 410, 413, 306 S.E.2d 783, 786 (1983).

Our Supreme Court has also repeatedly held that this pattern instruction provides "constitutionally sufficient guidance to the jury" as to what the words "especially heinous, atrocious, or cruel" mean. *Tirado*, 358 N.C. at 596-97; 599 S.E.2d at 545; *see also Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141. These provisions "incorporate narrowing definitions adopted by [our Supreme Court] and expressly approved by the United States Supreme Court, or are of the tenor of the definitions approved[.]" *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141.

The trial court here did not adapt this pattern instruction from the capital case instructions in its charge to the jury, and provided jurors with none of the approved "narrowing definitions" that are constitutionally required to limit the jury's discretion in finding this aggravating factor. The entire instruction on EHAC consisted of the following conclusory mandate: "If you find from the evidence beyond a reasonable doubt that . . . the offense was especially heinous, atrocious, or cruel . . . then you will write yes in the space after the aggravating factor[] on the verdict sheet." The trial court failed to deliver the substance of the pattern jury instruction on EHAC approved by our Supreme Court, and in doing so, instructed the jury in a way that the United States Supreme Court has previously found to be unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. 356, 362-64, 100 L. Ed. 2d 372, 378-79 (1988) (holding that the phrase "especially heinous, atrocious, or cruel" was unconstitutionally vague on its face and as applied without narrowing

definitions that limited the jury's discretion in considering that aggravating factor). Therefore, the trial court erred in failing to define EHAC in its instructions to jurors during the penalty phase of the trial.

However, under plain error review, defendant has the burden of demonstrating "not only that there was error, but that absent the error, the jury probably would have reached a different result; or we must be convinced that any error was so fundamental that it caused a miscarriage of justice." *Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751-52 (citations and internal quotation marks omitted). Defendant has failed to carry that burden here. In non-capital cases, the determination of whether EHAC exists is focused on "whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*." *Blackwelder*, 309 N.C. at 413-14, 306 S.E.2d at 786. Here, the State presented substantial evidence that defendant, K.D.'s caregiver, slammed K.D.'s head into a wall of their home with enough force to break sheetrock and rupture the child's skull in two places. K.D. responded to pain stimuli during the beginning of her ambulance transport to the ER, but she gradually grew less responsive and arrived at the hospital in a deep coma. Her injuries required surgical removal of large pieces of her skull to relieve bleeding in her brain, which swelled beyond her skull and protruded roughly one inch from her head. Despite immediate aggressive medical intervention, K.D. could no longer live the life of a normal three-year-old girl. Nor could her life ever again be normal or without suffering. An MRI conducted a few days after surgery showed that K.D. suffered damage to almost every portion of her brain. Her neurosurgeon testified that K.D.'s personality, motivation, speech, memory, and vision would all be permanently affected. Photographs admitted at trial showed K.D. grimacing in pain from the tracheotomy tube inserted into her neck to assist with breathing. As of the date of trial, K.D. could no longer stand, walk, hold up her head, use her hands, or control her bladder or bowel movements.

Therefore, in light of evidence that supports all four factors identified by the *Blackwelder* Court—excessive brutality and physical pain, psychological suffering, and dehumanizing aspects not normally present in the offense of felony child abuse inflicting serious bodily injury—we cannot conclude that the jury "probably" would have reached a different verdict had it been fully instructed on EHAC. Nor do we believe that the error, in the context of this evidence, was "so fundamental that it caused a miscarriage of justice." *Elkins*, 210 N.C. App. at 119, 707 S.E.2d at 751-52. We discern no plain error.

IV. Charge Conference

[4] Defendant's final argument on appeal is that the trial court reversibly erred by failing to conduct a charge conference as required by statute before instructing the jury during the penalty phase of the proceedings. We agree that the trial court failed to fully comply with the applicable statute, but we hold that defendant has failed to show material prejudice.

Although defendant did not request a charge conference before the trial court instructed the jury on aggravating factors during the penalty phase, and although defendant raised no objection at trial on this ground, this issue is properly before us. "[H]olding a charge conference is mandatory, and a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial." *State v. Hill*, __ N.C. App. __, __, 760 S.E.2d 85, 89, *disc. review denied*, __ N.C. __, 766 S.E.2d 637 (2014).

N.C. Gen. Stat. § 15A-1231(b) (2013) provides:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury.

In *Hill*, this Court held that the statutory mandate in section 15A-1231(b) requires the trial court to hold a charge conference, regardless of whether a party requests one, before proceeding to instruct the jury on aggravating factors during the penalty phase of a non-capital case. *Hill*, __ N.C. App. at __, 760 S.E.2d at 89-90.

We agree with defendant that the trial court did not conduct a full charge conference here. Outside the presence of the jury, the trial court engaged in the following colloquy before proceeding with the penalty phase:

> THE COURT: All right. Let the record reflect the jury is out of the hearing of this Court. I notice in the file, it's my understanding that the State is preparing to argue for aggravating factors, aggravating factor statutorily listed as number eight, that the offense was especially heinous,

> atrocious, or cruel; and number twelve, the victim or the child was very young. Is that correct?
>
> [THE STATE]: That's correct, Your Honor. Those are the two aggravating factors that the State wishes to proceed on, and the State did file notice of our intent to proceed with these aggravating factors on December 5th of 2013.
>
> THE COURT: All right. And it's my understanding you are not preparing or asking the Court to submit a third aggravating factor which seems to have the same elements as the crime. Is that right –
>
> . . .
>
> [THE STATE]: That's right, Your Honor.
>
> THE COURT: All right, thank you. All right, anything from the State further on the charge conference?
>
> [THE STATE]: No, Your Honor.
>
> THE COURT: From the defendant?
>
> [DEFENSE COUNSEL]: Your Honor, my client has asked me to object to the verdict sheet because it does not correspond to the indictment, so I'm kind of just doing that for the record, Your Honor.
>
> THE COURT: Thank you. Anything further for the record? Let's bring the jury back in.

The jurors were then brought back into the court room to hear argument from counsel and instructions from the trial court, without the trial court first informing counsel of the substance of those instructions.

As the *Hill* Court noted, "[t]he purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and reaching the correct verdict." *Hill*, __ N.C. App. at __, 760 S.E.2d at 89 (internal quotation marks omitted). Here, prior to instructing the jury, the trial court apprised both parties of the aggravating factors that the State sought to pursue, referring to its colloquy with counsel as a "charge conference." After instructing the jury and before deliberations began, the trial court asked counsel whether there was anything further from the State or the defendant. Therefore, unlike in *Hill*, the trial court did not completely fail to comply

with section 15A-1231(b), because it informed the parties of the aggravating factors that it would charge, it gave counsel a general opportunity to be heard at the charge conference, and it gave counsel an opportunity to object at the close of the instructions. However, because the trial court failed to inform counsel of the instructions that it would provide the jury, it deprived the parties of the opportunity to "know what instructions will be given," and thus did not "comply fully" with all provisions of section 15A-1231(b). *See Hill*, __ N.C. App. at __, 760 S.E.2d at 88-89.

Under section 15A-1231(b), "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." Although our Courts have not yet defined what it means for a defendant's case to have been "materially prejudiced" by the trial court's failure to fully comply with section 15A-1231(b), our Supreme Court has held that defense counsel's failure to object to jury instructions at trial had bearing on the issue of prejudice in the context of the trial court's failure to record the charge conference. *See State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (1990) (holding that where both sides indicated they were satisfied with the charge and the defendant did not object to the instructions at trial, despite having the opportunity to do so, the defendant could not establish material prejudice on appeal); *see also State v. Wiley*, 355 N.C. 592, 631, 565 S.E.2d 22, 49 (2002) ("As in *Wise*, defendant in the instant case may not assign error to the lack of recordation where he had the opportunity to object to the charge but declined to do so."). Consistent with our Supreme Court's emphasis on the opportunity to object, the *Hill* Court found that the defendant suffered material prejudice because, in addition to failing to conduct any semblance of a charge conference, the trial court did not give counsel an opportunity to object to the charge at the close of instructions. *Hill*, __ N.C. App. at __, 760 S.E.2d at 90.

The trial court here did not err so egregiously. It conducted what it referred to as a "charge conference," during which it conferred with counsel regarding the specific aggravating factors that it would charge to the jury. The trial court asked counsel if either of them wished to be heard before the jury was charged, opening the door for counsel to tender proposed instructions or to ask about instructions. Furthermore, the trial court specifically asked defense counsel if there was anything further before allowing the jury to begin deliberations, opening the door for objection to the instructions if defendant had one.

Given the opportunity that defendant had to correct the trial court's inadequate EHAC instruction after the jury had been charged, and also

considering the aforementioned overwhelming evidence supporting the jury's finding of EHAC in this case, we cannot conclude that defendant has demonstrated material prejudice resulting from the trial court's failure to comply fully with section 15A-1231(b).

Conclusion

After careful review, we hold that the trial court did not err in its evidentiary rulings during the guilt-innocence phase of the underlying proceedings. In light of the evidence presented by the State, we also hold that the trial court did not commit plain error by giving an unconstitutionally vague instruction, and defendant was not materially prejudiced by the trial court's failure to fully comply with section 15A-1231(b).

NO PREJUDICIAL ERROR.

Judges STEELMAN and DIETZ concur.

STATE OF NORTH CAROLINA
v.
SAMUEL AARON JACOBS

No. COA14-774

Filed 17 February 2015

Sentencing—erroneous enhancement—assault with deadly weapon with intent to kill inflicting serious injury—attempted second-degree kidnapping

The trial court erred by enhancing defendant's convictions for assault with a deadly weapon with intent to kill inflicting serious injury and attempted second-degree kidnapping under N.C.G.S. 50B-4.1(d) based on knowingly violating a domestic violence protective order. The sentence enhancements were reversed and remanded for resentencing.

Appeal by Defendant from judgments entered 24 January 2014 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Karen A. Blum, for the State.

Kevin P. Bradley, for Defendant-appellant.

DILLON, Judge.

Samuel Aaron Jacobs ("Defendant") appeals from convictions for assault with a deadly weapon with intent to kill inflicting serious injury, attempted second-degree kidnapping, and violation of a domestic violence protective order with a deadly weapon. For the following reasons, we reverse and remand for resentencing.

I. Background

On 14 March 2011, Defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced by knowingly violating a domestic violence protective order pursuant to G.S. 50B-4.1(d); assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), enhanced by knowingly violating a domestic violence protective order pursuant to G.S. 50B-4.1(d); and violation of a domestic violence protective order with the use of a deadly weapon.

Defendant was tried on all charges at the 13 January 2014 Criminal Session of Robeson County Superior Court. The State's evidence tended to show that in September 2010, Christy Smith[1] received a domestic violence protective order ("DVPO"), valid for one year against Defendant to prevent him from contacting her. Five months later, Ms. Smith was confronted by Defendant at a gas pump outside a convenience store. During the encounter, Defendant stabbed Ms. Smith multiple times before she was able to escape into the store.

The jury acquitted Defendant of the attempted first-degree murder charge. The jury, however, found Defendant guilty of three crimes: (1) attempted second-degree kidnapping, a Class F felony, enhanced to a Class D felony pursuant to N.C. Gen. Stat. § 50B-4.1(d) because Defendant knew the behavior was in violation of a DVPO; (2) AWDWIKISI, a Class C felony, enhanced to a Class B2 felony also pursuant to G.S. 50B-4.1(d); and (3) violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g), a Class H felony.

The trial court sentenced Defendant to a term of 180 to 225 months of imprisonment for the AWDWIKISI conviction; a consecutive term of 73 to 97 months of imprisonment for the attempted second-degree

1. A pseudonym.

kidnapping conviction; and a consecutive term of 8 to 10 months of imprisonment for the violation of a DVPO with a deadly weapon conviction. Defendant gave oral notice of appeal at trial.

II. Analysis

On appeal, Defendant argues that the trial court erred in (1) submitting to the jury the element of knowing violation of a DVPO to enhance the punishment for the AWDWIKISI and attempted second-degree kidnapping convictions[2]; and (2) in sentencing him for attempted second-degree kidnapping as a class D felony.

A. Enhancement under G.S. 50B-4.1(d)

Defendant's first argument pertains to the application of N.C. Gen. Stat. § 50B-4.1(d)(2011) to his convictions for AWDWIKISI and attempted second-degree kidnapping. G.S. 50B-4.1 contains nine subsections; however, only subsections (a), (d) and (g) are relevant in understanding Defendant's argument here.

Subsection (a) of G.S. 50B-4.1 makes it a class A1 misdemeanor to knowingly violate a valid DVPO.

Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon.

Subsection (d) provides that a person who commits another felony knowing that the behavior is also in violation of a DVPO shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement "shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section." *Id.*

In the present case, Defendant was convicted of two felonies, which were each enhanced pursuant to subsection (d) of G.S. 50B-4.1 as the jury determined that these felonies involved behavior which Defendant knew was in violation of the DVPO. Specifically, his conviction for AWDWIKISI, a Class C felony, was enhanced to a Class B2 felony; and

---

2. Defendant argues in the alternative that if the enhancement was correct, the trial court erred in entering judgment on both the conviction for AWDWIKISI in knowing violation of a DVPO and on the conviction for violation of a DVPO with a deadly weapon. However, based on our resolution of Defendant's first argument, we need not address Defendant's argument in the alternative.

his conviction for attempted second-degree kidnapping, a Class F felony, was enhanced to a Class D felony.[3]

Defendant argues that, since G.S. 50B-4.1(d) is not to be applied to "persons charged . . . under subsection (g)" of the statute, the G.S. 50B-4.1(d) enhancements should not have been applied in his case to *any* of his felony convictions since he was "a person" who was also charged (and convicted) under subsection (g). In other words, Defendant argues that the G.S. 50B-4.1(d) enhancements do not apply to *any* felonies a person might be convicted of, no matter the class, where that *person* was also charged with a Class A felony, a Class B1 felony, or under subsection (f) or (g) of G.S. 50B-4.1.

The State argues essentially that the phrase "person charged" in G.S. 50B-4.1(d) should be interpreted to mean "the conviction." Thusly, subsection (d) only prohibits convictions for the Class A and B1 felonies as well as the Class H felonies under subsections (f) and (g) of that statute from being enhanced; but subsection (d) does not prohibit the enhancement of *other* felonies such as AWDWIKISI and attempted kidnapping from being enhanced, even where the defendant was also charged with a Class A or B1 felony or a felony under subsection (f) or (g) of the statute.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). Our Supreme Court has further stated that

> [w]hen a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

State v. Davis, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (alterations in original) (quotation marks and citations omitted).

We believe the limiting language in G.S. 50B-4.1(d) - that the subsection "shall not apply to a person charged with or convicted of" certain felonies - is unambiguous and means that the subsection is not to be applied to "the person," as advocated by Defendant, *rather than* to certain

3. The trial court enhanced Defendant's conviction for attempted second-degree kidnapping, not one class higher, see G.S. 50B-4.1(d), but two classes higher than the principal felony. This issue is addressed in section II, subsection (B.) of this opinion.

felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant's convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B-4.1(d) since he was "a person charged" under subsection (g) of that statute. Therefore, we reverse these sentence enhancements and remand for resentencing.

We understand that adopting the construction advocated by Defendant may lead to some interesting results in other cases. For example, a person who is charged with and convicted of second-degree sexual offense, a Class C felony, *see* N.C. Gen. Stat. § 14-27.5 (2011), would be guilty and punished as a Class B2 offender if the act was also in violation of a DVPO. However, this Class C felony conviction could not be enhanced under G.S. 50B-4.1(d) if the defendant was, in fact, initially "charged" with first-degree rape, a Class B1 felony, see N.C. Gen. Stat. § 14-27.2 (2011) – even though he was only convicted of second-degree sexual offense – since he would be "a person who is charged with" a Class B1 felony.

The State's interpretation, however, would require this Court to ignore the plain meaning of the words used by the General Assembly in subsection (d). That is, the State's interpretation might be correct if subsection (d) provided that it "shall not apply to *convictions*" for certain felonies. Since the statute refers to "the persons" and also refers to persons who are "charged with" OR "convicted of" certain felonies, we must agree with Defendant.

Further, if the General Assembly had intended for the limitation in subsection (d) to apply to the *convictions* rather than *the persons* charged or convicted, there would have been no need to include the limitation that "Class A" felonies not be subject to enhancement because there is no felony class higher than Class A.

B. Sentencing attempted second-degree kidnapping

Defendant contends and the State concedes that the trial court erred in sentencing Defendant as a Class D felon for attempted second-degree kidnapping enhanced based on knowing violation of a DVPO pursuant to G.S. 50B-4.1(d). As stated above, we review questions of statutory interpretation *de novo*. *Largent*, 197 N.C. App. at 617, 677 S.E.2d at 517.

Second-degree kidnapping is punishable as a Class E felony. N.C. Gen. Stat. § 14-39(b) (2011). Therefore, *attempted* second-degree kidnapping is a Class F felony. *See* N.C. Gen. Stat. § 14-2.5 (2011) ("Unless a different classification is expressly stated, an attempt to commit . . . a

felony is punishable under the next lower classification as the offense which the offender attempted to commit"). Defendant, however, was sentenced two classes higher as a Class D felon for this conviction. As determined above, the trial court erred in enhancing this felony based on language in G.S. 50B-4.1(d) and Defendant should have properly been sentenced for this conviction as a Class F felony.

III. Conclusion

For the forgoing reasons, we reverse the trial court's judgments for AWDWIKISI, and attempted second-degree kidnapping and remand for resentencing to remove the G.S. 50B-4.1(d) enhancement on these convictions and for further correction of Defendant's offense class in the attempted second-degree kidnapping judgment.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
TERRELL KNOX, DEFENDANT

No. COA14-773

Filed 17 February 2015

1. Probation and Parole—revocation hearing—notice requirement

Defendant waived the notice required for the trial court to hold a probation revocation hearing by voluntarily appearing and participating in his hearing.

2. Probation and Parole—revocation hearing—subject matter jurisdiction—probation violation report

The trial court properly exercised subject matter jurisdiction over defendant's probation revocation hearing. Even though the State completed its violation report after the hearing, there was no violation of N.C.G.S. § 15A-1344(f) because the trial court revoked defendant's probation before the period of probation expired.

Appeal by defendant from judgments entered on or about 8 April 2014 by Judge Robert C. Ervin in Superior Court, Gaston County. Heard in the Court of Appeals 18 November 2014.

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

The Exum Law Office, by Mary March Exum, for defendant-appellant.

STROUD, Judge.

Terrell Knox ("defendant") appeals from a judgment entered revoking his probation and activating his sentence for a 2012 offense, and a judgment entered upon a plea agreement in which he pled guilty to a 2014 offense pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). Defendant argues that the trial court lacked (1) statutory authority to hold a probation revocation hearing, because defendant did not receive proper notice of the hearing; and (2) subject matter jurisdiction to revoke his probation, because the State completed its probation violation report after the revocation hearing. We affirm the trial court's judgments.

I. Background

On or about 11 November 2012, defendant committed the offense of assault by strangulation. *See* N.C. Gen. Stat. § 14-32.4(b) (2011). On or about 25 February 2013, defendant pled guilty to assault by strangulation pursuant to a plea agreement. The trial court sentenced defendant to nine to twenty months' imprisonment but suspended the sentence and placed defendant on thirty-six months' supervised probation.

On or about 25 January 2014, defendant committed the offense of felony larceny. *See id.* § 14-72(a) (2013). On or about 3 February 2014, a grand jury indicted defendant for felony larceny and breaking or entering into a motor vehicle. *See id.* §§ 14-56, 14-72(a) (2013).

On 8 April 2014, the trial court held a probation revocation hearing in which defendant accepted a plea agreement and pled guilty to the offense of felony larceny pursuant to *Alford*, 400 U.S. 25, 27 L. Ed. 2d 162. Defendant's counsel stated that defendant acknowledged that he had received a probation violation report, and that defendant admitted the allegations in the report. In the plea agreement, the State dismissed the remaining charge.

On or about 8 April 2014, the trial court ordered that defendant's probation be revoked and activated defendant's sentence for the assault

by strangulation offense. The trial court also sentenced defendant to nine to twenty months' imprisonment for the felony larceny offense. The trial court ordered that defendant serve the sentences consecutively.

On or about 9 April 2014, the State completed a probation violation report. On 9 April 2014, defendant gave timely notice of appeal.

II. Notice

[1] Defendant contends that the trial court lacked statutory authority to hold a probation revocation hearing, because defendant did not receive proper notice of the hearing, in contravention of defendant's right to due process and N.C. Gen. Stat. § 15A-1345(e) (2013). N.C. Gen. Stat. § 15A-1345(e) provides in pertinent part: "The State must give the [defendant] notice of the [revocation] hearing and its purpose, including a statement of the violations alleged. The notice, *unless waived* by the [defendant], must be given at least 24 hours before the hearing." *See* N.C. Gen. Stat. § 15A-1345(e) (emphasis added). "[W]hen a defendant voluntarily appears at the appointed time and place and participates in [a probation revocation] hearing as the defendant did in this case, he is not prejudiced by the failure of the written notice to contain [the date, time, and place of the hearing]." *State v. Langley*, 3 N.C. App. 189, 191, 164 S.E.2d 529, 530 (1968).

At the revocation hearing, defendant's counsel stated that defendant acknowledged that he had received a probation violation report, and that defendant admitted the allegations in the report. Defendant appeared and participated in the hearing voluntarily. Accordingly, we hold that defendant waived the notice requirement. *See* N.C. Gen. Stat. § 15A-1345(e); *Langley*, 3 N.C. App. at 191, 164 S.E.2d at 530. We therefore hold that the trial court violated neither N.C. Gen. Stat. § 15A-1345(e) nor defendant's right to due process.

III. Subject Matter Jurisdiction

A. Standard of Review

[2] We review *de novo* whether a trial court has subject matter jurisdiction in a probation revocation hearing. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008). A defendant may raise this issue at any time, even for the first time on appeal. *Id.*, 660 S.E.2d at 625.

B. Analysis

Defendant next contends that the trial court lacked subject matter jurisdiction to revoke his probation, because the State completed its

probation violation report after the revocation hearing, in contravention of N.C. Gen. Stat. § 15A-1344(f)(1) (2013). N.C. Gen. Stat. § 15A-1344(f) provides in pertinent part:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

N.C. Gen. Stat. § 15A-1344(f) (emphasis added). On or about 25 February 2013, the trial court placed defendant on thirty-six months' supervised probation. On or about 8 April 2014, the trial court revoked defendant's probation. Because the trial court revoked defendant's probation *before* the period of probation expired, N.C. Gen. Stat. § 15A-1344(f) is inapplicable here. *See id.*

Defendant's reliance on *State v. Moore* is misplaced. 148 N.C. App. 568, 571, 559 S.E.2d 565, 567 (2002). There, this Court held that, under N.C. Gen. Stat. § 15A-1344(f), the trial court lacked subject matter jurisdiction to modify the defendant's probation *after* the period of probation had expired, because the record lacked sufficient evidence that the State had filed a probation violation report before the period of probation had expired. *Id.*, 559 S.E.2d at 567. In contrast, here, the trial court revoked defendant's probation *before* the period of probation had expired.

Because the trial court revoked defendant's probation before the period of probation had expired, we hold that the trial court did not violate N.C. Gen. Stat. § 15A-1344(f) and properly exercised subject matter jurisdiction. *See* N.C. Gen. Stat. § 15A-1344(f).

IV. Conclusion

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

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

STATE v. SAUNDERS

[239 N.C. App. 434 (2015)]

STATE OF NORTH CAROLINA
v.
SYLVESTER SAUNDERS, JR.

No. COA14-929

Filed 17 February 2015

Rape—first-degree—jury instruction—aggravating factor

The trial court did not err or commit plain error in a prosecution for first-degree rape by failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. There was no overlap in the evidence on these issues.

Appeal by Defendant from judgment entered 16 July 2013 by Judge Edwin G. Wilson in Forsyth County Superior Court. Heard in the Court of Appeals 8 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

STEPHENS, Judge.

In February 2013, Defendant Sylvester Saunders, Jr., was tried in the Forsyth County Superior Court on charges of first-degree rape, second-degree kidnapping, and first-degree burglary. After the jury deadlocked, the trial court declared a mistrial. Defendant was retried before a jury in July 2013. The evidence at the second trial tended to show the following: The victim[1] was an 82-year-old woman who lived alone in her house in Winston-Salem. In the early morning hours of 1 August 2009, a man entered the victim's home, grabbed her around the neck in a choke hold, and demanded money. The victim gave the man all of the money in her purse as well as two checks, but he still forced her into her living room, threw her onto a loveseat, and raped her. The victim attempted to fight back, but the man was too strong. During the rape, the man told the victim to raise her right leg. She explained that she could not do so

1. We identify the victim as such, rather than by her name, in an effort to protect her privacy.

because of her arthritis. The man forced the victim's leg up anyway. The victim asked the man why he would choose an old woman to attack, and he responded that he "like[d] old people." After completing the rape, the man told the victim he was hungry and took her to the kitchen in a choke hold, where she gave him two ice cream cones. Once the man left, the victim called the police.

That same day, after a fingerprint at the victim's home was identified as belonging to Defendant, a warrant was issued for his arrest. Defendant was taken into custody on 2 August 2009 while standing next to his car. Following his arrest, the two checks taken from the victim were discovered underneath Defendant's car. A print matching Defendant's left palm was discovered on one of the checks. Other evidence linking Defendant to the crimes included a dishtowel from the victim's kitchen which was found in the trunk of Defendant's car, as well as hair and fingerprint evidence from inside and outside the victim's home that was matched to Defendant.

At trial, the victim testified that, after the rape and burglary, she felt angry, upset, stressed out, and uncomfortable in social situations. She limited her public activities and worried that people around her knew about the rape. The victim had installed an alarm system and kept a gun in her home. Her family and associates testified that she seemed depressed and withdrawn since the incident. Defendant presented no evidence. The jury found Defendant guilty of each charge and returned verdicts finding three aggravating factors. The trial court imposed an aggravated sentence of life in prison without the possibility of parole.

From the judgment entered upon his convictions, Defendant appeals, raising a single issue: that the trial court erred in failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. Specifically, Defendant contends the jury may have relied on evidence about ongoing emotional suffering and behavioral changes which the victim experienced after the rape to find both an element of the offense and the aggravating factor. We find no error.

One of the aggravating factors submitted to and found by the jury was that the victim was very old. *See* N.C. Gen. Stat. § 15A-1340.16(d)(11) (2013) (providing that it is an aggravating factor if "[t]he victim [of a crime] was very young, or very old, or mentally or physically infirm, or handicapped"). "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one

factor in aggravation." N.C. Gen. Stat. § 15A-1340.16(d). Defendant acknowledges that he did not request a specific instruction on this point nor did he object to the court's jury instructions as given. Accordingly, Defendant is entitled only to plain error review of his argument.

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). Thus, we must consider whether the jury instructions were erroneous and, if so, whether "the error had a probable impact on the jury verdict." *See id.*

Our General Statutes provide that "[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith another person by force and against the will of the other person, and . . . [i]nflicts serious personal injury upon the victim . . . ." N.C. Gen. Stat. § 14-27.2(a)(2)(b) (2013). Serious personal injury can be mental or emotional harm, but,

> in order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the *res gestae* results present in every forcible rape. *Res gestae* results are those so closely connected to an occurrence or event in both time and substance as to be a part of the happening.

State v. Baker, 336 N.C. 58, 62-63, 441 S.E.2d 551, 554 (1994) (citations, internal quotation marks, and brackets omitted; italics in original). For example, in *Baker*, ten to twelve months after the rape, the victim was still experiencing weight loss, depression, sleep disruptions, and social anxiety, and had quit her job, moved, and sought counseling. Id. at 65, 441 S.E.2d at 555. Thus, a jury's determination that a rape victim has

suffered a serious personal injury based on mental or emotional harm involves consideration of the *after-effects* of the crime upon the victim. *See id.*

In contrast, regarding the aggravating factor of the victim being "very old,"

> [t]his Court has observed that the policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of [her] age or mental or physical infirmity.
>
> However, age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already [would be] as a result of committing a violent crime against another person.
>
> A criminal may take advantage of the age of a victim in two different ways: First, he may target the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend [herself].
>
> Appellate review of a . . . finding of the aggravating factor at issue thus necessarily focuses upon *whether the victim, by reason of [her] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been.*

State v. Hilbert, 145 N.C. App. 440, 442-43, 549 S.E.2d 882, 884 (2001) (citations and internal quotation marks omitted; emphasis added). A jury's determination of the aggravating factor that the victim was very old requires consideration of facts and circumstances that existed before or during the crime, to wit, "whether the victim, by reason of [her] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been." *See id.* at 443, 549 S.E.2d at 884.

Defendant cites *State v. Barrow*, 216 N.C. App. 436, 718 S.E.2d 673 (2011), in support of his position that the trial court plainly erred in its jury instructions. We find that case easily distinguishable. First, we note that *Barrow* did not involve plain error, and thus, that case received a

different standard of review than does Defendant's argument. *Id.* at 445, 718 S.E.2d at 679. More importantly, in *Barrow*,

> the State's theory regarding second[-]degree murder relied almost exclusively on the fact that because of the vulnerability of a five-month[-]old child, shaking him is such a reckless act as to indicate a total disregard of human life — the showing necessary for malice. Thus, the State's theory regarding malice is virtually identical to the rationale underlying submission of the aggravating factor that the victim was "very young and physically infirm."

Id. at 446-47, 718 S.E.2d at 680 (citation omitted). In other words, the victim's infancy was the sole evidence to establish the recklessness of shaking him, and, of course, his age of five months was also the evidence to prove the aggravating factor of the victim in *Barrow* being "very young." *See id.*

Here, as noted *supra*, at trial, testimony from the victim and other witnesses established that, following the rape, the victim suffered mental and emotional consequences from the rape that extended for a time well beyond the attack itself. *See Baker*, 336 N.C. at 62-63, 441 S.E.2d at 554. These after-effects of the crime were the evidence that the jury considered in finding that the victim suffered a serious personal injury, an element of first-degree rape. *See id.* None of the evidence regarding the lingering negative impact of the rape on the victim's emotional well-being was specifically related to her age. Indeed, it would not be surprising for a rape victim of *any* age to suffer such after-effects. Further, because all of this evidence concerned the victim's behavior, mental state, and activities *after* the rape, plainly none of it can have been relevant to "whether the victim, by reason of h[er] years, was more vulnerable to the [crime] committed against [her] than [she] otherwise would have been." *Hilbert*, 145 N.C. App. at 443, 549 S.E.2d at 884; *see also State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985) (noting that this aggravating factor is properly found "where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized"). The pertinent evidence on this issue was that Defendant was 53 years old, while the victim was 82 years old and attempted to fight back against Defendant but was overpowered by him. In sum, for the age of the victim to be an aggravating factor, the relevant evidence is that existing before or during the crime: whether and how age made the victim a more likely or easier target. For a serious personal injury by emotional suffering to be found to prove first-degree rape, the relevant evidence is that existing after and caused by the crime: on-going

harmful effects of the crime on the victim's well-being. In this case, there is no overlap in the evidence on these issues, and thus, the jury cannot possibly have relied on the same evidence in making these two distinct determinations. Accordingly, there was no need for the trial court to give any instruction cautioning against a violation of section 15A-1340.16(d).

NO ERROR.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA
v.
DEMARIO LAMONT SNEAD

No. COA14-940

Filed 17 February 2015

1. Evidence—store surveillance video—not properly authenticated

The trial court improperly admitted a video recording as substantive evidence in a case involving the theft of clothing from a department store (Belk) where defendant argued that the trial court erred by admitting the surveillance videotape without it being properly authenticated. The sole authenticating witness, the Belk regional loss prevention manager, explained how Belk's video surveillance system worked and testified that he had reviewed the video images after the incident but he admitted he was not at the store at the time of the incident, and could not testify whether the images on the video recording accurately presented the events depicted. Nor was he the person in charge of maintaining the video recording equipment and ensuring its proper operation and the State did not offer any evidence of who made the recording onto the compact disc ("CD"), how or when it was copied, or who took custody of the CD after it was copied.

2. Evidence—admission of store surveillance video—erroneous—prejudicial

Defendant was prejudiced by the erroneous admission of a video recording as substantive evidence in a case involving the larceny of clothing from a department store. The video recording was the only evidence offered to establish the value of the property

stolen. This testimony was the only evidence before the jury of the value of the stolen goods.

3. Evidence—value of stolen merchandise—not within personal knowledge of witness

The trial court erred in admitting testimony about the value of property stolen from a store in a larceny prosecution. The only contested issue at trial was the total value of the stolen merchandise and the State presented no other evidence to establish that the value of the stolen property exceeded $1,000, an essential element of felonious larceny.

4. Larceny—felonious larceny—erroneous admission of evidence of value—resentencing for misdemeanor larceny

Defendant's conviction of felonious larceny was vacated and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny where the trial court erroneously admitted the only evidence of value. Defendant admitted at that trial he stole the merchandise and all of the essential elements of the lesser included offense of misdemeanor larceny were established at trial.

5. Conspiracy—larceny—evidence sufficient

There was sufficient evidence that a jury could return a verdict of guilty on a conspiracy to commit larceny charge where the conviction for felonious larceny was vacated due to erroneously admitted evidence of the value of the property. Defendant testified that he did not steal "the right kind of shirts that [the woman he was with] wanted" and that he went to Belk "with the guy that I know by the name of Chicago" with the intent of "tak[ing] anything I could get my hands on." Defendant pled guilty to being an habitual felon.

Appeal by defendant from judgment entered 13 March 2014 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 21 January 2015.

Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for the State.

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

TYSON, Judge.

Demario Lamont Snead ("Defendant") appeals from convictions of felony larceny and conspiracy to commit felony larceny. We vacate the judgment in part and remand for entry of judgment on a lesser included offense and for resentencing. We find no error in Defendant's conviction of conspiracy to commit felonious larceny and affirm Defendant's guilty plea and conviction as an habitual felon.

I. Factual Background

On 1 February 2013, a theft was reported at Belk Department Store ("Belk") at Carolina Mall in Concord, North Carolina. The store's video surveillance system recorded the theft and showed two men entered the store at approximately 4:58 p.m. One of the men, identified as Defendant, is seen grabbing an armful of Polo-style shirts and running out of the store. The other man is shown grabbing a pile of hooded sweatshirts.

On 4 March 2013, Defendant was indicted for felony larceny. On 25 March 2013, Defendant was indicted for attaining habitual felon status. On 10 February 2014, a superseding indictment was entered for the felony larceny charge that added the charge of conspiracy to commit felony larceny. The superseding indictment stated, in pertinent part, as follows:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above, the defendant named above unlawfully, willfully and feloniously did steal, take and carry away store merchandise, clothing including but not limited to Ralph Lauren Polo shirts, the personal property of Belk, Inc., such property having a value in excess of $1,000.
>
> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above, the defendant conspire [sic] with others to commit the crime of felony larceny 14-72(a) against Belk, Inc. by stealing and taking away store merchandise, including but not Limited [sic] to Ralph Lauren Polo shirts, the personal property of Belk, Inc., such property having a value in excess of $1,000.

A. State's Evidence

A jury trial was held in Cabarrus County Superior Court on 11 March 2014. Toby Steckler ("Mr. Steckler"), regional loss prevention manager for Belk, testified he was familiar with the operation of the video

surveillance system. He explained that the system was an "industry standard digital video recorder," which allowed for live monitoring and recording. He further stated the images produced by the video recorders were water-marked to ensure against tampering and displayed a time and date stamp. He also testified that he reviewed the surveillance camera video recording after the theft was reported.

During *voir dire*, Mr. Steckler testified that, after viewing the video and based on his familiarity with the layout of Belk stores and Belk merchandise displayed on the table from which the shirts were taken, he believed the shirts stolen were Ralph Lauren Polo shirts. He also stated the stacks of shirts on the table would have consisted of six to eight shirts per stack, valued at $85 to $89.50 per shirt.

During Mr. Steckler's testimony, the trial court intervened and excused the jury to engage in a discussion with the prosecutor, Defendant's counsel, and Mr. Steckler. During this discussion, the trial court asked Mr. Steckler whether he had reviewed the surveillance video directly from the monitor or after it had been copied onto a disk. Mr. Steckler responded "I'm not sure. Yes. Yes." Mr. Steckler also testified the recording equipment was in working order on the date of the theft.

However, Mr. Steckler later testified he was not present at the store when the incident occurred. The video recording was admitted as substantive evidence of the crimes over Defendant's objection.

After the video recording was admitted into evidence, it was shown and published to the jury, while Mr. Steckler gave a narration of the images. He described the layout of the store and stated the videotape showed Defendant in the Ralph Lauren Polo section. He testified that the fair market value of the Ralph Lauren Polo shirts on the date of the theft would have been between $85 and $89.50 each. When the prosecutor asked Mr. Steckler whether he could tell from the videotape how many shirts were taken, Mr. Steckler replied, "An exact amount, no, sir." Mr. Steckler testified that he "estimate[d] between 20 and 30 of the Polo shirts" were taken by Defendant.

B. Defendant's Evidence

Defendant testified and admitted he had stolen seven shirts from Belk on 1 February 2013. He stated, although he could not recall from which table he took the shirts, he knew they were not Ralph Lauren Polo shirts. Defendant explained the woman he was with "got mad at [him] because they wasn't [sic] the right kind of shirts that she wanted."

On 13 March 2014, the jury returned verdicts finding Defendant guilty of felonious larceny and conspiracy to commit felonious larceny. Defendant has a long criminal record and was wearing electronic monitoring from a prior offense during the theft. Defendant also admitted to two other "snatch and grab" larcenies committed at Macy's and Dick's Sporting Goods the same day as the incident at Belk. Defendant pled guilty to having attained the status of habitual felon.

The trial court sentenced Defendant to an active term of 84 to 113 months imprisonment for his felonious larceny and habitual felon convictions, to run consecutively and beginning at the end of any other sentences. He was also sentenced to a concurrent term of 33 to 52 months imprisonment for the conspiracy and habitual felon convictions. Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) admitting into evidence the surveillance videotape, which was not properly authenticated; and (2) allowing Mr. Steckler to provide lay opinion testimony outside his personal knowledge of the value of the stolen property.

A. Authentication of Surveillance Videotape

Defendant argues the trial court erred by admitting the surveillance videotape into evidence for substantive purposes without being properly authenticated. We agree.

1. Standard of Review

A trial court's determination as to whether a videotape has been properly authenticated is reviewed *de novo* on appeal. *State v. Crawley*, 217 N.C. App. 509, 719 S.E.2d 632 (2011). "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citation omitted), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

2. Analysis

Video recordings are admissible into evidence for both substantive and/or illustrative purposes provided that the offeror lay a proper foundation. N.C. Gen. Stat. § 8-97 (2013).

> The prerequisite that the offeror lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately

> illustrates the events filmed (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape; (3) testimony that the photographs introduced at trial were the same as those the witness had inspected immediately after processing (substantive purposes); or (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

State v. Cannon, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (citations and internal quotation marks omitted), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

When reviewing the foundation for admissibility of a video recording, our precedents have defined three significant areas of inquiry: "(1) whether the camera and [recording] system in question were properly maintained and were properly operating when the [recording] was made, (2) whether the video [recording] accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *State v. Mason*, 144 N.C. App. 20, 26, 550 S.E.2d 10, 15 (2001).

(a) Foundation

[1] Defendant argues the State failed to lay a proper foundation for the admission of the surveillance video recording. He asserts the State failed to offer any information about the history of maintenance on the camera and recording system or its operation. At trial, Mr. Steckler, the sole authenticating witness, explained how Belk's video surveillance system worked and testified that he had reviewed the video images after the incident. Mr. Steckler also testified that the video equipment was "working properly" on the day of the incident.

However, the State's witness admitted he was not at the store at the time or on the date of the incident, nor was he the person in charge of maintaining the video recording equipment and ensuring its proper operation. The State did not offer any other evidence that the video equipment was properly maintained or operating correctly when the incident occurred.

The State failed to offer any other evidence of chain of custody. Mr. Steckler testified that he "reviewed the video after it was burned [sic] off onto a CD." However, the State did not offer any evidence of who "burned" the recording onto the compact disc ("CD"), how or when it was copied, or who took custody of the CD after it was copied. Although

Mr. Steckler reviewed the video on CD shortly before trial and was able to identify it as the same video he had previously viewed, we have held that this testimony fails to establish an adequate chain of custody. *Id.* at 27, 550 S.E.2d at 15-16 (holding that State had not shown adequate evidence of chain of custody where "[n]o testimony was presented from any witness who handled the tape," despite one witness' testimony that video shown in court was the same video she watched after the incident).

Mr. Steckler could not testify whether the images on the video recording accurately presented the events depicted because he was not present at the time or on the date of the incident. *See Mason*, 144 N.C. App. at 23, 550 S.E.2d at 13 (holding employee could not attest to accuracy of videotaped robbery scenes because she had been unable to see actual robbery).

The State did not offer testimony of any employees who were present at the time of the incident depicted in the video recording. Mr. Steckler's testimony, without more, was insufficient to properly establish the chain of custody. We conclude the trial court improperly admitted the video recording as substantive evidence. *State v. Sibley*, 140 N.C. App. 584, 586, 537 S.E.2d 835, 838 (2000) (holding video recording not properly authenticated, and thus inadmissible, where "[t]he State did not call any witnesses to testify that the camera was operating properly or that the information depicted on the videotape was an accurate representation of the events at the time of filming").

(b) Prejudice

[2] Having concluded that the State failed to lay a proper foundation for admission of the video recording as substantive evidence, we review whether the erroneous admission of the videotape prejudiced Defendant. An error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a) (2013). "Where it does not appear that the erroneous admission of evidence played a pivotal role in determining the outcome of the trial, the error is harmless." *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16 (citation omitted).

If it appears reasonably possible that the jury would have reached a different verdict without the erroneously admitted evidence, the error is reversible. *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001). With Defendant's admission of the larceny, the main issue before the jury was the value of the stolen merchandise. In order to be convicted of felonious larceny, the State was required to prove that Defendant stole

property or merchandise valued *in excess of $1,000*. N.C. Gen. Stat. § 14-72(a) (emphasis added).

Mr. Steckler estimated, solely based on his review of the video, that approximately twenty to thirty Ralph Lauren Polo shirts were taken from the table. Defendant testified that he stole seven shirts and they were not Ralph Lauren Polo shirts.

Mr. Steckler testified that his estimation of the number of shirts taken was based on how the video depicted the stacking of the shirts. The erroneously admitted video recording was the *only* evidence the State offered which tended to establish the total value of the shirts stolen. The State conceded that Mr. Steckler's opinion regarding the value of the stolen merchandise was "based on his review of the video."

We cannot conclude there is no reasonable possibility the jury would have found that the value of the stolen merchandise exceeded $1,000 without Mr. Steckler's estimate of the number and value of shirts stolen. His testimony was based solely upon his review of the erroneously admitted video recording.

The video recording was the only evidence offered to establish the value of the property stolen to support Defendant's conviction of felonious larceny. Since this testimony was the only evidence of value of the stolen goods before the jury, Defendant was prejudiced by the erroneous admission of the video recording as substantive evidence. *Sibley*, 140 N.C. App. at 587, 537 S.E.2d at 838 (holding that admission of videotape was prejudicial where it constituted the only evidence to support Defendant's conviction of possession of a firearm).

B. Lay Opinion Testimony

[3] Defendant also argues the trial court erred by allowing Mr. Steckler to render an opinion before the jury regarding the value of the stolen merchandise, where such opinion was not based on his personal knowledge.

1. Standard of Review

We review the admissibility of lay opinion testimony for abuse of discretion. *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (2009). An abuse of discretion occurs when the trial judge's decision "lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d 436, 439 (citation and quotation marks omitted), *disc. review denied*, 359 N.C. 414, 613 S.E.2d 26 (2005).

2. Analysis

Under Rule 701 of the North Carolina Rules of Evidence, witness lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. R. Evid. 701. In allowing lay opinion testimony, we have held: "statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *State v. Davis*, 77 N.C. App. 68, 73, 334 S.E.2d 509, 512 (1985) (citation omitted).

In *Buie*, we held that an officer's narration of a video and his opinions regarding the contents of the video constituted "inadmissible lay opinion testimony that invaded the province of the jury." 194 N.C. App. at 732, 671 S.E.2d at 355. Here, as in *Buie*, Mr. Steckler "offered his opinion, at length, about the events depicted in the surveillance [recording]." The State correctly asserts Mr. Steckler's testimony concerning the price of each of the Ralph Lauren Polo shirts on the date of the incident was based on his own perception because it was "based upon his review of Belk's internal reporting."

However, Mr. Steckler's testimony of the total value of the stolen merchandise was based solely on his review of the surveillance video. The trial court stated in the record: "this witness has testified that he does not know of his own knowledge, independent knowledge what was on that table."

This testimony "was not based on any firsthand knowledge or perception by [Mr. Steckler], but rather solely on [his] viewing of the surveillance video." *Id.* at 733, 671 S.E.2d at 356. The admission of Mr. Steckler's testimony, based upon his review of the video, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise was error.

Having found the trial court erroneously admitted Mr. Steckler's lay opinion testimony, we must determine whether Defendant was prejudiced by this error. N.C. Gen. Stat. § 15A-1443(a); *State v. Wilson*, 121 N.C. App. 720, 723, 468 S.E.2d 475, 478 (1996) ("A defendant wishing to overturn a conviction on the basis of error relating to non-constitutional rights has the burden of showing a reasonable possibility that a different result would have been reached at trial absent the error.").

Defendant argues this error was prejudicial because Mr. Steckler's lay opinion was the only evidence before the jury of the total value of the stolen merchandise to raise the level of his larceny charge from a misdemeanor to a felony. Without the admission of the video recording and Mr. Steckler's opinions regarding the amount and total value of the stolen merchandise, formed while reviewing the video, Defendant has shown a reasonable possibility a different verdict would have resulted.

Without Mr. Steckler's opinion, the State presented no other evidence to establish the value of the stolen property exceeded $1,000, an essential element of felonious larceny. N.C. Gen. Stat. § 14-72(a) (2013). The jury could have reasonably reached a different conclusion about the number of shirts taken, the kind of shirts taken, and the total value of the merchandise stolen. We conclude the admission of this lay opinion testimony, under these facts, was prejudicial to Defendant.

C. Lesser Included Offense

[4] These errors do not require us to remand for a new trial. Defendant admitted at trial he stole shirts from Belk on 1 February 2013, and he is one of the persons depicted in the surveillance video recording. With these admissions, the only contested issue at trial was the total value of the stolen merchandise. All of the essential elements for a conviction of misdemeanor larceny, a lesser included offense of felonious larceny, were established at trial. The trial court also instructed the jury on the lesser included offense of misdemeanor larceny.

We vacate Defendant's conviction of felonious larceny and remand this case for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny. *See State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating judgment of first degree burglary and remanding for entry of judgment on lesser included offense of second degree burglary where evidence insufficient to prove an additional essential element of greater offense); *State v. Hatcher*, __ N.C. App. __, __, 750 S.E.2d 598, 602 (2013) (remanding for resentencing on lesser included offense of involuntary manslaughter where evidence was insufficient to find defendant acted with malice in shooting victim but evidence was sufficient to find defendant unintentionally killed victim); *State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000) (remanding for resentencing on lesser included offense of attempted trafficking by possession where evidence insufficient to establish greater offense of trafficking in marijuana by possession); *State v. Suggs*, 117 N.C. App. 654, 662, 453 S.E.2d 211, 216 (1995) (remanding for resentencing on lesser included offenses of conspiracy and solicitation of misdemeanor assault

where evidence was insufficient for one element of greater offenses of conspiracy and solicitation to commit assault with a deadly weapon inflicting serious injury).

D. Conspiracy and Habitual Felon Convictions

[5] The jury also returned a verdict of guilty on Defendant's conspiracy to commit felonious larceny charge. Our review of the record, including Defendant's testimony that he did not steal "the right kind of shirts that [the woman he was with] wanted" and he went to Belk on 1 February 2013 "with the guy that I know by the name of Chicago" with the intent of "tak[ing] anything I could get my hands on" shows there was sufficient evidence that a jury could return a verdict of guilty on the conspiracy charge. There is no error in Defendant's conviction of conspiracy to commit felonious larceny, and it remains undisturbed. *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (holding that it is not necessary that the unlawful act be completed in order for the State to prove conspiracy). Defendant pled guilty to being an habitual felon. His conviction of having attained habitual felon status is affirmed. These convictions may be taken into consideration by the trial court upon resentencing.

Conclusion

The trial court's judgment is vacated in part and remanded for entry of judgment and resentencing on the lesser included offense of misdemeanor larceny. We find no error in Defendant's conspiracy to commit felonious larceny conviction and affirm his habitual felon conviction.

VACATED IN PART AND REMANDED FOR ENTRY OF JUDGMENT AND RESENTENCING FOR LARCENY; NO ERROR IN PART FOR CONSPIRACY; AFFIRMED IN PART FOR HABITUAL FELON.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
VICTOR LEE TURNER

No. COA14-958

Filed 17 February 2015

1. Criminal Law—motion for DNA testing—incorrect theory of law given for dismissal—ruling upheld

The trial court did not err in a robbery with a dangerous weapon, first-degree rape, possession of a firearm by a felon, two counts of first-degree sexual offense, crime against nature, first-degree kidnapping, and felony possession of cocaine case by denying defendant's motion for DNA testing. Defendant failed to establish a condition precedent to the trial court's authority to grant his motion (*i.e.*, materiality). Even if dismissal was for the wrong reason, the trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gave a wrong or insufficient reason for it.

2. Constitutional Law—failure to consider request for appointment of counsel—failure to meet burden of showing materiality

The trial court did not err in a robbery with a dangerous weapon, first-degree rape, possession of a firearm by a felon, two counts of first-degree sexual offense, crime against nature, first-degree kidnapping, and felony possession of cocaine case by failing to consider defendant's request for the appointment of counsel pursuant to N.C.G.S. § 15A-269(c). Defendant failed to meet his burden of showing materiality under N.C.G.S. § 15A-269(a)(1), and thus, was not entitled to the appointment of counsel.

Appeal by Defendant from order entered 21 May 2014 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. Heard in the Court of Appeals on 6 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

Don Willey for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Victor Lee Turner ("Defendant") appeals from an order denying his motion for postconviction DNA testing pursuant to N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270 (2013). Defendant contends that the trial court erred in (1) denying Defendant's motion for DNA testing, and (2) failing to consider Defendant's request for the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c). For the following reasons, we find no error and affirm the trial court's order.

I. Factual & Procedural History

On 13 April 2005, Defendant pled guilty, in accordance with a plea agreement, to robbery with a dangerous weapon, first degree rape, possession of a firearm by a felon, two counts of first degree sexual offense, crime against nature, first degree kidnapping, and felony possession of cocaine. The facts presented as a foundation for the plea tended to show the following.

On the evening of 27 April 2004, Penelope Jones ("Ms. Jones"),[1] an employee of the Days Inn Motel in Gastonia, reported that she had been robbed and sexually assaulted while working as the night shift clerk. Officers from the Gastonia Police Department responded to the scene and, after interviewing Ms. Jones, transported her to the hospital. There, hospital personnel collected DNA specimens from Ms. Jones and placed the specimens into a sexual assault evidence kit. Gastonia Police took custody of the sexual assault evidence kit and placed it into evidence at the police station.

Subsequent investigation led police to identify Defendant as a suspect, and Defendant's DNA was sent to the State Bureau of Investigation ("SBI") for comparison with the DNA collected from the scene and from Ms. Jones' sexual assault evidence kit. A forensic biologist with the SBI analyzed the DNA samples and determined that the DNA profile obtained from Ms. Jones' thigh matched Defendant's DNA profile. The SBI analyst further found that the DNA profile obtained from Ms. Jones' vaginal swab was consistent with a mixture of DNA profiles of Ms. Jones and Defendant. The SBI analyst's report indicates that the DNA profile obtained from Ms. Jones' thigh is approximately "9.62 million trillion times more likely to be observed if it came from [Defendant] than if it came from another unrelated individual in the N.C. Black population."

On 17 May 2004, Defendant was indicted for robbery with a dangerous weapon, first degree rape, possession of a firearm by a felon,

1. The victim's name has been changed to protect her identity.

two counts of first degree sexual offense, crime against nature, and first degree kidnapping. On 13 April 2005, Defendant pled guilty to all crimes for which he was indicted, as well as an unrelated felony possession of cocaine charge. The trial court consolidated the convictions into two judgments and imposed consecutive active terms of imprisonment of 61 to 83 months and 275 to 339 months.

Eight years later, on 17 June 2013, Defendant filed a *pro se* "Motion for DNA Testing" in Gaston County Superior Court, citing N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270. Defendant's motion alleges, *inter alia*, that "the ability to conduct the requested DNA testing is material to defendant[']s defense."

On 21 May 2014, Superior Court Judge Jesse B. Caldwell, III entered an order denying Defendant's motion for DNA testing without hearing. The trial court found that "the statutes Defendant/Petitioner cites relate to DNA testing *before* trial, and that no other legal basis exists to merit the Defendant/Petitioner's Motion[.]" Defendant's written notice of appeal was untimely filed on 16 June 2014; however, Defendant filed a petition for writ of certiorari with this Court on 13 October 2014. We allow Defendant's petition for writ of certiorari to address the underlying legal issues.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, which provides for appellate review under the extraordinary writ of certiorari. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1).

III. Standard of Review

"Our standard of review of a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief." *State v. Gardner*, ___ N.C. App. ___, ___, 742 S.E.2d 352, 354 (2013). Therefore, the lower court's "[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*." *Id.*

IV. Analysis

On appeal, Defendant presents two arguments of error. First, Defendant argues that the trial court erred in concluding that Defendant's

"Motion for DNA Testing" cited only statutes for pretrial DNA testing, and thus the trial court erred in denying Defendant's motion. Second, Defendant argues that the trial court erred in failing to consider his request for the appointment of counsel, in violation of N.C. Gen. Stat. § 15A-269(c). We address these arguments in turn.

A. Defendant's Motion for DNA Testing

[1] Defendant cites N.C. Gen. Stat. §§ 15A-267, 268, 269, and 270 as the legal basis for his entitlement to DNA testing. He errs in part. The only statute relevant here is N.C. Gen. Stat. § 15A-269. The other statutes do not apply to this case. Section 15A-267 pertains to *pretrial* access to DNA samples from the crime scene. Section 15A-268 pertains to the preservation of biological evidence collected at the scene. Defendant's motion does not contend that the evidence in this case has been improperly preserved. Section 15A-270 pertains to post-test procedures after the trial court grants a motion for postconviction DNA testing. Therefore, we need only analyze Defendant's legal claims under N.C. Gen. Stat. § 15A-269, which addresses requests for postconviction DNA testing.

N.C. Gen. Stat. § 15A-269 provides:

> (a) A defendant may make a motion before the trial court . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269 (2013). By the plain language of the statute, the burden is on the defendant to make the required showing under each subsection (1), (2), and (3) before the trial court. As in a proceeding for a postconviction motion for appropriate relief, "the moving party has the burden of proving by the preponderance of the evidence every fact

to support his motion." *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1983). Absent the required showing, the trial court is not statutorily obligated to order postconviction DNA testing. *See State v. Foster*, ___ N.C. App. ___, ___, 729 S.E.2d 116, 120 (2012); *see also State v. McLean*, ___ N.C. App. ___, ___, 753 S.E.2d 235, 239 (2014) (so holding in the context of pretrial motions for DNA testing).

With regard to the materiality element set forth in section (a)(1), we held in *State v. Gardner* that "where a motion brought under [subsection (a)(1)] provided no indication of how or why the requested DNA testing would be material to the petitioner's defense, the motion was deficient and it was not error to deny the request for the DNA testing." ___ N.C. App. at ___, 742 S.E.2d at 354 (2013); *see also Foster*, ___ N.C. App. at ___, 729 S.E.2d at 120. In *Gardner*, the defendant pled guilty to fifteen counts of statutory rape. *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 353. The trial court consolidated judgment and sentenced the defendant to 173 to 217 months imprisonment. *Id.* Eleven years later, the defendant filed a *pro se* motion for postconviction DNA testing. *Id.* In his motion, with regard to the materiality element, the defendant asserted only the conclusory statement that DNA testing would be material to his defense. *Id.* at ___, 742 S.E.2d at 356. This Court upheld the trial court's denial of the defendant's motion for postconviction DNA testing, holding that the defendant's burden of showing materiality requires more than a conclusory statement. *Id.*

This case is indistinguishable from *Gardner*. Here, Defendant's motion for DNA testing contains only the following conclusory statement regarding materiality: "The ability to conduct the requested DNA testing is material to defendant[']s defense[.]" This is the identical conclusory statement that was used by the defendants in *Gardner* and *Foster*. As in *Gardner* and *Foster*, we hold that Defendant's motion in this case is insufficient to satisfy his burden under N.C. Gen. Stat. § 15A-269. Because we find that Defendant failed to establish a condition precedent to the trial court's authority to grant his motion (*i.e.*, materiality), we do not reach the State's argument that a defendant can never establish materiality for postconviction DNA testing after entering a guilty plea.

While the trial court correctly denied Defendant's motion for DNA testing, we recognize that the trial court's reasoning for reaching that conclusion was somewhat flawed. The trial court's order denying Defendant's motion states that "the statutes Defendant/Petitioner cites relate to DNA testing *before* trial, and that no other legal basis exists to merit the Defendant/Petitioner's Motion." This conclusion is erroneous,

as Defendant's motion clearly cites N.C. Gen. Stat. § 15A-269 as one legal basis for his motion—a statute providing exclusively for requests for postconviction DNA testing. Nevertheless, because the trial court reached the correct conclusion—that Defendant's motion for DNA testing should be denied—we affirm its order. "[E]ven if dismissal was for the wrong reason, a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (internal quotation marks omitted); *see also Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408, 411 (1984) ("[A] judgment that is correct must be upheld even if it was entered for the wrong reason.").

Therefore, we affirm the result of the trial court denying Defendant's motion for DNA testing.

B. Defendant's Request for Appointment of Counsel

[2] Defendant's second and final argument on appeal is that the trial court erred in failing to consider Defendant's request for the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), which provides that

> [i]n accordance with rules adopted by the Office of Indigent Defense Services, the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with rules adopted by the Office of Indigent Defense Services upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C. Gen. Stat. § 15A-269(c) (2013). Defendant argues that, pursuant to this statute, the trial court should have either appointed him counsel or held a hearing to determine whether DNA testing "may be material to [his] claim of wrongful conviction." However, in *Gardner*, we rejected this identical argument. In *Gardner*, we held that " '[a]ccording to the plain language of the statute, a trial court is required to appoint counsel for a defendant bringing a motion under this section only if the defendant makes a showing (1) of indigence and (2) that the DNA testing is material to defendant's claim that he or she was wrongfully convicted.' " *Gardner*, ___ N.C. App. at ___, 742 S.E.2d at 355 (quoting *State v. Barts*, 204 N.C. App. 596, 696 S.E.2d 923, 2010 WL 2367302, at *1 (June 15, 2010) (unpublished)). Therefore, an indigent defendant must make a sufficient

showing of materiality before he is entitled to appointment of counsel. *Id.* at ___, 742 S.E.2d at 355 ("[I]n order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1).").

Here, because we hold that Defendant has not met his burden of showing materiality under N.C. Gen. Stat. § 15A-269(a)(1), he is not entitled to the appointment of counsel, and the trial court did not err in failing to consider his request for counsel.

V. Conclusion

For the foregoing reasons, we affirm the order of the trial court denying Defendant's motion for DNA testing.

Affirmed.

Judges BRYANT and STROUD concur.

MONICA WILSON AND WILSON LAW GROUP PLLC, PLAINTIFFS
v.
NORTH CAROLINA DEPARTMENT OF COMMERCE; NC DEPARTMENT OF COMMERCE; DIVISION OF EMPLOYMENT SECURITY; SHARON ALLRED DECKER, IN HER CAPACITY AS SECRETARY OF COMMERCE; AND DALE R. FOLWELL, IN HIS CAPACITY AS ASSISTANT SECRETARY OF EMPLOYMENT SECURITY, DEFENDANTS

No. COA14-975

Filed 17 February 2015

1. Appeal and Error—interlocutory orders—substantial right

A preliminary injunction order compelling the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers affected a substantial right because defendants alleged that the notices contained confidential information and disclosure could result in a loss of federal administrative funding. Therefore, the interlocutory order was immediately appealable.

2. Appeal and Error—mootness—effect of statutory amendment

A statutory amendment did not render plaintiffs' appeal of an interlocutory order moot. The amendment did not provide plaintiffs the relief they sought—the disclosure of daily hearing notices from

the Division of Employment Security prior to the statutory amendment and attorney fees.

3. Injunctions—preliminary—consideration of federal regulations

A preliminary injunction order by the trial court, which compelled the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers, was vacated, and the matter was remanded for findings and conclusions addressing plaintiffs' likelihood of success in light of federal regulations. The trial court was instructed to reconsider the likelihood of substantial injury to plaintiffs in the absence of injunctive relief after determining the issue of likelihood of success.

4. Injunctions—preliminary—effect of statutory amendment passed after order

A preliminary injunction order by the trial court, which compelled the North Carolina Division of Employment Security to continue providing daily hearing notices to subscribers, was vacated, and the matter was remanded for findings and conclusions addressing, among other things, the effect of a statutory amendment passed after the trial court issued its order.

Appeal by defendants from order entered 13 March 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 7 January 2015.

Law Office of James C. White, P.C., by James C. White and Michelle M. Walker, for plaintiffs-appellees.

The North Carolina Department of Commerce Division of Employment Security, by Ted Enarson and Jeremy L. Ray, for defendants-appellants.

INMAN, Judge.

Defendants appeal the order granting plaintiffs a preliminary injunction compelling the disclosure of unemployment hearings information. Defendants contend that the interlocutory order is immediately appealable because it involves a substantial right. Furthermore, they allege that the trial court erred in entering the preliminary injunction because plaintiffs are unable to show a likelihood of success on the merits because federal law prohibits the disclosure of the unemployment appeals

hearing notices. In contrast, plaintiffs argue that the appeal should be dismissed not only because it is moot but also because it is interlocutory and does not affect a substantial right. In the alternative, plaintiffs contend that the order should be affirmed because it was decided correctly under the law in effect at the time of the hearing.

After careful review, we vacate the order and remand for the trial court to enter additional findings and conclusions not inconsistent with this opinion.

Factual and Procedural Background

This appeal involves the North Carolina Division of Employment Security's ("DES's") decision to terminate its practice of providing third parties, specifically plaintiffs Monica Wilson ("Ms. Wilson") and her law firm Wilson Law Group PLLC ("WLG") (collectively, Ms. Wilson and WLG are referred to as "plaintiffs"), with daily access to appeals hearing notices about unemployment claimants (the "hearing notices"). The hearing notices listed all scheduled hearings set before DES appeals referees and hearing officers and provided various information about each claimant, including, among other things, the claimant's name, address, phone number, information about her termination, and the last four digits of her social security number. Since 2004, Ms. Wilson and several other attorneys received daily hearing notices from DES in exchange for a monthly fee of $300. Ms. Wilson picked her copy up daily via courier from DES because the notices provided only 14 days notice of the scheduled hearings.

On 26 February 2014, in addition to the day's hearing notices, DES sent Ms. Wilson an undated letter stating:

> Due to security concerns, the process of entering [DES] through the back door of our building near the mail room and outside our security guards [sic] knowledge will no longer be allowed after February 28th. I understand the process of allowing attorneys to pick up appeals hearing notices was established by a former DES General Counsel years ago, but for the safety of our employees and constituents, this will end.

The letter went on to say that the hearing notices would be sent to the law offices "at least three times per month" and that the monthly cost would increase from $300 to $600. The letter was signed by defendant Dale R. Folwell ("Mr. Folwell"), the Assistant Secretary of DES. According to

plaintiffs, this change negatively impacted claimants' ability to obtain counsel which resulted in an unfair advantage for employers.

On 28 February 2014, plaintiffs filed a complaint and request for injunctive relief against DES, Mr. Folwell, the North Carolina Department of Commerce, and Sharon Decker ("Ms. Decker"), the Secretary of Commerce (collectively, these parties are referred to as "defendants") challenging the withholding of daily hearing notices.[1] Plaintiffs claimed that defendants violated Chapter 132 of the General Statutes, commonly referred to as North Carolina's Public Records Act. Plaintiffs alleged that the daily hearing notices constituted public records under N.C. Gen. Stat. § 132-6(a) and that they were entitled to injunctive relief compelling DES to provide copies of the daily hearing notices. Plaintiffs further contended that they were entitled to expedited discovery and to compensation from defendants for their attorneys' fees.

Plaintiffs' request for a temporary restraining order ("TRO") was heard by Judge Michael Morgan on 3 March 2014. After concluding that plaintiffs were likely to prevail on their claim that DES's refusal to provide the hearing notices constituted a violation of section 132-6(a), the trial court issued a TRO and scheduled a preliminary injunction hearing.

On 10 March 2014, plaintiffs' petition for a preliminary injunction came on for hearing before Judge Paul Ridgeway. Counsel for the respective parties submitted affidavits, exhibits, and arguments, and the trial court took the matter under advisement.

On 13 March, the trial court issued an order concluding that plaintiffs had met their burden of proving the likelihood that they would succeed in their public records claim and that injunctive relief was necessary to protect plaintiffs' rights until the matter could be resolved. Furthermore, the trial court required defendants to allow any person access to DES headquarters "for the purposes of picking up copies of hearing notices generated that day in accordance with that person's previous request."

Defendants timely appealed. On 27 May 2014, defendants filed a petition for writ of supersedeas to stay the trial court's 13 March 2014 order pending outcome of the appeal, which petition this Court granted.

---

1. During the pendency of this appeal, Sharon Decker resigned her position as Secretary of Commerce. This change does not render plaintiffs' claims moot but may lead to an amendment of the pleadings with regard to acts or omissions after her departure date. *See* N.C. Gen. Stat. § 1A-1, Rule 25(f) (2013) ("When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party.").

During the pendency of this appeal, on 25 August 2014, the General Assembly enacted Session Law 2014-117, "An Act to Clarify the Confidentiality of Unemployment Compensation Records," providing that unemployment appeal hearing notices are "confidential information" and are specifically exempt from the Public Records Act.

Analysis

I. Jurisdiction

[1] Initially, we must determine whether the interlocutory preliminary injunction is immediately appealable. *See generally A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (noting that "[a] preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits" and is not immediately appealable absent a showing that it involves a substantial right). This Court has held that interlocutory orders requiring the disclosure of information that an appellant claims constitutes trade secrets, *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003), and orders mandating the disclosure of information that a party asserts is protected by a statutory privilege, *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999), are immediately appealable. We conclude that the preliminary injunction order at issue here similarly affects a substantial right because the order requires the disclosure of information that defendants contend constitutes confidential information under both state and federal law and because defendants allege that this disclosure could result in the loss of federal administrative funding. Consequently, the preliminary injunction is immediately appealable.

II. Mootness

[2] Next, we must address plaintiffs' contention that, in light of the amendment to section 96-4(x), defendants' appeal is moot. Although an amendment to a statute may render an appeal moot, *see Davis v. Zoning Bd. of Adjustment of Union Cnty.*, 41 N.C. App. 579, 582, 255 S.E.2d 444, 446 (1979), statutory amendment does not moot an appeal when the relief sought has not been granted or the questions originally in controversy are still at issue, *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed."). *See also Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003).

Here, N.C. Gen. Stat. 96-4(x) was amended in August 2014 specifically to classify the hearing notices as confidential information and exempt them from the public records disclosure requirements of state law. While the language of the amendment appears to go to the heart of plaintiffs' claims, it is plaintiffs' contention that the amendment substantially changes the statute and therefore is not retroactive. *See Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 682 (2012) (distinguishing between clarifying amendments that apply both to cases brought after the statute's effective dates and to cases pending before the courts when the amendment is adopted and substantive amendments where "the effective date appl[ies]"). Thus, plaintiffs' position is still that, based on the 2013 version of section 96-4(x), at least with respect to hearings scheduled prior to the statutory amendment, they were entitled to disclosure of daily hearing notices and to recover their attorneys' fees incurred in enforcing their right. The statutory amendment does not provide plaintiffs the relief they sought: compelled disclosure of the hearing notices prior to the August 2014 amendment and attorneys' fees for enforcing that right. Accordingly, the amendment of N.C. Gen. Stat. § 96-4(x) has not mooted the appeal.

III. Standard of Review

Our standard of review from a preliminary injunction is "essentially *de novo*." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 362 (2004). However, the trial court's ruling is "presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Id.* Generally, on appeal from an order granting or denying a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Indus.*, 308 N.C. at 402, 302 S.E.2d at 760. However, the Court may vacate an injunctive order and remand to the trial court for entry of additional findings where the order's findings fail to make all necessary determinations. *See N. Star Mgmt. of Am., LLC v. Sedlacek*, __ N.C. App. __, __, 762 S.E.2d 357, 363 (2014) (vacating the trial court's preliminary injunction order and remanding for further proceedings because the trial court failed to make findings as to the reasonableness of the geographic scope and prohibited activities of a non-compete agreement); *Conrad v. Jones*, 31 N.C. App. 75, 79, 228 S.E.2d 618, 620 (1976) (vacating a permanent injunction and remanding for the trial court to make findings as to the plaintiff's interest in the property allegedly being trespassed upon).

IV. Analysis

[3] A preliminary injunction is "an extraordinary measure" and will only issue:

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Ridge Cmty. Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (alteration in original). Pursuant to Rule 65(d), an order granting injunctive relief must, among other things, "set forth the reasons for its issuance [and] shall be specific in terms[.]" N.C. Gen. Stat. § 1A-1, Rule 65(d) (2013). This Court has interpreted Rule 65(d) to require the trial court to "adequately set forth findings that succinctly state[] the reasons for the issuance of the injunction[.]" *Staton v. Russell*, 151 N.C. App. 1, 12, 565 S.E.2d 103, 109-110 (2002). With regard to plaintiffs' likelihood of success on the merits, here, the trial court concluded that "[p]laintiffs have met their burden, for the purposes of this Preliminary Injunction, of proving that there is probable cause the [p]laintiffs will be able to established [sic] their asserted rights under the North Carolina Public Records Law at the trial of this matter." Defendants contend that this conclusion is erroneous because: (1) under the 2013 version of N.C. Gen. Stat. § 96-4(x), any disclosure of confidential unemployment information must be consistent with federal law; (2) federal regulations—specifically, 20 C.F.R. §§ 603.2(a) and 603.4(b)—prohibit the disclosure of the hearing notices because they contain the name of the employee and employer, addresses, and the reasons for the claim; (3) the hearing notices do not fall within any exception to the federal regulations' general prohibition on disclosure of confidential information; and (4) the United States Department of Labor intended the federal regulations to set the minimum requirements on the confidentiality of unemployment information.

At the preliminary injunction hearing, defendants argued that the disclosure of the hearing notices violated federal law and that this violation could "impact [the] grant money that [DES] use[s]" to administer the appeal hearing system. To support their contention, defendants introduced, and the trial court allowed for the purpose of "explaining what [DES] did upon receipt of [the] letter," a letter from the United States Department of Labor claiming that the practice of selling the hearing information constitutes "a failure to comply substantially with [f]ederal law." Specifically, the letter asserts that the information contained in the hearing notices is confidential and that federal law only permits the disclosure of appeals records and decisions when they are "final."

In addition to involving federal regulations, plaintiffs' claims and DES' defenses require interpretation of two state statutes. North

Carolina's Public Records Act, specifically, section 132-6, requires that "in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Act must be made available for public inspection[,]" *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992). The second statute, N.C. Gen. Stat. § 96-4, describes the administration, powers, and duties of DES and is the statute amended since the trial court's issuance of the preliminary injunction at issue here.

Prior to its amendment, N.C. Gen. Stat. § 96-4(x) required that any disclosure of unemployment information be consistent with 20 C.F.R. Part 603, the federal regulations concerning the confidentiality of unemployment insurance information. N.C. Gen. Stat. § 132-6 compels disclosure of public records when there is no statutory exception or exemption. *News & Observer*, 330 N.C. at 486, 412 S.E.2d at 19. Accordingly, to determine whether plaintiffs would likely succeed in their claims, the trial court would necessarily have to consider how the federal regulations affect a person's right to disclosure of the hearing notices under the Public Records Act. Here, the trial court's order does not mention the federal regulations and their bearing, if any, on plaintiffs' public records claim. Such analysis would be necessary before finding whether plaintiffs had a likelihood of success on the merits. Given the absence of any findings on this issue, we must vacate the order and remand for the trial court to make the necessary findings and conclusions addressing plaintiffs' likelihood of success in light of the applicable federal regulations.

In addition to showing a likelihood of success on the merits, a party seeking a preliminary injunction must show either that in the absence of injunctive relief, plaintiffs would suffer an irreparable injury or that injunctive relief is necessary to protect rights that cannot be enforced later, *A.E.P.*, 308 N.C. at 405, 302 S.E.2d at 761-62 (noting that the second element may be satisfied by either finding). In this case, the trial court found that because plaintiffs were entitled to receive the hearing notices on a daily basis, injunctive relief was necessary to protect that right. However, since the trial court must enter additional findings and conclusions as to the first element, this second finding may change. Consequently, on remand, the trial court should make sufficient findings as to this second element based on its analysis of the interplay between state and federal law.[2]

---

2. Because the trial court's order was not based on a finding of irreparable harm and defendants do not put forth any argument on this issue on appeal, we do not address whether plaintiffs would be able to establish irreparable harm in support of their request for injunctive relief.

[4] In addition to making the necessary findings and conclusions discussed above, the trial court also will have to consider the amendment of N.C. Gen. Stat. § 96-4(x) in August 2014, after the trial court's order but before this appeal was heard. During that time, the General Assembly passed Session Law 2014-117, "An Act to Clarify the Confidentiality of Unemployment Compensation Records." Prior to this change, section 96-4(x) (2013), which was in effect at the time of plaintiffs' hearing, only required that the disclosure of unemployment information be consistent with 20 C.F.R. Part 603. However, the 2013 version of section 96-4(x) does not specifically exempt unemployment information from North Carolina's Public Records Act nor does it classify that information as "confidential information." The statute was "clarified"[3] in August 2014 to provide that unemployment compensation information constitutes "confidential information" and is exempt from the public records disclosure requirements.

Thus, on remand, the trial court also must determine whether the amendment to N.C. Gen. Stat. § 96-4(x) changed the substance of the statute or merely clarified it, and in turn, whether the amendment applies to plaintiffs' claims for the disclosure of hearing notices created prior to the amendment. *See Ray*, 366 N.C. at 9, 727 S.E.2d at 681 (distinguishing between amendments that change the substance of a statute and those that clarify a statute, and noting that clarifying amendments "apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment").

If the trial court concludes that the amendment is substantive, the trial court's consideration on the merits of plaintiffs' claims will be twofold. First, whether plaintiffs are entitled to a preliminary injunction for the hearing notices issued before 25 August 2014 will depend on the trial court's analysis discussed above and must include findings and conclusions regarding how the federal regulations affect the disclosure of unemployment information. Second, to determine whether plaintiffs are entitled to a preliminary injunction for the hearing notices issued on 25 August 2014 and afterwards, the trial court must take into consideration the new statutory language of section 96-4(x).

---

3. We note that we use the term "clarified" in quotation marks because the General Assembly titled the session law "An Act to Clarify." We make no determination at this time of whether the amendment constituted a clarifying amendment or a substantial change to the statute, leaving that analysis for the trial court in the first instance.

In contrast, if the trial court concludes that the amendment to N.C. Gen. Stat. § 96-4(x) is clarifying, the new version of the statute would apply to plaintiffs' requests for the hearing notices regardless of the fact that the amendment occurred after plaintiffs' claim arose. In other words, the amendment may be used in interpreting the earlier statute. *See Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993). For purposes of remand, this means that if the trial court concludes that the amendment is clarifying, it should apply the statute as amended to determine whether plaintiffs are able to show a likelihood of success on their claims that defendants' refusal to provide access to the hearing notices violates N.C. Gen. Stat. § 132-6(a).

Conclusion

Based on the foregoing reasons, we vacate the trial court's order granting plaintiffs a preliminary injunction and remand for the trial court to enter necessary findings and conclusions in accordance with this opinion.

VACATED AND REMANDED.

Judges STEELMAN and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 FEBRUARY 2015)

ATKINSON v. REIKOWSKY No. 14-624	Surry (11CVS575)	Affirmed
BENNETT v. BENNETT No. 14-548	Catawba (13CVD1469)	Dismissed
BLAIR v. BLAIR No. 14-887	Buncombe (13CVD3615)	Dismissed
BUCK v. BUCK No. 14-279	Rowan (11CVS1361)	No Error
CURRY v. TAYLOR No. 14-869	Nash (03CVD2117)	Vacated and Remanded
GREEN v. CLARKE No. 14-969	Wake (13CVS8399)	Dismissed
HOMETRUST BANK v. MURPHY No. 14-734	Haywood (12CVS591)	Affirmed
IN RE: G.P. No. 14-857	Cumberland (10JT229) (10JT230) (10JT231) (11JT669)	Affirmed
IN RE J.T.N. No. 14-827	Johnston (09JT143)	Affirmed
IN RE R.D.L. No. 14-781-2	Robeson (10JT206)	Vacated
IN RE S.G. No. 14-824	Cumberland (12JA417) (12JA418)	Affirmed
IN RE V.A.P. No. 14-1007	Guilford (12JT55)	Affirmed
KEDAR v. PATEL No. 14-735	Mecklenburg (13CVS9860)	Dismissed
LEAZER v. LEAZER No. 14-778	Rowan (13CVD1217)	Affirmed

MARTIN v. MOREAU No. 14-811	Wake (11CVS15808)	Affirmed
PIRO v. PIRO No. 14-962	Mecklenburg (06CVD12628)	Affirmed in part, Vacated in part and Remanded
RIBELIN v. CREEL No. 14-643	Rowan (06CVD1646)	Affirmed and Remanded
ROBERSON v. ROBERSON No. 14-920	Pitt (12CVD730)	Vacated and Remanded
SHOWCASE CONSTR. CO. v. PROPS. OF S. WAKE, LLC No. 14-644	Cumberland (13CVS6848)	Affirmed
SIMS v. BECKNELL No. 14-936	Mecklenburg (14CVD8403)	VACATED and DISMISSED
STATE v. BAKER No. 14-260	Davidson (10CRS55741)	No Error
STATE v. BAKER No. 14-501	Mecklenburg (12CRS201355-61)	No prejudicial error.
STATE v. BARNES No. 14-863	Mecklenburg (11CRS235347) (11CRS235349)	No Error
STATE v. BLACKWELL No. 14-865	Person (12CRS297-99) (12CRS50170-72)	Affirmed
STATE v. CADE No. 14-785	Buncombe (08CRS59746-47) (08CRS711-713)	Affirmed
STATE v. DARCELIEN No. 14-582	Wake (11CRS12449)	No Error
STATE v. DILLS No. 14-906	Moore (12CRS1942-43)	Affirmed
STATE v. FOXWORTH No. 14-693	Guilford (09CRS72211)	Affirmed in part and Reversed in part and Vacated in part and Remanded.
STATE v. FRIDAY No. 14-529	Alamance (09CRS55360)	Affirmed

STATE v. McCRAE No. 14-790	Cabarrus (10CRS54559)	No Error
STATE v. O'NEIL No. 14-472	McDowell (13CR50033)	Affirmed
STATE v. PUGH No. 14-930	Wake (05CRS115060)	Affirmed
STATE v. SEGARRO No. 14-746	New Hanover (11CRS51860)	No Error
STATE v. SMITH No. 14-839	Wake (12CRS211960)	No Error
STATE v. THOMAS No. 14-713	Union (12CRS2038) (12CRS51101-02)	No Error
STATE v. WALSTON No. 12-1377-2	Dare (09CRS85-91)	Other
STATE v. WATKINS-PRICE No. 14-946	Pender (12CRS51464) (13CRS1531-1532)	Affirmed
STATE v. WHITE No. 14-797	Columbus (10CRS51833)	No Error
STATE v. WHITEHEAD No. 14-737	Craven (01CRS53730)	Affirmed
STATE v. WILSON No. 14-813	Mecklenburg (11CRS247467-68) (11CRS247473)	No Error
STATE v. WOODS No. 14-677	Buncombe (11CRS56562)	No Error
STATE v. YOUNG No. 14-989	Cabarrus (11CRS2421) (11CRS3027)	NO PREJUDICAL ERROR
WILLIAMS v. LIVINGSTONE COLL., INC. No. 14-696	Rowan (13CVS2791)	Affirmed
WILLIAMSON v. WILLIAMSON No. 14-838	Catawba (07CVD3914)	Dismissed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS