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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 20, 2017

MAILING ADDRESS: The Judicial Department
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OF

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FILED 17 MARCH 2015

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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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FRANCES ATIAPO, EMPLOYEE, PLAINTIFF
v.
GOREE LOGISTICS, INC., AND OWEN THOMAS, INC., EMPLOYER, NONINSURED, DEFENDANTS AND THE NORTH CAROLINA INDUSTRIAL COMMISSION
v.
GOREE LOGISTICS, INC., AND OWEN THOMAS, INC., NONINSURED EMPLOYER, AND MANDIEME DIOUF, INDIVIDUALLY, DEFENDANTS

No. COA14-977

Filed 17 March 2015

1. Workers' Compensation—transportation broker—trucking company without insurance—broker liable

The Industrial Commission had jurisdiction over Owen Thomas, Inc., a transportation broker, in a workers' compensation case where Sunny Ridge paid Owen Thomas to deliver its goods, Owen Thomas then hired Goree Logistics to perform the delivery, the injured driver worked for Goree, and Goree did not have workers' compensation insurance.

2. Workers' Compensation—transportation broker—no federal preemption

Owen Thomas, a transportation broker, was not exempt from a state workers' compensation provision due to federal preemption. There is no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services and the federal preemption established in 49 U.S.C. § 14501(c)(1) does not apply to N.C.G.S. § 97-19.1, which imposes liability upon those who employ persons or entities that fail to procure required workers' compensation insurance.

3. Workers' Compensation—interstate trucking company—not exempt from workers' liability

A trucking company and an individual were not exempt from liability for not carrying workers' compensation insurance where they argued that the statute mentioned contractors and subcontractors but not employers.

Appeal by defendants from opinion and award entered 20 June 2014 by Commissioner Tammy Nance in the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2015.

Grandy & Martin, P.A., by Kenneth C. Martin, for plaintiff-appellee Frances Atiapo.

Lawrence P. Margolis for defendants-appellants Goree Logistics, Inc. and Mandieme Diouf.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, PLLC, by John F. Scarbrough, for defendant-appellant Owen Thomas, Inc.

STEELMAN, Judge.

Where the evidence supported a finding that Owen Thomas was a general contractor, the Industrial Commission did not err in holding Owen Thomas liable as a statutory employer pursuant to N.C. Gen. Stat. § 97-19.1. Where an employer failed to carry workers' compensation insurance, the Industrial Commission did not err in imposing penalties upon the employer and its principal.

I. Factual and Procedural Background

On 22 June 2011, Owen Thomas, Inc. (Owen Thomas), a licensed transportation broker, entered into a "Broker-Carrier Agreement" with Goree Logistics, Inc. (Goree). Owen Thomas was acting on behalf of its client, Sunny Ridge Farms (Sunny Ridge), to procure transportation for Sunny Ridge's goods. The agreement provided that Goree would exercise full control over the work it performed in transporting the goods, and that Goree would assume responsibility for payment of all taxes, unemployment, and workers' compensation, and other related fees.

Frances Atiapo (plaintiff) drove a tractor trailer for Goree, and was directed to drive a tractor trailer transporting Sunny Ridge's goods. At the time of plaintiff's injury, Goree did not have workers' compensation insurance.

Plaintiff was instructed to deliver the goods to Wyoming. When the goods were rejected, plaintiff was directed by Goree to drive the truck to Georgia. Plaintiff was later directed by Goree to go to Colorado. Near Ft. Collins, Colorado, plaintiff crested the peak of a hill, and came upon a string of stopped vehicles. His brakes failed and the tractor trailer collided with another vehicle. As a result of the collision, plaintiff sustained injuries.

On 29 July 2011, plaintiff filed an IC Form 18 notice of accident. On 19 September 2011, plaintiff filed a Form 33 request for hearing on his workers' compensation claim. On 28 September 2011, Goree filed a Form 61 denial of plaintiff's claim, contending that plaintiff was not an employee of Goree, but an independent contractor, and that Goree had only two persons driving trucks for it.

Following a hearing before the deputy commissioner, Owen Thomas was added as a party defendant to this proceeding.

On 14 April 2014, the Industrial Commission filed its Opinion and Award. The Commission found, despite the presence of a written agreement between plaintiff and Goree stating that plaintiff was an independent contractor, that for purposes of Chapter 97 of the North Carolina General Statutes, plaintiff was an employee of Goree. It further found that Goree had no workers' compensation insurance. Because Goree did not regularly employ three or more employees, the Commission did not assess penalties pursuant to N.C. Gen. Stat. § 97-94. Based upon its findings of fact, the Commission concluded that Owen Thomas was a "principal contractor within the meaning of N.C. Gen. Stat. § 97-19.1(a)" and ordered that Owen Thomas pay to plaintiff temporary total disability compensation, all of plaintiff's medical expenses arising from his injury by accident, and the costs of the hearing.

On 23 April 2014, the Attorney General filed a motion for reconsideration, asserting that under the provisions of N.C. Gen. Stat. § 97-19.1(a), a "contractor, intermediate contractor, or subcontractor" contracting in the interstate or intrastate carrier industry and operating a tractor trailer licensed by the United States Department of Transportation is required to carry workers' compensation insurance, "irrespective of whether such contractor regularly employs three or more employees[.]" N.C. Gen. Stat. § 97-19(a) (2013). Therefore, it was argued that Goree and its principal, Mandieme Diouf (Diouf), were subject to penalties under § 97-94 for failure to procure workers' compensation insurance.

On 20 June 2014, the Industrial Commission filed an Amended Opinion and Award, assessing penalties of $8,800 against Goree, and $78,868.63 against Goree's principal, Diouf.

On 3 July 2014, Owen Thomas served notice of appeal from the Amended Opinion and Award. On 23 July 2014, Goree and Diouf served notice of appeal from the Amended Opinion and Award.

II. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). However, the Commission's "findings of jurisdictional facts are not conclusive on appeal even if they are supported by competent evidence;" instead, "a reviewing court must consider all the evidence in the record and make an independent determination of the jurisdictional facts." *Cain v. Guyton*, 79 N.C. App. 696, 698, 340 S.E.2d 501, 503, *aff'd per curiam*, 318 N.C. 410, 348 S.E.2d 595 (1986).

III. Appeal of Owen Thomas – Jurisdiction

[1] In its sole argument on appeal, Owen Thomas contends that the Industrial Commission lacked jurisdiction over it. We disagree.

A. N.C. Gen. Stat. § 97-19.1

In its findings of fact, the Commission recognized that Owen Thomas "is a federally licensed 'freight broker' authorized by its customers to negotiate and arrange for the transportation of shipments in interstate commerce." The Commission concluded that plaintiff was an employee of Goree. The Commission then further concluded that "the use of the word 'broker' is a distinction without a difference." It noted that Owen Thomas was able to use its own judgment in selecting a carrier for its client, and that it retained a portion of what it received for the contract. It therefore concluded that Owen Thomas was a principal contractor. Because Owen Thomas was a principal contractor, and because Goree did not carry workers' compensation insurance, the trial court held Owen Thomas liable to plaintiff pursuant to N.C. Gen. Stat. § 97-19.1.

N.C. Gen. Stat. § 97-19.1 provides, in relevant part:

> Any principal contractor, intermediate contractor, or subcontractor, irrespective of whether such contractor regularly employs three or more employees, who contracts with an individual in the interstate or intrastate carrier industry who operates a truck, tractor, or truck tractor trailer licensed by the United States Department of

> Transportation and who has not secured the payment of compensation in the manner provided for employers set forth in G.S. 97-93 for himself personally and for his employees and subcontractors, if any, shall be liable as an employer under this Article for the payment of compensation and other benefits on account of the injury or death of the independent contractor and his employees or subcontractors due to an accident arising out of and in the course of the performance of the work covered by such contract.

N.C. Gen. Stat. § 97-19.1(a) (2013). In order for Owen Thomas to be liable under this statute, it must be shown that (1) Owen Thomas was a principal contractor, and (2) the subcontractor did not have the proper insurance. In the instant case, there is no factual dispute that Goree did not have the required workers' compensation insurance coverage. The only question, then, is whether the Commission correctly found and held that Owen Thomas was a principal contractor.

Owen Thomas contracted with Sunny Ridge to ship its goods. Owen Thomas was to be paid by Sunny Ridge for this service and would retain any monies not paid to the trucking company it hired. It had discretion in selecting a carrier. Owen Thomas provided 1099 tax forms to Goree. Owen Thomas controlled not only the outcome of the task, namely the delivery of goods, but the method by which the task would be performed, including how frequently Goree would report to Owen Thomas, and specifications on the temperature that would be maintained during transport. Sunny Ridge paid Owen Thomas "for insuring a delivery[.]"

Sunny Ridge paid Owen Thomas to deliver its goods. Owen Thomas then hired Goree to perform the delivery. Owen Thomas provided Goree with 1099 tax forms for the money paid by Owen Thomas.

We hold that this evidence supports the Industrial Commission's determination that Owen Thomas acted as a contractor hired by Sunny Ridge for the purpose of ensuring delivery of Sunny Ridge's goods. This in turn supports a finding that Owen Thomas employed Goree, a subcontractor without workers' compensation insurance coverage, and is therefore liable to plaintiff under N.C. Gen. Stat. § 97-19.1.

This argument is without merit.

B. Federal Preemption

[2] Owen Thomas contends that it is exempt from N.C. Gen. Stat. § 97-19.1 due to federal preemption, and that federal law precludes states from regulating interstate commerce. Owen Thomas notes that

an exception to this rule exists in 49 U.S.C. § 14501(c), but contends that the statute creates an exception only for motor carriers.

49 U.S.C. § 14501(c)(1) provides that:

> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price*, *route*, *or service* of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (2005) (emphasis added). An exception exists to this statute, which notes that this rule

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to *minimum amounts of financial responsibility relating to insurance requirements* and self-insurance authorization[.]

49 U.S.C. § 14501(c)(2)(A) (emphasis added).

We note that Owen Thomas does not contend that North Carolina's workers' compensation insurance requirements constitute a "law related to a price, route, or service of any motor carrier." We see no reason why a statute requiring financial responsibility as to workers' compensation should be considered a regulation of prices, routes, or services. We further note that the exception enumerated in 49 U.S.C. § 14501(c)(2)(A) explicitly holds that the rule in § 14501(c)(1) does not apply to insurance requirements. We hold that the federal preemption established in 49 U.S.C. § 14501(c)(1) does not apply to N.C. Gen. Stat. § 97-19.1, which imposes liability upon those who employ persons or entities that fail to procure required workers' compensation insurance.

Owen Thomas contends nonetheless that the exception in 49 U.S.C. § 14501(c)(2)(A) does not apply, because while § 14501(c)(1) contains language including motor carriers and brokers, § 14501(c)(2)(A) contains language including only motor carriers. Owen Thomas contends that the exception does not apply to brokers.

In the instant case, however, Owen Thomas went beyond its role as broker and acted as a contractor. As stated in section III-A of this opinion, Owen Thomas was hired to insure shipment of Sunny Ridge's goods. Owen Thomas then employed Goree to perform its obligation. At this point, Owen Thomas was not a broker, but a general contractor who had contracted with a motor carrier. Owen Thomas was, in effect, a motor carrier, despite the fact that the company itself owned no vehicles. Even assuming *arguendo* that § 14501(c)(2)(A) did not create an exception for brokers, Owen Thomas was not acting as a broker at the time it did business with Goree, and therefore was subject to the exception, which allowed N.C. Gen. Stat. § 97-19.1 to apply.

This argument is without merit.

IV. Appeal of Goree and Diouf – Penalties

[3] In their sole argument on appeal, Goree and Diouf contend that the Full Commission erred in imposing penalties upon Goree and Diouf for failure to procure workers' compensation insurance. We disagree.

In its original Opinion and Award dated 20 April 2014, the Full Commission did not hold Goree or Diouf liable for statutory penalties pursuant to N.C. Gen. Stat. § 97-94, because Goree was not shown to regularly employ three or more employees. Thereafter, the Attorney General filed a motion for reconsideration. In its Amended Opinion and Award, the Full Commission imposed penalties against Goree and Diouf pursuant to N.C. Gen. Stat. § 97-94. On appeal, Goree and Diouf do not dispute the Commission's finding that plaintiff was an employee and not an independent contractor; rather, they contend that they are exempt from N.C. Gen. Stat. § 97-19.1, because they do not regularly employ three or more people, and because they are not a "principal contractor, intermediate contractor, or subcontractor[.]"

The Purpose of the Workers' Compensation Act "is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Riley v. DeBaer*, 149 N.C. App. 520, 523, 562 S.E.2d 69, 70 *aff'd per curiam*, 356 N.C. 426, 571 S.E.2d 587 (2002) (quoting *Johnson v. First Union Corp.*, 131 N.C. App. 142, 144, 504 S.E.2d 808, 809-10 (1998)). The argument presented by Goree and Diouf, that they are exempt from liability because the statute mentions contractors and subcontractors, but not employers, is specious. N.C. Gen. Stat. § 97-11 specifically provides that "[n]othing in this Article shall be construed to relieve any employer or employee from penalty for failure or neglect to perform any statutory duty." N.C. Gen. Stat. § 97-11 (2013). We decline to construe the provisions of

N.C. Gen. Stat. § 97-19.1 to relieve an employer and its principal from penalties for failure to perform the statutory duty of providing workers' compensation insurance for its workers.

We further note that, in the context of interstate or intrastate trucking, § 97-19.1 applies "irrespective of whether such contractor regularly employs three or more employees[.]" N.C. Gen. Stat. § 97-19.1. Goree and Diouf's contentions that they employ fewer than three employees is thus irrelevant; the provisions of § 97-19.1 apply. We hold that the Commission did not err in imposing penalties upon Goree and Diouf for failure to carry workers' compensation coverage.

This argument is without merit.

AFFIRMED.

Judges DIETZ and INMAN concur.

BROWN'S BUILDERS SUPPLY, INC., PLAINTIFF
v.
JOHN SCOTT JOHNSON AND ANGELA R. JOHNSON, JOINTLY AND SEVERALLY, DEFENDANTS

No. COA14-836

Filed 17 March 2015

1. Construction Claims—general contractor licensure—control over project and subcontractors

In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals rejected defendants' argument that plaintiff's failure to hold a general contractor's license barred recovery. Plaintiff's work on defendants' kitchen remodel project was limited to selling and installing some hardware. Because plaintiff did not exercise control over defendants' project or other subcontractors, plaintiff was not subject to the licensure requirement for general contractors.

2. Attorney Fees—findings of fact—unjustifiable refusal to resolve out of court

In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals rejected defendants' argument that the trial court abused its discretion by

awarding attorney fees without first finding that defendants unjustifiably refused to resolve the matter out of court. The trial court's order contained such a finding.

3. Attorney Fees—findings of fact—skill, rate, and experience

In an appeal from a judgment awarding plaintiff subcontractor damages and attorney fees, the Court of Appeals reversed and remanded the portion of the trial court's judgment awarding attorney fees. The trial court's order failed to include the necessary findings of fact regarding the skill required for the services rendered, the customary rate for such work in the area, and the experience or ability of plaintiff's attorney.

Appeal by Defendants from judgment entered 13 December 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 3 December 2014.

Vann Attorneys, PLLC, by Joseph A. Davies and James R. Vann, for the Plaintiff-Appellee.

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for the Defendant-Appellants.

DILLON, Judge.

John S. Johnson and his wife, Angela R. Johnson ("Defendants"), appeal from a judgment awarding Brown's Builders Supply ("Plaintiff") damages and attorneys' fees. We affirm in part and reverse and remand in part.

I. Background

The evidence at trial tended to show the following: Defendants engaged Jimmy Allen as a general contractor to remodel their home. Mr. Allen contacted Plaintiff to perform certain work involved in the remodel of the kitchen area of the home. To save on the expense of management, Defendants retained Mr. Allen at an hourly rate and paid individual subcontractors on the project directly, including Plaintiff.

Plaintiff supplied Defendants with a wooden hood to sit atop their stove and installed it for them. Defendants discovered that the wooden hood had been seriously damaged sometime after its installation and requested that Plaintiff install a new one, free of charge. Plaintiff refused, contending that it was not responsible for damages caused either

by other subcontractors or by environmental conditions such as heat and humidity.

Plaintiff thereafter demanded payment and threatened to sue for the amount due and outstanding on Defendants' account, notifying Defendants of its intention to seek costs, interest, and attorneys' fees if timely payment was not received. Plaintiff also claimed a lien on Defendants' real property to secure payment.

Plaintiff filed suit in Durham County Superior Court when payment was not forthcoming, seeking damages for breach of contract or recovery in *quantum meruit* in the alternative. The matter came on for trial before Superior Court Judge Paul C. Ridgeway on 21 August 2013.

Following a two-day bench trial, the court entered judgment in favor of Plaintiff, awarding Plaintiff damages of $17,737.66 plus interest at the legal rate from 9 May 2012 until paid in full for breach of contract, attorneys' fees of $5,912.55, and costs of $2,986.80. Defendants entered written notice of appeal.

II. Analysis

Defendants make two arguments on appeal, which we address in turn.

A. General Contractor Licensure Requirement

[1] Defendants first contend that the trial court erred in entering judgment in favor of Plaintiff because the price of Defendants' contract with Plaintiff exceeded $30,000.00 and Plaintiff was not a licensed general contractor. Specifically, Defendants contend that Plaintiff's failure to hold a valid general contractor's license absolutely bars Plaintiff's recovery. We disagree.

N.C. Gen. Stat. § 87-1 (2011) defines "general contractor," in relevant part, as "[a] firm or corporation who . . . undertakes to . . . construct . . . any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more[.]' " Unlike subcontractors, general contractors must be licensed. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131-32, 177 S.E.2d 273, 281 (1970). The purpose of the licensure requirement "is to protect the public from incompetent builders." *Id.* at 130, 177 S.E.2d at 280. Accordingly, unlicensed general contractors are prohibited from recovering in contract or *quantum meruit*. *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 785, 336 S.E.2d 108, 110 (1985).

What distinguishes a general contractor from a subcontractor is "the degree of control to be exercised by the contractor over the construction of the *entire project*." *Harrell v. Clarke*, 72 N.C. App. 516, 517, 325 S.E.2d 33, 35 (1985) (emphasis added). When the written agreement setting forth the terms of the parties' relationship is in the record, we review its terms "to determine the degree of control exercised[.]" *Signature Development, LLC v. Sandler Commercial at Union, L.L.C.*, 207 N.C. App. 576, 584-90, 701 S.E.2d 300, 306-10 (2010). Without the benefit of the parties' agreement in the record, we review the evidence at trial to determine whether a particular contractor exercised the requisite control to be considered a general contractor, thus becoming subject to the licensure requirement and corresponding prohibitions on recovery. *Spears v. Walker*, 75 N.C. App. 169, 171-72, 330 S.E.2d 38, 40 (1985).

In the present case, we do not believe the scant written evidence suggests that Plaintiff exercised more than minimal control over the remodel project. Defendants' written agreement with Mr. Allen is not in the record. Evincing the terms of an agreement between Plaintiff and Defendants is a recital on one invoice and three sales orders, which states as follows:

> All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra cost will be executed upon written orders and billed as an additional cost. All agreements are contingent upon strikes, accidents, acts of God, or delays beyond our control. Purchaser to carry all necessary property or casualty insurance for the jobsite.

The invoice and sales orders also list the materials supplied to Defendants and the prices of those materials, briefly describing them.

Nor do we believe the other evidence indicated that Plaintiff exercised more than minimal control over the project. Instead, it tended to show that Plaintiff's involvement in the remodel of Defendants' home was limited to the sale and installation of kitchen cabinets, several countertops, a wooden hood to sit atop Defendants' stove, and a sink. Plaintiff did not oversee, direct, or manage the work of the other subcontractors. Instead, the evidence indicated that it was Mr. Allen who oversaw the construction, ordered various building materials, and coordinated the work of the various subcontractors, including Plaintiff.

Based on this evidence, we believe the degree of control exercised by Plaintiff was minimal and concerned only certain aspects of the

kitchen, not the *entire project*. Plaintiff was, therefore, not subject to the licensure requirement applicable to general contractors, nor the corresponding bars on recovery. Accordingly, Defendants' first argument is overruled.

B. Attorneys' Fees

[2] Defendants next challenge the trial court's award of attorneys' fees. First, Defendants contend that the court abused its discretion in awarding attorneys' fees without first finding, as required, that Defendants unjustifiably refused to resolve the matter out of court. We disagree.

We review an award of attorneys' fees for an abuse of discretion. *Terry's Floor Fashions, Inc. v. Crown General Contract'rs, Inc.*, 184 N.C. App. 1, 17, 645 S.E.2d 810, 820 (2007), *aff'd per curiam*, 362 N.C. 669, 669 S.E.2d 321 (2008).

N.C. Gen. Stat. § 44A-35 (2013) provides:

> [T]he presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit[.]

"The statute does not mandate that the trial court award attorneys' fees, but instead places the award within the trial court's discretion." *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co., Inc.*, 129 N.C. App. 525, 530, 500 S.E.2d 108, 112 (1998).

Defendants' contention that the trial court abused its discretion in awarding attorneys' fees without finding that Defendants unjustifiably refused to resolve the matter out of court mischaracterizes the court's judgment. Specifically, the trial court found that there was "an outstanding balance due and owing to the Plaintiff from the Defendants"; that Plaintiff "caused a demand letter to be sent to the Defendants, which included notice . . . that the Plaintiff would seek to recover attorneys' fees"; that "Plaintiff filed a claim of lien on Defendants' real property"; that "Plaintiff filed this action to enforce its lien rights"; and finally, that "Defendants' *refusal to resolve the lien [was] unreasonable*." (Emphasis added.) Not only did the court specifically find that there was "an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit," as statutorily required, *see* N.C. Gen. Stat. § 44A-35, "[t]hese findings of fact indicate, on their face, that the trial court's award of attorneys fees was the product of a reasoned

decision[.]" *Terry's Floor Fashions, Inc.*, 184 N.C. App. at 18, 645 S.E.2d at 821. Accordingly, Defendants' first contention regarding the award of attorneys' fees is overruled.

[3] Defendants next contend that the trial court's award of attorneys' fees must be reversed because the record does not contain the findings required to support the award. We agree.

"As a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs. . . . [However,] [b]y allowing the recovery of attorneys' fees, N.C. Gen. Stat. § 44A–35 creates an exception to the general rule that attorneys' fees are not recoverable." *Martin & Loftis Clearing & Grading, Inc. v. Saieed Const. Systems Corp.*, 168 N.C. App. 542, 546, 608 S.E.2d 124, 127 (2005).

In an opinion affirmed *per curiam* by our Supreme Court, we held that an award of attorneys' fees is only appropriate where the trial court makes "findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney."[1] *N.C. Dep't of Corr. v. Myers*, 120 N.C. App. 437, 442, 462 S.E.2d 824, 828 (1995) (internal marks omitted), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Where a statute authorizes the award of only reasonable fees, these findings are necessary to support the reasonableness of the award. *Cobb v. Cobb*, 79 N.C. App. 592, 595-96, 339 S.E.2d 825, 828 (1986). Without these findings, the reviewing court is "effectively preclude[d] . . . from determining whether the trial court abused its discretion[.]" *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000).

In the present case, the trial court found as follows:

> The Plaintiff'[s] attorney has expended 96.30 hours in pursuit of this matter, as well as 33.40 hours of paralegal time. Costs and expenses incurred by the Plaintiff were

1. In 1992, our Supreme Court seemingly approved an award of attorneys' fees that apparently did not include express findings concerning the attorney's skill and ability or the customary rate for similar work. *Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992). However, *Dyer* predates our Supreme Court's approval of our opinion in *Myers* by four years. Since *Myers*, this Court has required the trial court to make such or similar findings for virtually every type of attorneys' fee award. *See, e.g.*, *Simpson v. Simpson*, 209 N.C. App. 320, 324, 703 S.E.2d 890, 893 (2011) (award under N.C. Gen. Stat. § 50-13.6); *Dunn v. Canoy*, 180 N.C. App. 30, 49, 636 S.E.2d 243, 255 (2006) (award as a Rule 11 sanction); *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000) (award under N.C. Gen. Stat. § 6-21.1); *Brockwood Unit Ownership Ass'n v. Delon*, 124 N.C. App. 446, 449-50, 477 S.E.2d 225, 227 (1996) (award under N.C. Gen. Stat. § 47C-4-117).

> $2,986.80. The Court finds that reasonable attorney's fees in this matter are one-third of the amount recovered, namely $5,912.55, and that Plaintiff should also be entitled to recover costs of this action in the amount of $2,986.80.

While the affidavit for attorneys' fees and client ledger included in the record on appeal support this finding by the trial court, the court's finding omits any mention of (1) the skill required to provide the services rendered; (2) a customary rate for similar work in the area; or (3) the experience or ability of Plaintiff's attorney. Although our review of the record reveals evidence in support of these facts, the order itself does not contain these findings, as required. *See Myers*, 120 N.C. App. at 442, 462 S.E.2d at 828. Accordingly, we must reverse and remand for further findings. On remand, the trial court may but is not required to award attorneys' fees provided it determines that the evidence in support of the necessary findings is competent and the court makes those findings, as required.[2]

III. Conclusion

For the reasons stated herein, we affirm the portion of the trial court's judgment awarding Plaintiff damages and reverse and remand the portion awarding Plaintiff attorneys' fees, with instructions to the trial court to conduct further proceedings consistent with this opinion.

AFFIRMED in part and REVERSED AND REMANDED in part.

Judges BRYANT and DIETZ concur.

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2. Relying on an affidavit from an officer of the court is appropriate in these circumstances. *See Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992) (upholding award of attorneys' fees based on statements by attorney as to "the amount of time he devoted to the case").

HARNETT COUNTY OBO CHELLE B. DE LA ROSA, PLAINTIFFS
v.
PATRICIO A. DE LA ROSA, DEFENDANT

No. COA14-775

Filed 17 March 2015

1. Appeal and Error—child support order—not certificate of service

The Court of Appeals had jurisdiction to consider the father's appeal in an action for child support and equitable distribution. No certificate of service for the child support order was filed, and therefore father's time for appeal was tolled.

2. Child Custody and Support—child support order—treated as permanent

A 2011 order was a permanent order for child support because, although it was entered without prejudice, no review hearing was set and all of the parties and the trial court treated the order as permanent. Because it was a permanent child support order, the burden of proof to show a substantial change in circumstances would be on the father for his motion to modify the order and on the County on the motion to show arrears.

3. Child Custody and Support—imputed income to father—increased debt—lack of effort to earn

The trial court did not abuse its discretion by finding that a father showed a deliberate disregard of his responsibility to support his children, given his increased debt and lack of effort recently to earn an income. The trial court's "deliberate disregard" finding of fact supported the trial court's determination to impute income.

4. Child Custody and Support—imputed income—father's expenses—paid by his parents

The trial court abused its discretion in the manner in which it imputed income to the father in a child support action by relying solely upon the father's parents' expenditures for the father's living expenses to impute income. While in some cases monthly expenditures may be a reasonable way to assist the trial court in determining an imputed income amount, in this case, father was not paying those expenses.

5. Child Custody and Support—arrears—determination of amount—not based on evidence

The trial court's determination of the amount of child support arrears and a payment schedule were reversed where the findings of fact regarding arrears were not based upon any evidence and the appellate court could not determine how the arrears were calculated or from what date the trial court made a child support modification effective.

Appeal by defendant from order entered 28 February 2014 by Judge Mary H. Wells in District Court, Harnett County. Heard in the Court of Appeals 18 November 2014.

No plaintiff-appellee brief filed.

Elizabeth Myrick Boone, for defendant-appellant.

STROUD, Judge.

Patricio De la Rosa appeals order awarding child support arrears to mother Chelle De la Rosa. For the following reasons, we reverse.

I. Background

On 13 December 2011, father Patricio De la Rosa ("Father") filed a complaint for custody and child support, divorce from bed and board, and equitable distribution. On 13 April 2011, mother Chelle De la Rosa ("Mother") answered the complaint and counterclaimed for custody and child support, divorce from bed and board, equitable distribution, and alimony and post-separation support. On 26 September 2011, the trial court entered an order granting the parties "joint legal custody with [Mother] having primary physical custody and [Father] having secondary custody in the form of visitation" and requiring Father to pay Mother

> $1,878.00 per month as temporary child support beginning August 1, 2011, and [Father] shall establish an allotment or other direct pay to ensure this payment is made. Once begun, he shall take no steps to modify it without a court order. In the event the employment status of either party changes, either party may motion the court to modify the same.

The 2011 order also provided that "[t]his is a temporary, non-prejudicial order that does not preclude either party from presenting any evidence

they now could, or hereinafter acquire at any further hearings in this matter."

- On 31 August 2012, Father filed a motion to modify child support, which was still $1,878.00 per month. In his motion Father alleged "a substantial change of material circumstances affecting the welfare of the minor children[,]" including his discharge from the United States Army on 19 June 2012, his subsequent lack of employment, and his travel expenses to visit the children. Mother filed no response to Father's motion, but on 23 October 2012, Harnett County Child Support Services ("Harnett County") filed a motion to intervene as defendant in this case, a motion to redirect child support payments to the North Carolina Child Support Centralized Collections, a motion to sever the issue of child support from the other issues in the case, and a motion to establish arrears and set up a payment plan for the arrears.

On 13 March 2013, the trial court entered an "ORDER TO INTERVENE AND REDIRECT PAYMENTS" which granted all of Harnett County's motions and also addressed Father's motion to modify child support.[1] As to the motion to modify, the trial court found:

> There has been a change of circumstances since the entry of the Order referred to above which materially affects the welfare of the minor children to wit: [Father] is currently unemployed having been discharged from the US Army without benefits and his motion to modify should be allowed.

The trial court ordered Father to pay $222 a month in child support beginning that month as "a temporary, non[-]prejudicial amount" and stated that retroactive child support would be determined "at a later date.[2] [H]owever[,] it is admitted that there is an arrearage amount and

1. While Father was initially the plaintiff in this action, upon the entry of the 2013 order and thereafter, he is listed as the defendant. The plaintiff from the 2013 order and thereafter is Harnett County on behalf of Chelle De la Rosa.

2. The 2013 order appears to be signed at the bottom by plaintiff, defendant, and defendant's attorney, indicating it was entered by consent. An employee for Harnett County also testified at the later 23 September 2013 review hearing that the amount of $222.00 per month in child support was entered into by consent.

that the [Father] shall begin payments on this amount, the amount total to be determined" but that payment should currently be "100.00 per month, until paid in full." The trial court then set a review hearing for 24 June 2013 and decreed that "[t]his is a temporary, non-prejudicial order[.]"

On 23 September 2013, the trial court held a review hearing. At the beginning of the hearing, Harnett County's attorney noted that there were issues of "ongoing support and that of arrears." On 28 February 2014, the trial court entered an order finding:

> 1. This is an action on . . . [Harnett County]'s Motion to Add Pay Frequency on Arrears.
>
> 2. There is an ongoing support order requiring [Father] to pay $222.00 per month for child support.
>
> 3. [Mother] and [Father] are physically and mentally capable of earning an income.
>
> 4. [Mother] is voluntarily unemployed.
>
> 5. [Mother] was voluntarily unemployed during the summer of 2013.
>
> 6. [Father]'s last known employment was as a Major in the U.S. Military where he earned approximately $6000.00 per month.
>
> 7. [Father] has not served in the U.S. military since June 19, 2012.
>
> 8. No evidence or testimony regarding [Father]'s separation from the military was presented.
>
> 9. [Father] secured a $250,000.00 line of credit to purchase an ice cream franchise during the summer of 2013.
>
> 10. [Father] has used $30,000.00 from the line of credit to purchase the ice cream franchise.
>
> 11. [Father] failed to provide any documentation detailing the terms of the line of credit; amounts withdrawn; or balance remaining under [Father]'s control.
>
> 12. [Father] failed to provide any documentation detailing his business plan for the ice cream franchise.
>
> 13. [Father] failed to provide suitable documentation of past or current income.

14. [Father] failed to provide his most recent tax return.

15. The ice cream franchise is not open. [Father] is not earning an income from the franchise as of this date.

16. [Father] did not consider his ability to meet his child support obligation when he chose to increase his debt by securing the $250,000.00 line of credit.

17. [Father] [has] shown no intention of obtaining gainful employment pending the anticipated income from the ice cream franchise, even though he will be unable to support himself or his children in his current situation.

18. [Father]'s minimal monthly income expenses are:

rent -	$ 1200.00
lights/utilities	$ 120.00
internet	$ 50.00
motorcycle	$ 236.00
water -	$ 80.00
cell phone	$ 50.00
cable	$ 50.00
Ford Expedition	$ 600.00

19. [Father]'s disposable income is unknown.

20. [Father]'s actions to substantially increase his debt and his failure to show any attempt to immediately earn an income is willful and shows a deliberate disregard of his responsibility to support his children.

21. [Father]'s probable earning level equals the amount of [sic] which he is actually living, based on the amount [Father] spends monthly on expenses.

22. [Father]'s child support obligation is to be calculated pursuant to the North Carolina Child Support Guidelines with [Father] earning $2,436.00 per month.

23. That pursuant to the North Carolina Guidelines, [Father']s child support obligation is $774.00 per month.

24. That [Father] did not make child support payments to [Mother] from July, 2012 through December, 2012.

25. That for the months of January and February, 2013, [Father] did not make payments.

> 26. That from March until February, 2014, [Father] paid support to [Mother] in the sum of $222.00 per month.
>
> 27. That the parties previously agreed in the order dated 3/11, 2013, that the issue of arrears would be addressed[.]
>
> 2[8]. [Father] has the ability to comply with the orders of this court.

The trial court then ordered:

> 1. Arrears as of the date of February, 2014, are 7,728.00 owed to the [Mother]. The [Father] failed to make any payments for six months in 2012.
>
> 2. The [Father] shall pay $77.00 towards the arrears beginning 3/1, 2013.
>
> 3. This cause is retained for further orders of this court.

Father appeals the 2014 order.

II. Jurisdiction to Consider Appeal

[1] Father's notice of appeal states, "The [Father] was never served with a copy of this order and no Certificate of Service is attached to this order." The record includes a certificate of service both for Father's notice of appeal and the proposed record, and this verifies that Harnett County was made aware of Father's assertion regarding a lack of service. Neither Harnett County nor Mother sought to amend or add to the record on appeal nor have they in any way challenged Father's proposed record, so it now serves as the record on appeal. *See* N.C.R. App. P. 11(b) ("If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.") Based upon the record, no certificate of service for the order was filed, and therefore Father's time for appeal was tolled. *See Rice v. Coholan*, 205 N.C. App. 103, 110-11, 695 S.E.2d 484, 489-90 (2010) ("Because there was no certificate of service filed, the time for filing the notice of appeal was tolled. Thus, Father's notice of appeal filed in Mecklenburg County on 17 September 2008 was timely. Our Court, therefore, has jurisdiction to hear this appeal.") Accordingly, we have jurisdiction to consider Father's appeal.

II. Standard of Review

> Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. In a case for child support, the trial court must make specific findings and conclusions. The purpose of this requirement is to allow a reviewing court to determine from the record whether a judgment, and the legal conclusions which underlie it, represent a correct application of the law.

Loosvelt v. Brown, ___ N.C. App. ___, ___, 760 S.E.2d 351, 354-55 (2014) (citation and brackets omitted).

III. Findings of Fact

[2] Father challenges over half of the findings of fact on appeal. Rather than addressing each challenged finding of fact separately we will consider the contested findings of fact within each of the other arguments raised by Father. Before we can consider the findings of fact, we must first determine exactly what issues were before the trial court and what issues the order addressed. Despite the fact that Father called his 31 August 2012 motion a "MOTION TO MODIFY CHILD SUPPORT" and alleged a substantial change of circumstances, the prior 2011 order, purported to be temporary and non-prejudicial and as such Father would not need to demonstrate a substantial change of circumstances in order to modify the 2011 order. *See LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) ("If a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." (citation and footnote omitted)).

However, in *LaValley*, this Court clarified:

> In this case, the Order was entered without prejudice to either party. It did not set any date for a court hearing on the custody issue, and the matter was not set before the trial court until almost two years later when

> the Motion was filed. The inclusion of the language without prejudice is sufficient to support a determination the Order was temporary. It was, however, converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time after the entry of the Order.
>
> Accordingly, the trial court, in determining the issue of custody, was required to review the Motion under a substantial change of circumstances test.

151 N.C. App. at 292-93, 564 S.E.2d at 915 (quotation marks, brackets, and footnotes omitted). Though *LaValley* was addressing child custody, we find its logic instructive. *See id.*

Here, as in *LaValley*, although the 2011 order was entered without prejudice it did not set a future hearing date to determine permanent child support. *See id.* at 293, 564 S.E.2d at 915. While in *LaValley* "almost two years" went by before a motion was filed regarding child support, *id.*, here, Father filed his motion within approximately eleven months of the entry of the 2011 order. Our Court pointed out in *LaValley*, "[w]hether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis. In this case, we simply hold that twenty-three months is not reasonable." *Id.* at 293 n.6, 564 S.E.2d at 915 n.6. In this case, although not even a year had passed, Father himself treated the temporary 2011 order as a permanent order by filing a motion alleging "a substantial change of circumstances" and requesting modification of child support based upon these circumstances. Thereafter, in its 2013 consent order, the parties and trial court also treated the 2011 order as a permanent order by stating that Father's "motion to modify should be allowed" because "[t]here has been a substantial change of circumstances[;]" this standard is required to modify permanent, not temporary, support orders. *See id.* at 292, 564 S.E.2d at 915. No party suggested at the hearing that the prior orders were temporary and non-prejudicial nor has Father argued before this Court that the trial court should have considered his motion as an initial determination of permanent child support. Thus, in considering this on a "case-by-case basis[,]" *id.* at 293 n.6, 564 S.E.2d at 915 n.6, here, as no review hearing was set in the 2011 order and all of the parties and the trial court treated the 2011 order as a permanent order for child support, we conclude that the 2011 order was indeed a permanent child support order, so the burden of proof to show a substantial change in circumstances would be on Father for his motion to modify a permanent

child support order. *See id.* at 292, 564 S.E.2d at 915; *see generally Banks v. Shepard*, 230 N.C. 86, 91, 52 S.E.2d 215, 218 (1949) ("Burden of proof means the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause." (citation and quotation marks omitted)).

Our Courts have recognized that child support modification is "a two-step process." *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995). "The court must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the Guidelines to calculate the applicable amount of support." *Id.* at 26-27, 453 S.E.2d at 536. The trial court took the first step, determination of a substantial change of circumstances, in the 2013 consent order. Accordingly, the only issues left for the trial court to determine in the 2014 order being appealed were the amount of the modification and arrears. As to the modification, the burden of proof was upon Father as the movant on the motion to modify, and as to the establishment of arrears, the burden of proof was upon Harnett County, as the movant on the motion to establish arrears. *See generally Banks*, 230 N.C. at 91, 52 S.E.2d at 218.

IV. Imputing Income

[3] Father contends that "the trial court erred in imputing income to . . . [him] and in calculating his child support obligation under the guidelines using this imputed income amount." Father argues that

> in order to impute income, the trial court must make findings of fact that the parent is voluntarily unemployed or underemployed and that such voluntarily [(sic)] unemployment or underemployment is the result of the parents bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation. No such findings were made in this action[.]

(Citation and quotation marks omitted.)

As a general rule, "a party's ability to pay child support is determined by that party's actual income at the time the award is made." *Respess v. Respess*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 704 (2014). But child support may be based upon earning capacity

> where the party deliberately acted in disregard of his obligation to provide support. Before earning capacity may be used as the basis of an award, there must be a showing that the actions reducing the party's income were taken

> in bad faith to avoid family responsibilities. This showing may be met by a sufficient degree of indifference to the needs of a parent's children.

Id. (citation, quotation marks, ellipses, and brackets omitted).

Before the trial court may impute income, it "must find a deliberate depression of income or other bad faith[.]" *Ludlam v. Miller*, ___ N.C. App. ___, ___, 739 S.E.2d 555, 560 (2013) (citations and quotation marks omitted). The Child Support Guidelines do not allow the trial court to choose "a method of imputing income based upon the degree of bad faith found by the trial court[;]" that is, the court may not impute a higher income based on a "higher degree of bad faith[.]" *Id.* If the trial court determines that a party has deliberately depressed income or otherwise acted in bad faith, it may then decide how to impute income, but the imputed income still must be based upon

> the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community. If the parent has no recent work history or vocational training, potential income should not be less than the minimum hourly wage for a 40–hour work week.

Id. (quoting N.C. Child Support Guidelines effective at the time of this case).

Here, the trial court found that "[Father]'s actions to substantially increase his debt and his failure to show any attempt to immediately earn an income is willful and shows a deliberate disregard of his responsibility to support his children." Father testified that he had opened a $250,000 line of credit and already used $30,000 of it to buy an ice cream franchise; thus, there was evidence that Father "substantially increase[d] his debt[.]" Furthermore, Father testified that his previous attempts to find employment had been unsuccessful and that he had stopped searching for employment, which is evidence of "willful[ness]" or voluntariness and a "failure to show any attempt to *immediately* earn an income[.]" (Emphasis added.) Although a full reading of the transcript might support a determination that Father was in the process of opening his ice cream franchise in a timely manner in order to earn income, we cannot say, given Father's increased debt and lack of effort recently to earn an income, that the trial court abused its discretion in finding that Father "show[ed] a deliberate disregard of his responsibility to support his children." The trial court's "deliberate disregard" finding of fact supports

the trial court's determination to impute income. *See id.* We now turn to the trial court's method of imputation of income to Father.

[4] Imputed income should be determined based upon "the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community[,]" *id.*, but here the trial court instead based it upon "the amount of [(sic)] which he is actually living, based on the amount Father spends monthly on expenses." The evidence showed that Father's parents were paying his living expenses. While in some cases monthly expenditures may be a reasonable way to assist the trial court in determining an imputed income amount, in this case, Father was not paying those expenses. Father's reliance upon his parents for his own support may be further evidence of his bad faith in failing to find employment, but it does not provide any information about *Father's* earning capacity. Father may have a much greater or lesser capacity to earn income than what his parents are willing or able to pay. In relying solely upon the Father's parents' expenditures for Father's living expenses to impute income, the trial court abused its discretion in the manner in which it imputed income to Father.

In some cases, we may remand a case to the trial court to make additional findings of fact based upon the evidence presented, but here, the lack of findings is due to the lack of evidence itself. Father has not worked since 2012, and therefore he has no "work history" within approximately the past two years. *Id.* There was no evidence of Father's "occupational qualifications[,]" *id.*, other than that he had served in the military. There was no evidence about how his military service may have prepared him for any type of work outside of the military since there was no mention of what type of work he actually did. The record is also devoid of evidence regarding Father's education, work history prior to his military service or "prevailing job opportunities and earning levels in the community[.]" *Id.* On remand, the trial court would have no reasonable basis upon which to determine an imputed income amount because there was no evidence of Father's "recent work history, occupational qualifications [or] prevailing job opportunities and earning levels in the community." *Id.* We therefore reverse the trial court's imputation of income and the amount of child support set based upon the trial court's imputation of income.

V. Child Support Arrears

[5] Father next contends that "the trial court erred in awarding retroactive child support arrears in that such award is not supported by the

evidence, findings of fact or conclusions of law." The record and the full transcript of the hearing shows that there was no evidence presented to the trial court regarding arrears. One attorney made an introductory statement to the trial court mentioning arrears in a general sense but no evidence was presented regarding any payments Father had made or how much child support would have been owed.[3] We cannot determine how the arrears were calculated or from what date the trial court made the child support modification effective. Since the 2011 order had become a permanent order, Father filed his motion for modification on 31 August 2012, and the 2013 consent order determined that he was entitled to modification without determining the amount of ongoing support or arrears, it appears that the modification probably extended as far back as 1 September 2012, but neither the record, transcript, or brief sheds any light on the actual time period of the arrearage calculation. The findings of fact regarding arrears are not based upon any evidence and are therefore erroneous; thus, the trial court's determination of the arrears amount and payment schedule must be reversed.[4]

VI. Conclusion

For the foregoing reasons, we reverse the order of the trial court.

REVERSED.

Judges CALABRIA and McCULLOUGH concur.

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3. We realize that the 2013 consent order stated that the amount of arrears were to be determined at a later date, so there had likely been some discussion among the parties and trial court about amounts paid and perhaps some documentation of child support payments. But our record does not include any evidence regarding either parent's financial state, and if this information was known to the trial court, it was not mentioned or presented as evidence during the hearing by either testimony or documentary exhibit.

4. An additional problem is that the trial court determined that defendant's "child support obligation is $774.00 per month[,]" but the trial court did not *decree* that defendant pay any ongoing child support nor did the trial court set a date for payment of monthly child support. The decretal portion of the 2014 order states only that the arrears as of February 2014 were $7,728.00 and that defendant "shall pay $77.00 towards the arrears beginning 3/1, 2013." Thus, the 2014 order by its decree neither requires any payment of ongoing monthly child support nor monthly payments toward arrears. As we must reverse, we note these additional errors so that any future orders entered in this action may set out in detail an ongoing child support payment schedule and a payment schedule for the arrears.

HEBENSTREIT v. HEBENSTREIT

[240 N.C. App. 27 (2015)]

JORDAN HEBENSTREIT, PLAINTIFF
v.
RACHEL HEBENSTREIT, DEFENDANT

No. COA14-1025

Filed 17 March 2015

Contempt—first motion—involuntary dismissal—second motion—new issues

The trial court erred by ruling that plaintiff's second motion for contempt was not properly before the court after a first that had been dismissed. The second motion raised issues not raised in the first.

Appeal by plaintiff from order entered 20 May 2014 by Judge Louis F. Foy, Jr. in Onslow County District Court. Heard in the Court of Appeals 3 February 2015.

Ferrier Law, P.L.L.C., by Kimberly M. Ferrier, for plaintiff.

Lana S. Warlick, for defendant.

TYSON, Judge.

Plaintiff appeals from the trial court's order, which ruled his motion for contempt had previously been adjudicated, was not properly before the court, and which dismissed his motion. We reverse and remand.

I. Background

The parties were married in 2010 and separated in July of 2012. One child was born of the marriage. On 14 August 2013, the district court granted plaintiff an absolute divorce from defendant. With consent of the parties, the court also awarded the parties joint legal custody of the minor child. Defendant-mother was awarded primary physical custody. Plaintiff-father was awarded secondary physical custody and liberal visitation privileges.

The custody order sets forth plaintiff's visitation schedule with the child. The court awarded plaintiff visitation every other weekend, and recited a schedule for visitation on holidays. On 9 September 2013, less than a month after entry of the custody order, plaintiff filed a motion for contempt. Plaintiff alleged defendant absconded with the child to

Texas without plaintiff's permission, remained there for six weeks, and refused to return the child to North Carolina. Plaintiff also sought modification of the 14 August 2013 custody order to award primary custody of the child to him.

Plaintiff's attorney calendared the motion for contempt. The case appeared on the district court calendar on 30 September 2013, before the Honorable Anne B. Salisbury. When the matter was called for hearing, neither plaintiff nor plaintiff's attorney were present. Defendant's attorney, Lana S. Warlick, Esq., appeared on behalf of defendant. The record shows Ms. Warlick filed a notice of appearance on 1 July 2013 and represented defendant at the custody hearing.

Plaintiff's counsel represented to the court that she contacted Ms. Warlick's office when she filed the motion for contempt and was informed that Ms. Warlick no longer represented defendant. Ms. Warlick was retained for purposes of the contempt hearing subsequent to plaintiff's filing of the contempt motion. Plaintiff's attorney stated she was unaware that defendant was represented by counsel on the day of the hearing.

Defendant's attorney did not move for dismissal and requested the court to continue the matter. The court dismissed, *sua sponte*, plaintiff's motion for contempt for failure to prosecute. The court also ordered the parties to attend custody mediation with regard to plaintiff's motion to modify the custody order.

Plaintiff filed a second motion for contempt on 7 October 2013. The motion alleges defendant had remained in Texas with the child, refused to return the child to North Carolina, and was collecting unemployment in Texas. Plaintiff's motion further alleged he had traveled to Texas to visit the child. Defendant continued to deny plaintiff access to the child, refused to return the child to North Carolina, and repeatedly stated she intended to remain in Texas.

Plaintiff's second motion for contempt was heard before the court on 28 October 2013, before the Honorable Louis F. Foy, Jr. Plaintiff's attorney explained to the court that the child was currently back in North Carolina, and that plaintiff sought an order to prevent defendant from taking and keeping the child out of state.

Plaintiff's attorney informed the court she was present in court in another county on the date Judge Salisbury dismissed plaintiff's first contempt motion. Plaintiff's counsel further explained she had recently established a law practice in Onslow County and understood she would

receive notice of hearing of when the case was calendared. The court did not rule on the matter and held it open for further consideration.

The matter was held open until 20 May 2014. The court determined the 30 September 2013 dismissal of plaintiff's first motion for contempt was an adjudication of the merits of plaintiff's second motion for contempt. The court ruled that plaintiff's second motion for contempt, which it determined requested the same relief the trial court had ruled upon in the first motion for contempt, was not properly before the court. The court further ordered that plaintiff may file a motion for reconsideration of the ruling on the prior motion to be addressed by Judge Salisbury. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) finding that his 9 September 2013 motion and 7 October 2013 motion contained the same allegations and sought the same relief; (2) concluding Judge Salisbury's 30 September 2013 order dismissed her motion for contempt with prejudice; (3) failing to consider lesser sanctions; (4) failing to make proper findings of fact and conclusions of law; and, (5) requiring plaintiff to file a motion for reconsideration.

III. Plaintiff's Arguments on Appeal

Plaintiff argues issues related to the entry of Judge Salisbury's 30 September 2013 order. Plaintiff has not appealed from the 30 September 2013 order, and we do not address any arguments pertaining thereto. N.C.R. App. P. Rule 10(a) (2013). Plaintiff has only appealed from Judge Foy's 20 May 2014 order, in which he concluded the allegations of plaintiff's second motion for contempt were previously adjudicated on 30 September 2013.

We will only consider plaintiff's arguments and issues pertaining to the 20 May 2014 order, and specifically whether the court erred in concluding that it was precluded from ruling upon the merits of the case by Judge Salisbury's prior order.

IV. Adjudication of Plaintiff's Claims

Plaintiff argues the court erred by ruling his second motion for contempt was not properly before the court, because it contained the same allegations as the first motion for contempt, dismissed by Judge Salisbury on 30 September 2013. We agree.

On 9 September 2013, plaintiff filed his first motion for contempt and motion to modify child custody. Plaintiff alleged:

> 6. The Defendant has willfully and without legal justification or excuse failed and refused to comply with the terms of the Judgment in that Defendant has failed to allow Plaintiff reasonable visitation with the minor child. Specifically, Defendant informed the Plaintiff that her grandmother was dying, but instead of taking the minor child for a few days, took the minor child for six weeks to Texas over the objection of the Plaintiff and without the Plaintiff's permission. Furthermore, Defendant is now refusing to return the minor child to the State of North Carolina upon Plaintiff's request.

This is the only allegation contained in the 9 September 2013 motion pertaining to contempt. Plaintiff alleged that a substantial and material change in circumstances occurred by defendant's departure from the State with the child, which completely denied plaintiff access to the child. Plaintiff sought an order to adjudicate defendant in willful civil contempt, and sought modification of his visitation with the child.

The court dismissed, *sua sponte*, plaintiff's first contempt motion and motion to modify child custody on 30 September 2013 for plaintiff's failure to prosecute. Neither plaintiff nor his counsel was present when the case was called for hearing. Defendant's counsel did not move for dismissal, but rather for a continuance.

On 7 October 2013, plaintiff filed a second contempt motion and alleged:

> 7. The Defendant has willfully and without legal justification or excuse failed and refused to comply with the terms of the Judgment in that Defendant has failed to allow Plaintiff reasonable visitation with the minor child. Specifically, Defendant informed the Plaintiff that her grandmother was dying, but instead of taking the minor child for a few days, took the minor child to Texas over the objection of the Plaintiff and without the Plaintiff's permission. Furthermore, Defendant is now refusing to return the child to the State of North Carolina upon Plaintiff's request.
>
> 8. The Defendant has repetitively promised to return the minor child to the State of North Carolina and has repetitively failed to return the minor child to the State of North Carolina.

> 9. Upon information and belief, the Defendant has not returned the minor child to the State of North Carolina and appears to have no intent on returning the child to the State of North Carolina as the Defendant is collecting unemployment in the State of Texas.
>
> 10. The Plaintiff has flown to the State of Texas to visit with the minor child and was not allowed to bring the minor child back to the State of North Carolina and has been refused normal visitation and access to the minor child has continued to be denied.

In the 7 October 2013 motion, plaintiff sought an order holding defendant in willful civil contempt of court. Plaintiff also sought an order granting temporary emergency custody of the child to plaintiff, and to prevent defendant from removing the child from plaintiff's care and the jurisdiction of this State, pending further orders of the court.

Under the heading "Request for Return to the State of North Carolina and Temporary Custody of the Minor Child and Emergency Modification of the Prior Order," plaintiff alleges defendant has refused to return the child to the State of North Carolina, plaintiff has a loving bond with the child, defendant has denied plaintiff all access to the child, and plaintiff is fully capable of providing full-time care for the child.

V. Dismissal of First Motion

In the 30 September 2013 order, Judge Salisbury found that plaintiff had failed to prosecute the motion for contempt and *sua sponte* dismissed the motion. Unless the court specifies otherwise, an involuntary dismissal for failure to prosecute operates as an adjudication upon the merits. N.C. Gen. Stat. §1A-1, Rule 41(b) (2013). The court, in its discretion, may specify in the order that the dismissal is without prejudice and may also specify that a new action based on the same claim may be commenced within one year or less after the dismissal. *Id.*

Here, Judge Salisbury did not specify that the dismissal was without prejudice or that plaintiff may commence a new action within one year. Pursuant to N.C. Gen. Stat. §1A-1, Rule 41(b), Judge Salisbury's order dismissed plaintiff's first motion for contempt with prejudice.

"[O]ne judge may not reconsider the legal conclusions of another judge." *Adkins v. Stanly Cnty. Bd. of Educ.*, 203 N.C. App. 642, 692 S.E.2d 470 (2010). When Judge Salisbury involuntarily dismissed plaintiff's first

contempt motion with prejudice, the court adjudicated the merits of that motion. N.C. Gen. Stat. §1A-1, Rule 41(b). Plaintiff is precluded from filing another motion with identical allegations.

Plaintiff's second motion contains additional allegations, which were not included in the first motion. The first motion only alleges defendant took the child to Texas for six weeks and refused to return the child to North Carolina upon plaintiff's request. The second motion alleges additional acts of contempt. It alleges plaintiff spent $3,000.00 to travel to Texas to visit with the child. While plaintiff was in Texas, defendant denied him access to the child, and refused to allow plaintiff to return to North Carolina with his child. It also alleges that defendant repeatedly promised to return the child to North Carolina and had refused to do so. The allegation that defendant is collecting unemployment in the State of Texas is also not contained in the first motion. If true, this evidences defendant's intent to remain in Texas with the child in spite of the North Carolina order awarding joint custody and liberal visitation rights.

Plaintiff also requested additional relief in the second motion, which was not requested in the first motion. Specifically, in the 7 October 2013 motion, plaintiff requested the court award him emergency temporary custody of the child, because of plaintiff's failure to return the child to North Carolina from Texas. See N.C. Gen. Stat. § 50-13.5(d)(3) (2013) (A temporary custody order may be entered ex parte and prior to service of process or notice, if "there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.").

When the parties appeared before the trial court on 28 October 2013, plaintiff's attorney represented to the court that the child was presently in North Carolina. She stated that she was seeking an order to ensure the child remained in North Carolina, and that plaintiff is able to visit with the child pursuant to the custody order. The court held the matter open until 20 May 2014.

The issue of emergency custody was not raised in the motion before Judge Salisbury on 30 September 2013 and was not adjudicated by operation of Rule 41. N.C. Gen. Stat. §1A-1, Rule 41(b). Where plaintiff raised issues in the 7 October 2013 motion, which were not raised in the 9 September 2013 motion, the trial court erred in concluding all matters had previously been adjudicated by entry of the involuntary dismissal. The 20 May 2014 order is reversed.

VI. Conclusion

Plaintiff raised allegations and sought relief in his 7 October 2013 motion for contempt and custody, which were not raised in his 9 September 2013 motion for contempt. The court was not precluded from hearing the issues and considering the relief sought in the 7 October 2013 motion, which were not addressed in the 9 September 2013 motion. The court erred in concluding all of plaintiff's allegations and requests for relief included in the 7 October 2013 motion for contempt were adjudicated by the court's previous entry of an involuntary dismissal.

The 20 May 2014 order is reversed and the case is remanded to the district court for further proceedings consistent with this opinion. In light of our decision, it is unnecessary for us to consider defendant's remaining arguments, which are properly before us.

Reversed and remanded.

Judges ELMORE and DAVIS concur.

IN THE MATTER OF N.T.

No. COA14-974

Filed 17 March 2015

Termination of Parental Rights—subject matter jurisdiction—verification of petition

The Court of Appeals vacated an order terminating respondent father's parental rights because the trial court lacked subject matter jurisdiction to enter the order. The petition alleging the juvenile neglected was not properly verified, so the trial court did not obtain subject matter jurisdiction over the matter and Wake County Human Services did not have standing to file the motion to terminate parental rights.

Appeal by respondent-father from order entered 7 May 2014 by Judge Monica Bousman in Wake County District Court. Heard in the Court of Appeals 17 February 2015.

Office of the Wake County Attorney, by Roger A. Askew and Claire A. Hunter, for petitioner-appellee Wake County Human Services.

W. Michael Spivey for respondent-appellant father.

Poyner Spruill LLP, by Shannon E. Hoff, for guardian ad litem.

BRYANT, Judge.

Because we are bound by *In re Appeal from 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."), to acknowledge that on the facts of this case, this issue of subject matter jurisdiction is controlled by *Fansler v. Honeycutt*, 221 N.C. App. 226, 728 S.E.2d 6 (2012), we are compelled to vacate the trial court's orders in this matter for lack of jurisdiction.

Respondent father appeals from an order terminating his parental rights to his minor child, N.T. ("Ned").[1] Because the trial court never gained subject matter jurisdiction over the underlying juvenile case, and thus, petitioner Wake County Human Services ("WCHS") never obtained lawful custody of Ned, we vacate the trial court's order terminating parental rights.

On 22 May 2012, WCHS filed a juvenile petition alleging Ned was a neglected juvenile, having obtained non-secure custody of Ned the previous day. By order entered 11 July 2012, the trial court concluded Ned was a neglected juvenile and continued custody of Ned with WCHS. WCHS worked to reunify Ned with his parents, but on 19 April 2013, the trial court entered an order ceasing reunification efforts and changing the permanent plan for Ned to adoption. On 24 September 2013, WCHS filed a motion to terminate parental rights to Ned, alleging grounds of neglect, failure to make reasonable progress to correct the conditions that led to Ned's removal from his home, and failure to pay a reasonable portion for Ned's cost of care while he was placed outside of the home. After a four-day hearing on the motion, the trial court entered an order on 7 May 2014 terminating the parental rights of both respondent and Ned's mother. Respondent filed timely notice of appeal.

Respondent's sole argument on appeal is that the trial court lacked subject matter jurisdiction over the termination proceeding. Respondent

1. The pseudonym "Ned" is used throughout to protect the identity of the juvenile and for ease of reading.

contends that because the 22 May 2012 juvenile petition was not properly verified, it did not confer subject matter jurisdiction over the underlying juvenile case to the trial court, and the trial court's orders in the juvenile case are thus void *ab initio*. Respondent argues that because the court's orders are void, WCHS was never given lawful custody of Ned and, thus, was without standing to file the motion to terminate parental rights. Based on precedent from this Court that we are compelled to follow, we agree.

"A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). Where the initial abuse, neglect, or dependency petition in a juvenile case is not properly verified, the trial court never obtains subject matter jurisdiction over the case and all of its orders are void *ab initio*. *Id.* at 588, 636 S.E.2d at 789; *see also In re S.E.P.*, 184 N.C. App. 481, 486, 646 S.E.2d 617, 621 (2007) ("In the absence of a verification a trial court's order is void *ab initio*." (citation omitted)). Thus, where an improperly verified petition is filed by a county department of social services, the department never obtains custody of the juvenile from a court of competent jurisdiction, and it lacks standing to file a petition or motion to terminate parental rights to that juvenile. *See* N.C. Gen. Stat. §§ 7B-1103(a)(3), 1104(2) (2013); *e.g. S.E.P.*, 184 N.C. App. at 487-88, 646 S.E.2d at 621-22. This Court has held that a pleading is not properly verified where the person before whom the pleading was to be verified did not indicate his title and nothing in the record established his authority to acknowledge the verification. *See Fansler*, 221 N.C. App. at 230, 728 S.E.2d at 9; *see also In re Green*, 67 N.C. App. 501, 503, 313 S.E.2d 193, 194-95 (1984) ("[W]here it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes." (citation omitted)).

In *Fansler*, the defendant appealed from trial court orders requiring that he refrain from stalking and harassing the plaintiffs, Mr. and Mrs. Fansler (Mr. and Mrs. Fansler filed individual complaints). *Fansler*, 221 N.C. App. 226, 728 S.E.2d 6. On appeal, this Court observed that the plaintiffs' individual complaints contained "no indication that either complaint had been verified before an individual authorized to administer oaths." *Id.* at 230, 728 S.E.2d at 9. Of particular pertinence to the current case, the *Fansler* Court noted that in the verification section of Mr. Fansler's complaint, the record reflected Mr. Fansler's signature, a date, and a signature in the block designated for the signature of the person before whom Mr. Fansler's verification had been executed; however,

there was no indication of the status of the person whose signature appeared in the box. In other words, there was no indication that Mr. Fansler's verification had been executed before an individual authorized to administer an oath. *Id.* The *Fansler* Court reasoned as follows:

> If an action is statutory in nature, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional, leaving a trial judge confronted with an unverified pleading devoid of subject matter jurisdiction. Put another way, where it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the petition can be used for legal purposes, since non-compliance renders the petition incomplete and non-operative.

Id. at 228, 728 S.E.2d at 8 (citations and quotations omitted). Thus, the Court held that "given the absence of any indication that either of Plaintiffs' complaints had been properly verified, we hold that the trial court never obtained jurisdiction over the subject matter of these cases, that the trial court's orders should be vacated, and that both cases must be dismissed." *Id.* at 230, 728 S.E.2d at 9.

The instant case cannot be distinguished from *Fansler*. The verification section of the initial petition alleging that Ned was a neglected juvenile indicates that it was verified by Diamond Wimbish, an authorized representative of the Director of WCHS; however, the signature of the person before whom the petition was verified is illegible and there is no title given for the person before whom the petition was verified. Nothing in the record before this Court establishes that the person before whom the petition was verified was authorized to acknowledge the verification.[2] Given the absence of any competent evidence in the

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2. WCHS has filed a motion to amend the record on appeal to include an affidavit from Wake County Magistrate Christopher H. Graves, who avers that the signature on the petition is his and that he signed the petition in his official capacity as a magistrate. However, this affidavit was never before the trial court and, thus, cannot be considered on appeal. *See* N.C.R. App. P. 9(a), 11(c); *see also*, *e.g.*, *State v. Gay*, 334 N.C. 467, 481, 434 S.E.2d 840, 847 (1993) (refusing to consider on appeal affidavits from the trial judge and prosecutor regarding *ex parte* contact with jurors because the affidavits were not part of the record made at trial). Accordingly, we deny WCHS's motion to amend the record on appeal.

Nevertheless, we acknowledge that this Court has in unpublished opinions allowed motions to amend in circumstances where a respondent failed to challenge the verification and/or signature on the petition before the trial court and, thus, where the trial court

record to show that the petition was properly verified, the trial court never obtained jurisdiction over the subject matter of the juvenile case. Therefore, the trial court's underlying orders are void *ab initio*, and thus, WCHS lacked standing to file the motion to terminate parental rights to Ned. *See Fansler*, 221 N.C. App. at 230, 728 S.E.2d at 9. Accordingly, as the trial court did not have subject matter jurisdiction to enter the order terminating respondent's parental rights, we must vacate its order.

Vacated.

Judges CALABRIA and DIETZ concur.

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had no opportunity to rule on the issue. Such unpublished opinions are not authority upon which we could rely to allow a motion to amend. *See* N.C. R. App. 30(e)(3) ("The unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.") Further, as neither the motion to amend nor the record on appeal indicates that the Chief District Court Judge of Wake County authorized a magistrate to verify petitions in emergency situations as required by North Carolina General Statutes, section 7B-404 — a necessary acknowledgement for receiving verification of an emergency petition, such as we have in the instant case — we would not consider suspending our rules pursuant to Rule 2.

INTEGON NATIONAL INSURANCE COMPANY, PLAINTIFF
v.
DAIJAH MAURIZZIO, BY AND THROUGH HER GUARDIAN AD LITEM, BARBARA LANGLEY, AND JASON AND RENAE MAURIZZIO, DEFENDANTS

No. COA14-1068

Filed 17 March 2015

Insurance—automobile accident—underinsured motorist coverage (UIM)—stacking policies to calculate UIM limits—underinsured highway vehicle

The trial court did not err in a declaratory judgment case determining underinsured motorist (UIM) coverage for a single car automobile accident, involving a grandchild in her grandmother's automobile, by denying plaintiff insurance company's motion for summary judgment and granting summary judgment in favor of defendants. The applicable UIM coverage of the pertinent policies could be stacked in order to calculate the UIM limits and determine if the vehicle was an underinsured highway vehicle. The $50,000 per person UIM coverage provided by the parents' policy stacked on the $50,000 UIM coverage provided by the grandmother's policy, for a total of $100,000 UIM coverage. This amount of UIM coverage was greater than the $50,000 liability limits of the grandmother's policy. Thus, the grandmother's vehicle was an underinsured highway vehicle for the purposes of the UIM coverage claim.

Appeal by plaintiff from order entered 23 July 2014 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 18 February 2015.

Frazier Hill & Fury, R.L.L.P., by Torin L. Fury, for plaintiff-appellant.

Hardee & Hardee, L.L.P., by Charles R. Hardee and Moulton B. Massey, IV, for defendants-appellees.

TYSON, Judge.

Integon National Insurance Company ("Plaintiff") appeals from order denying Plaintiff's motion for summary judgment and granting the motion for summary judgment of Daijah Maurizzio and Jason and Renae Maurizzio (collectively, "Defendants"). We affirm.

I. Factual Background

Both parties stipulated to the following facts: On 15 February 2011, Destany Maurizzio ("Destany") was operating a vehicle owned by her grandmother, Suzanne Maurizzio ("Suzanne"). The vehicle was involved in a single car accident. Daijah Maurizzio ("Daijah") and Desiree' Maurizzio ("Desiree' ") were passengers in the vehicle. Desiree' and Daijah suffered injuries as a result of the accident.

The vehicle operated by Destany and owned by Suzanne was insured by Plaintiff. This policy provided $50,000 per person/$100,000 per accident in liability coverage for bodily injury and $50,000 per person/$100,000 per accident in underinsured motorist coverage ("UIM coverage"). The bodily injury claim of Desiree' was settled within the available liability coverage limits provided by this policy.

Daijah sustained permanent injury in this accident. Defendants alleged expenses in excess of $200,000 were incurred to treat her injuries. Plaintiff tendered the $50,000 per person liability limits from Suzanne's policy to settle Daijah's claim pursuant to a covenant not to enforce judgment.

Daijah was not a named insured under Suzanne's policy, nor was she a resident household member of Suzanne. However, she is an insured under Suzanne's policy for the purposes of UIM coverage, because she was an occupant inside Suzanne's vehicle when the accident occurred.

At the time of the accident, Daijah's parents, Jason and Renae Maurizzio, were insured under an automobile policy also issued by Plaintiff. This policy provided $50,000 per person/$100,000 per accident in UIM coverage. At the time of the accident, Daijah resided with her parents and was an insured under their policy for purposes of UIM coverage.

On 27 August 2012, Plaintiff filed a complaint for declaratory judgment. Plaintiff sought for the trial court to declare the policy issued to Jason and Renae Maurizzio did not provide UIM coverage for this accident.

On 8 July 2014, Defendants filed a motion for summary judgment. Defendants contended the UIM coverage provided by Plaintiff's policy issued to Jason and Renae Maurizzio could be stacked on the UIM coverage provided by Plaintiff's policy issued to Suzanne for Daijah's personal injury claim. As a result, Defendants alleged Suzanne's vehicle was an "underinsured motor vehicle" for purposes of Daijah's personal injury claim.

On 14 July 2014, Plaintiff also filed a motion for summary judgment, asserting Defendants were not entitled to UIM coverage. Plaintiff contended North Carolina law did not permit the stacking of UIM coverage from Suzanne's policy with any additional UIM coverage provided to the Defendants, because more than one claimant was injured.

The parties' cross-motions for summary judgment were heard and an order was entered on 23 July 2014. The order denied Plaintiff's motion for summary judgment and granted Defendants' motion for summary judgment. Judge Sermons' order declared Plaintiff's policies issued to Suzanne and Daijah's parents provided $100,000 in aggregate UIM coverage less a $50,000 credit for the exhausted liability coverage. The order also declared Plaintiff's policy issued to Daijah's parents provided Defendants with $50,000 in UIM coverage for Daijah's personal injury claim.

Plaintiff gave timely notice of appeal to this Court.

II. Issues

Plaintiff argues the trial court erred by granting Defendants' motion for summary judgment, because there were two injured parties inside the tortfeasor vehicle.

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 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) (citations and internal quotation marks 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. Analysis

Pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) ("the Financial Responsibility Act"), an "underinsured highway vehicle" is defined as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2013).

The General Assembly amended N.C. Gen. Stat. § 20-279.21(b)(4) in 2004, adding the following:

> For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle *unless the owner's policy insuring*

> *that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.*

N.C. Gen. Stat. § 20-279.21(b)(4) (2013) (emphasis supplied). This amendment was subsequently referred to as the "multiple claimant exception" in *Benton v. Hanford*, 195 N.C. App. 88, 671 S.E.2d 31, *disc. review denied*, 363 N.C. 744, 688 S.E.2d 452 (2009).

Prior to the 2004 amendment to the Financial Responsibility Act, this Court decided the case of *Ray v. Atlantic Cas. Ins. Co.*, 112 N.C. App. 259, 435 S.E.2d 80, *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). In *Ray*, the plaintiff's vehicle was struck head-on by another vehicle. The plaintiff, along with two passengers in her vehicle, and the passenger in the tortfeasor's vehicle were all injured. Aetna Insurance Company ("Aetna") insured the tortfeasor's vehicle. This policy had liability limits of $100,000 per person/$300,000 per accident.

Atlantic Casualty Insurance Company ("Atlantic Casualty") insured the plaintiff, and her policy had UIM limits of $100,000 per person/$300,000 per accident. Aetna paid $98,000 of its liability coverage to the injured passenger in the tortfeasor's vehicle, leaving $202,000 in liability coverage to be divided amongst the plaintiff and her two passengers. *Id.* at 260-61, 435 S.E.2d at 80-81.

When a coverage dispute arose, this Court was required to determine whether the tortfeasor's vehicle was an "underinsured highway vehicle." The statute, as it existed at the time, required this Court to base this determination on a comparison of the tortfeasor's overall liability *coverage* (not the actual liability *payment*) to the victim's UIM coverage. We held, although the liability funds available to be paid to the plaintiff and her two passengers were less than the plaintiff's UIM coverage, no UIM coverage was available under the Atlantic Casualty policy because the tortfeasor's vehicle was not statutorily defined as an "underinsured highway vehicle," as the liability coverage and the UIM coverage were the same. *Id.* at 262, 435 S.E.2d at 81.

The 2004 amendment to the Financial Responsibility Act changed the rule this Court applied to reach its result in *Ray*. This amendment provided an additional definition of "underinsured highway vehicle" for situations where multiple claimants seek liability funds. Under the multiple claimant exception,

> where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" *if the*

> *total amount actually paid* to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2013) (emphasis supplied).

The multiple claimant exception prevents an increase in liability or UIM exposure of the carrier providing coverage for the tortfeasor's vehicle. The exception states a vehicle is not an "underinsured motor vehicle" if the owner's policy provides UIM coverage with limits, which are less than or equal to that policy's bodily injury liability limits. *Id.*

Plaintiff contends the multiple claimant exception applies to the present case because there were two injured parties in the tortfeasor vehicle. Plaintiff asserts the multiple claimant exception applies, and the statutory amendment disallows Suzanne's vehicle from being defined as an "underinsured motor vehicle." Plaintiff argues Defendants are not entitled to any UIM coverage under either policy because the UIM limits are equal to the liability limits. [D. Br. p. 10.] We disagree.

1. Discussion of *Benton v. Hanford*

This Court considered the applicability of the multiple claimant exception in *Benton v. Hanford*, 195 N.C. App. 88, 671 S.E.2d 31 (2009). In *Benton*, the plaintiff was injured in a single car accident in a vehicle insured by Nationwide Mutual Insurance Company ("Nationwide"). The Nationwide policy had liability limits of $50,000 per person/$100,000 per accident and UIM limits of $50,000 per person/$100,000 per accident.

The plaintiff was also insured as a household resident on a Progressive Southeastern Insurance Company ("Progressive") policy providing $100,000 per person UIM coverage. After Nationwide paid the plaintiff the policy's $50,000 liability limits, a UIM coverage dispute arose. Progressive relied on the second sentence of the multiple claimant exception and argued, as Defendant does at bar, because the Nationwide policy provided UIM coverage with limits equal to that of the policy's bodily injury liability limits, the vehicle was not an "underinsured highway vehicle" within the meaning of the statute.

This Court noted the purpose of the Financial Responsibility Act, as stated by our Supreme Court,

> is to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is

> to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act . . . is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (citations and internal quotation marks omitted).

With the statutory purpose in mind, *Benton* held "applicable UIM coverage may be stacked interpolicy to calculate the applicable limits of underinsured motorist coverage for the vehicle involved in the accident for the purpose of determining if the tortfeasor's vehicle is an underinsured highway vehicle." *Benton*, 195 N.C. App. at 92, 671 S.E.2d at 34 (citation and internal quotation marks omitted); *see also N.C. Farm Bureau Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 50-51, 483 S.E.2d 452, 458 (holding the legislature's use of the plural "limits" in the statutory definition of "underinsured highway vehicle" indicates an insured may stack all applicable UIM policies to determine if the definition is met), *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997).

This Court also concluded the second sentence of the multiple claimant exception "applies *only to accidents with multiple claimants*." *Benton*, 195 N.C. App. at 94, 671 S.E.2d at 35 (emphasis supplied). The plaintiff in *Benton* was the only claimant, the multiple claimant exception did not apply, and the court utilized the general definition of "underinsured highway vehicle." *Id.*

2. *Benton*'s Application to Plaintiff's Argument

Plaintiff argues the multiple claimant exception applies here because two persons were injured. However, the enactment of the 2004 amendment following our decision in *Ray* and our subsequent holding in *Benton* clearly establish the multiple claimant exception is not triggered simply because there were two injuries in an accident. The multiple claimant exception applies only when the amount paid to an individual claimant is less than the claimant's limits of UIM coverage after liability payments to multiple claimants. *Id.*

Here, two injuries resulted from the accident. Desiree' Maurizzio's bodily injury claim was settled within the per person liability coverage limits provided by Suzanne's policy with Plaintiff. This liability payment *did not* reduce the liability coverage available for Daijah's claim. Plaintiff tendered its full $50,000 per person liability limits from Suzanne's policy to settle Daijah's claim. The multiple claimant exception does not

apply here. The amount paid to Daijah was not reduced due to liability payments to multiple claimants. *Id.* This ruling is also consistent with our appellate courts' longstanding interpretation of the Financial Responsibility Act as a mechanism by which innocent victims may be compensated and provided with the fullest protection. *Pennington*, 356 N.C. at 573-74, 573 S.E.2d at 120; *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989); *Proctor v. N.C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989).

The general definition of "underinsured highway vehicle" must be used to determine the UIM coverage in this case. The applicable UIM coverage of both policies may be stacked in order to calculate the UIM limits and determine if the vehicle is an "underinsured highway vehicle." *Benton*, 195 N.C. App. at 92-93, 671 S.E.2d at 34; *Bost*, 126 N.C. App. at 50-51, 483 S.E.2d at 458.

Using these guidelines, the $50,000 per person UIM coverage provided by the parents' policy stacks on the $50,000 UIM coverage provided by Suzanne's policy, for a total of $100,000 UIM coverage. This amount of UIM coverage is greater than the $50,000 liability limits of Suzanne's policy. Suzanne's vehicle is an "underinsured highway vehicle" for the purposes of Daijah's UIM coverage claim. Plaintiff's argument is overruled.

Conclusion

The trial court's order granting summary judgment in favor of Defendants is affirmed. We also affirm the trial court's denial of Plaintiff's motion for summary judgment.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

MACON BANK, INC., PLAINTIFF
v.
STEPHEN P. GLEANER, DEFENDANT

Nos. COA14-809 & COA14-810

Filed 17 March 2015

1. Accord and Satisfaction—affirmative defense—promissory notes—statute of frauds—oral modification unenforceable

The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes. Stephen's affidavit constituted some evidence that Stephen and plaintiff orally agreed to an accord and satisfaction that modified the 2002 and 2007 promissory notes. Because both promissory notes fell within the statute of frauds, the alleged subsequent oral modification also fell within the statute of frauds and was thus unenforceable.

2. Estoppel—equitable estoppel—deficiency judgment—promissory notes—fraud—oral modification of real property interest—statute of frauds

The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes. Stephen's affidavit did not raise the factual issue of whether plaintiff is equitably estopped from collecting deficiency judgments on the 2002 and 2007 promissory notes. Stephen's affidavit did not constitute evidence supporting the application of equitable estoppel. Because defendants proffered no evidence of fraud and the alleged oral modification involved a real property interest, defendants' defense of equitable estoppel could not override the statute of frauds.

3. Mortgages and Deeds of Trust—promissory notes—deficiency—lost rents—no actual possession—no offset

The trial court did not err by granting summary judgment in favor of plaintiff bank regarding deficiency judgments for promissory notes even though defendants sought lost rents during a period when plaintiff did not exercise actual possession of the mortgaged property. Defendants have proffered no evidence that they are entitled to an offset of the judgment amount.

Appeal by defendants Stephen P. Gleaner and Martha K. Gleaner from summary judgment orders entered 12 March 2014 by Judge Bradley Letts in Superior Court, Macon County. Heard in the Court of Appeals 2 December 2014.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Esther E. Manheimer and Lynn D. Moffa, for plaintiff-appellee.

David R. Payne, P.A., by David R. Payne, for defendants-appellants.

STROUD, Judge.

In this opinion, we consolidate Case Nos. 14-809 and 14-810. Stephen P. Gleaner appeals from the trial court's order granting summary judgment to Macon Bank, Inc. ("plaintiff") in Case No. 13 CVS 69, and Stephen P. Gleaner and Martha K. Gleaner ("defendants") appeal from the trial court's order granting summary judgment to Macon Bank, Inc. in Case No. 13 CVS 456. Defendants contend that the trial court erred in granting summary judgment in both cases, because they proffered some evidence of (1) the affirmative defense of accord and satisfaction; (2) plaintiff's breach of the duty of good faith and fair dealing; (3) the affirmative defense of equitable estoppel; and (4) defendants' right to offset arising from plaintiff's failure to account for lost rental income. We affirm.

I. Background

On 18 January 2002, plaintiff, Stephen Gleaner, and William Patterson, Stephen's business partner, executed a promissory note in which Stephen and Patterson borrowed $260,000 from plaintiff ("the 2002 promissory note"). Stephen and Patterson used the loan proceeds to purchase undeveloped land and a rental house in Highlands, North Carolina ("the Highlands property"). Plaintiff secured the loan by executing a deed of trust on the Highlands property.

On 20 March 2007, plaintiff, Stephen, and Patterson executed a bridge loan note in which Stephen and Patterson borrowed an additional $150,000 from plaintiff ("the 2007 promissory note"). Plaintiff secured this loan by executing another deed of trust on the Highlands property. On 11 August 2010, plaintiff, Stephen, and Martha Gleaner, Stephen's wife, agreed to a loan modification of the 2007 promissory note. On 12 August 2010, plaintiff and Stephen agreed to release Patterson from liability on the 2002 promissory note.

On or about 30 January 2013, in Case Number 13 CVS 69, plaintiff sued Stephen for a deficiency judgment on the 2002 promissory note. Plaintiff alleged that Stephen had defaulted on the 2002 promissory note and that it had foreclosed on the Highlands property. On 3 May 2013, Stephen answered and counterclaimed for negligence, lost opportunity, and negligent non-disclosure. On 17 July 2013, plaintiff voluntarily dismissed without prejudice its action against Stephen.

On 17 July 2013, in Case Number 13 CVS 456, plaintiff sued Stephen, Martha, and Patterson for a deficiency judgment on both the 2002 and 2007 promissory notes. Plaintiff alleged that Stephen had defaulted on the 2002 promissory note, that Stephen, Martha, and Patterson had defaulted on the 2007 promissory note, and that it had foreclosed on the Highlands property.

On 16 August 2013, Stephen moved to dismiss plaintiff's second suit, because plaintiff had improperly dismissed Stephen's counterclaims in the first suit. On or about 23 October 2013, in the first suit, plaintiff moved that the trial court vacate its voluntary dismissal and reinstate its complaint pursuant to North Carolina Rule of Civil Procedure 60(b). *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2013). On 28 October 2013, in the first suit, the trial court vacated plaintiff's voluntary dismissal and reinstated plaintiff's claim against Stephen on the 2002 promissory note. On 28 October 2013, in the second suit, the trial court granted in part Stephen's motion to dismiss and dismissed plaintiff's claim against Stephen on the 2002 promissory note, because that claim was being litigated in the first suit. But the trial court denied Stephen's motion in part and did not dismiss plaintiff's claim against Stephen, Martha, and Patterson on the 2007 promissory note. On 28 October 2013, plaintiff voluntarily dismissed without prejudice its action against Patterson.

On or about 11 December 2013, in both suits, plaintiff moved for summary judgment or judgment on the pleadings. Plaintiff proffered an affidavit in which one of its employees averred that plaintiff's complaint was true and correct. In response, Stephen proffered an affidavit in which he averred that, in late 2010 or early 2011, Caroline Huscusson, plaintiff's employee, told him to "stop making any payments on the loans" and that plaintiff "would take care of it." Stephen averred that he told Huscusson that he would give plaintiff the Highlands property "in lieu of any foreclosure or any other judgment or other losses." Stephen further averred that he "[e]ventually" gave plaintiff the keys to the rental house and heard nothing from plaintiff until one year later when he received plaintiff's notice of foreclosure. Stephen also averred that

he did not lease the rental house during that year because Huscusson had said that plaintiff would be "taking care of it."

On 10 February 2014, the trial court held a hearing on plaintiff's motion. On 12 March 2014, the trial court granted summary judgment to plaintiff in both suits. In the first suit, the trial court awarded plaintiff $45,864.29 plus interest against Stephen, and in the second suit, the trial court awarded $106,605.51 plus interest against Stephen and Martha. On 20 March 2014, Stephen gave timely notice of appeal in the first suit, and Stephen and Martha gave timely notice of appeal in the second suit.

II. Standard of Review

We review a trial court's summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. rev. denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

> (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.
>
> Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. at ___, 736 S.E.2d at 517 (citations and quotation marks omitted). We review a trial court's interpretation of a contract *de novo*, since it is a question of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

III. Accord and Satisfaction

[1] Defendants contend that the trial court erred in granting summary judgment, because Stephen's affidavit constitutes some evidence that Stephen and plaintiff orally agreed to an accord and satisfaction that modified the 2002 and 2007 promissory notes.[1] Defendants assert

1. Defendants also characterize the alleged oral modification as a compromise and settlement. The doctrines of accord and satisfaction and compromise and settlement carry

that Stephen and plaintiff orally agreed to an accord in which Stephen would give plaintiff the Highlands property in satisfaction of the outstanding debt.

> An accord and satisfaction is compounded of the two elements enumerated in the term. An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a satisfaction is the execution, or performance, of such an agreement.

In re Foreclosure of Five Oaks Recreational Ass'n, Inc., 219 N.C. App. 320, 326, 724 S.E.2d 98, 102 (2012) (quotation marks omitted).

Plaintiff responds that the statute of frauds renders the alleged oral modification unenforceable under N.C. Gen. Stat. § 22-5 (2009). N.C. Gen. Stat. § 22-5 provides:

> No commercial loan commitment by a bank, savings and loan association, or credit union for a loan in excess of fifty thousand dollars ($50,000) shall be binding unless the commitment is in writing and signed by the party to be bound. As used in this section, the term "commercial loan commitment" means an offer, agreement, commitment, or contract to extend credit primarily for business or commercial purposes and does not include charge or credit card accounts, personal lines of credit, overdrafts, or any other consumer account. Offers, agreements, commitments, or contracts to extend credit primarily for aquaculture, agricultural, or farming purposes are specifically exempted from the provisions of this section.

N.C. Gen. Stat. § 22-5. "When the original agreement comes within the Statute of Frauds, subsequent oral modifications of the agreement are

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the following two distinctions: (1) performance is necessary to complete an accord and satisfaction but is not necessary to complete a compromise and settlement; and (2) an accord and satisfaction may be based upon an undisputed or liquidated claim, whereas a compromise and settlement must be based upon a disputed claim. *Bizzell v. Bizzell*, 247 N.C. 590, 601, 101 S.E.2d 668, 676, *cert. denied*, 358 U.S. 888, 3 L. Ed. 2d 115 (1958). Here, defendants contend that, under the oral modification, Stephen performed by giving the Highlands property to the bank, and the parties do not dispute the amounts that defendants originally owed under the 2002 and 2007 promissory notes. Accordingly, the alleged agreement would constitute an accord and satisfaction, rather than a compromise and settlement. *See id.*, 101 S.E.2d at 676.

ineffectual." *Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 465, 323 S.E.2d 23, 26 (1984).

Both the 2002 and 2007 promissory notes qualify as a "commercial loan commitment" exceeding $50,000 under N.C. Gen. Stat. § 22-5. Under the 2002 promissory note, plaintiff lent $260,000 so that Stephen and his real estate business partner could purchase the undeveloped land and the rental house as an investment. *See* N.C. Gen. Stat. § 22-5. Under the 2007 promissory note, plaintiff lent $150,000 to Stephen and his real estate business partner. *See id.* Defendants assert that, in late 2010 or early 2011, Stephen and plaintiff orally agreed to a modification of the 2002 and 2007 promissory notes. But because both promissory notes fall within the statute of frauds, we hold that this alleged subsequent oral modification also falls within the statute of frauds and is thus unenforceable. *See Clifford*, 312 N.C. at 465, 323 S.E.2d at 26. Accordingly, we hold that defendant's affidavit does not constitute evidence of accord and satisfaction.[2]

IV. Equitable Estoppel

[2] Defendants next contend that Stephen's affidavit raises the factual issue of whether plaintiff is equitably estopped from collecting deficiency judgments on the 2002 and 2007 promissory notes.

> The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. In appropriate cases, equitable estoppel may override the statute of frauds so as to enforce an otherwise unenforceable agreement. When faced with oral agreements involving real property interests, our courts have limited the application of the equitable estoppel doctrine to situations where the party seeking to invoke the statute of frauds has engaged in "plain, clear and deliberate fraud." The rationale for applying the equitable estoppel doctrine is quite obvious: A party who engages in fraud

2. Defendants also assert that plaintiff breached the duty of good faith and fair dealing implied in every contract. *See Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005). But in light of our holding that the alleged oral modification is not a valid contract, we hold that defendants have proffered no evidence that plaintiff breached the implied duty of good faith and fair dealing. Defendants also mention the legal theory of negligent non-disclosure but do not provide any supporting argument. Accordingly, we do not address this issue. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

> should not be permitted to shield itself from liability through the use of a statute which our legislature specifically designed to prevent fraud.

B & F Slosman v. Sonopress, Inc., 148 N.C. App. 81, 85-86, 557 S.E.2d 176, 179-80 (2001) (citations and quotation marks omitted), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 795 (2002). The essential elements of actual fraud are: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with an intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007).

Stephen did not aver in his affidavit that plaintiff intended to deceive him and thus defendants have not proffered any evidence of actual fraud. *See id.*, 649 S.E.2d at 387. Because defendants have proffered no evidence of fraud and the alleged oral modification involves a real property interest, we hold that defendants' defense of equitable estoppel cannot override the statute of frauds. S*ee Slosman*, 148 N.C. App. at 85-86, 557 S.E.2d at 180. Accordingly, we hold that Stephen's affidavit does not constitute evidence supporting the application of equitable estoppel.

V. Right to Offset

[3] Defendants further contend that Stephen's affidavit constitutes some evidence that they are entitled to an offset of the judgment amount. Defendants assert that plaintiff owes them lost rent from the date Stephen gave plaintiff the keys to the rental house to the date of foreclosure, because, as a mortgagee-in-possession, plaintiff had a duty to account for rent. Here, plaintiff secured both loans by executing deeds of trust on the Highlands property.

> North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes. In North Carolina, deeds of trust are used in most mortgage transactions, whereby a borrower conveys land to a third-party trustee to hold for the mortgagee-lender, subject to the condition that the conveyance shall be void on payment of debt at maturity. Thus, in North Carolina, the trustee holds legal title to the land.

Countrywide Home Loans, Inc. v. Reed, 220 N.C. App. 504, 509, 725 S.E.2d 667, 671 (2012).

> A mortgagee after default is entitled to possession of the mortgaged premises, and, to secure possession, may maintain an action against the mortgagor. But [a] mortgagee's right to possession is only for the better security of the debt owing to him. When he takes possession he becomes liable to keep such premises in usual repair and to account for the rents and profits received, in a settlement of the mortgage debts. The rents with which a mortgagee or trustee in possession is chargeable are applicable as credits on the debt secured by the mortgage. A mortgagee has no right to possession except to assure payment of the debt or performance of other conditions of the mortgage.

Gregg v. Williamson, 246 N.C. 356, 359, 98 S.E.2d 481, 484 (1957) (citations and quotation marks omitted). A mortgagee-in-possession must pay the "highest fair rent" and becomes responsible for "all such acts or omissions as would . . . constitute claims on an ordinary tenant, because by entry and possession he makes himself 'tenant of the land[.]' " *Green v. Rodman*, 150 N.C. 145, 147, 63 S.E. 732, 734 (1909) (quotation marks omitted).

To qualify as a mortgagee-in-possession, a mortgagee must exercise "actual possession of the physical property to the exclusion of [the mortgagor]." *24th & Dodge v. Acceptance Ins. Co.*, 690 N.W.2d 769, 774 (Neb. 2005) (citing *In re Olick*, 221 B.R. 146, 156-57 (Bankr. E.D. Pa. 1998), *U.S. Fid. & Guar. v. Old Orchard Plaza*, 672 N.E.2d 876, 882 (Ill. App. Ct. 1996), and *Prince v. Brown*, 856 P.2d 589 (Okla. Civ. App. 1993)). In other words, a mortgagee must exercise more than mere constructive possession to become a mortgagee-in-possession. *Id.* A person has constructive possession when he "has the intent and capability to maintain control and dominion over [the property]" despite not having actual possession. *State v. Lakey*, 183 N.C. App. 652, 656, 645 S.E.2d 159, 161 (2007) (discussing constructive possession in a criminal law context).

In his affidavit, Stephen avers that he told Huscusson that he would give plaintiff the Highlands property and that he "[e]ventually" gave plaintiff the keys to the rental house. Although defendants arguably have proffered some evidence that plaintiff had constructive possession of the rental house upon delivery of the keys, defendants proffer no evidence that plaintiff exercised actual possession of the rental house or that they were excluded from the rental house. *See 24th & Dodge*, 690 N.W.2d at 774. Accordingly, we hold that plaintiff was not a mortgagee-in-possession and thus need not account for any lost rental income. *See*

id. (holding that a mortgagee who acts upon an assignment of rents without taking actual possession of the mortgaged property had no duty to collect rents); *Peugh v. Davis*, 113 U.S. 542, 544, 28 L. Ed. 1127, 1128 (1885) (holding that a mortgagee was not liable for rent when the mortgagee's possession of the mortgaged property was merely constructive and the property was vacant and worthless).

Defendants' reliance on *Mills v. Building & Loan Assn.* is misplaced. *See* 216 N.C. 668, 671, 6 S.E.2d 549, 551 (1940). There, a mortgagor sued a mortgagee for rents and profits received *after* the mortgagee had foreclosed on the mortgaged property, had purchased the property at the foreclosure sale, and had begun possession. *Id.* at 666, 6 S.E.2d at 550. The North Carolina Supreme Court held that the foreclosure was wrongful and reversed the trial court's decision to dismiss the mortgagor's action. *Id.* at 671, 6 S.E.2d at 553. In contrast, here, defendants seek lost rents during a period when plaintiff did not exercise actual possession of the mortgaged property. Accordingly, we hold that defendants have proffered no evidence that they are entitled to an offset of the judgment amount.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's orders granting summary judgment to plaintiff.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
FRANKLIN MARCUS GRULLON, JR.

No. COA14-104

Filed 17 March 2015

1. Appeal and Error—invited error—re-reading of jury instructions—failure to object

In his trial for murder and robbery charges, defendant did not invite error when he failed to object to the trial court re-reading the instructions to the jury.

2. Homicide—first-degree murder—lying in wait—intent

In defendant's trial for first-degree murder, the trial court did not err by instructing the jury on a lying in wait theory of murder. There was sufficient evidence that defendant assaulted the victim after lying in wait, proximately causing his death. There is no requirement that the defendant have intended or expected the victim to die as a result of the assault.

3. Homicide—first-degree murder—merger doctrine—multiple theories of conviction

In defendant's trial resulting in convictions for first-degree murder, attempted robbery, and conspiracy to commit armed robbery, the trial court properly did not arrest judgment on one of defendant's convictions for attempted robbery. Because the jury found defendant guilty of first-degree murder under the theories of both felony murder and lying in wait, felony murder was not the sole theory of first-degree murder and the merger doctrine did not apply.

Appeal by defendant from judgments entered 27 August 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

GEER, Judge.

Defendant Franklin Marcus Grullon, Jr. appeals his convictions of first degree murder, attempted robbery, and conspiracy to commit armed robbery. Defendant argues primarily that the trial court erred in instructing the jury on a lying in wait theory of first degree murder because the State offered no evidence that defendant had a "deadly purpose" to kill. However, because our courts do not require proof of a specific intent to kill -- which we hold is synonymous with a deadly purpose to kill -- in order to support a lying in wait theory of murder, and because the evidence presented at trial was sufficient to support a jury instruction regarding lying in wait, we find no error.

Facts

The State's evidence tended to show the following facts. In the winter of 2009, defendant became acquainted with Raymond Ervin and stayed at Ervin's apartment in Charlotte, North Carolina several times. Ervin had previously sold drugs with Jonathan Crawford. While staying at Ervin's apartment, defendant saw Crawford's car and noted that it had valuable tire rims that were worth $10,000.00 or more. This prompted defendant -- under the pretense of wanting to get involved in drug dealing -- to begin asking Ervin for information about Crawford and his car.

After several weeks, defendant formulated a plan to rob Crawford. When defendant told Ervin about his plan, Ervin informed defendant that Crawford did not carry a gun and that Crawford often frequented the Chocolate City Club in South Carolina, stopping afterward at a Hess 24-hour gas station.

On 7 January 2010, defendant engaged in a three-way phone call with his girlfriend and mother of his son, Lizzette Drumgo, and Jasmine Johnson. Throughout the call, Ervin could be heard in the background, sometimes instructing defendant on what to say. The four formulated a plan for Johnson to text Crawford, pretending to have met him at the Chocolate City or the Hess station. Johnson would then lure Crawford to an empty apartment where the group could rob him.

Johnson texted Crawford as planned. Although Crawford was initially skeptical of Johnson's story regarding their purported encounter, he eventually believed it had occurred. Johnson continued to text with Crawford, and on the evening of 9 January 2010, Johnson met with Ervin, Drumgo, and defendant at Ervin's apartment and texted Crawford in order to lure him to the apartment to rob him. Crawford did not

immediately reply, and Johnson began to feel sick and went home prior to any response from Crawford. Defendant decided to still go through with the plan, however, and had Drumgo begin texting Crawford, pretending to be Johnson using another phone.

Crawford was driving to a club with his friend Kelvin Clark when Crawford received Drumgo's texts and agreed to meet at the apartment complex where defendant, Drumgo, and Ervin were setting the stage for the robbery. Defendant told Ervin to wait for Drumgo to bring Crawford and Clark to the darkened apartment and then to grab one of the men while defendant came out from under the stairs and held the gun on the other. Defendant then hid under a dark stairwell with a gun, waiting for Crawford and Clark to arrive.

When Crawford and Clark arrived at the apartment complex, Drumgo met them and took them down to the darkened apartment. Immediately after Drumgo went to turn on the lights, leaving Crawford and Clark alone in the doorway, Crawford and Clark were pushed into the apartment from behind.

Either Ervin or defendant had a gun and dark cloth wrapped around his head and said something like, "You know what this is." Either Crawford or Clark responded, "we ain't got nothing." There was a scuffle with one or two gunshots, and Clark fell to the floor while Crawford dove through a window, ran into the woods, and called 911. Clark died minutes later from a gunshot wound through the chest.

Panicked, defendant, Ervin, and Drumgo fled, leaving Clark on the floor along with his jewelry and over $1,300.00 in his wallet. Drumgo was later found at defendant's mother's house, and Ervin and defendant were arrested four days later in an abandoned apartment they had broken into in Fayetteville.

Defendant was tried in Mecklenburg County Superior Court on charges of first degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On 27 August 2013, the jury returned verdicts finding defendant guilty of first degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a dangerous weapon. The trial court sentenced defendant to life imprisonment without parole for the first degree murder charge, followed by two consecutive presumptive-range terms of 73 to 97 months imprisonment for two counts of attempted robbery with a dangerous weapon and a concurrent term of 29 to 44 months imprisonment for conspiracy to commit armed robbery. Defendant timely appealed to this Court.

Discussion

[1] Defendant first argues that there was insufficient evidence to support a jury instruction on lying in wait. In examining the sufficiency of the evidence supporting a jury instruction on appellate review, " '[a]ll evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered.' " *State v. Woodard*, 324 N.C. 227, 230, 376 S.E.2d 753, 755 (1989) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)). " '[T]he evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence.' " *Id.*, 376 S.E.2d at 754-55 (quoting *Bullard*, 312 N.C. at 160, 322 S.E.2d at 387-88). We review the trial court's decision to give the instruction de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

The State contends that defendant has waived the right to appeal the issue. Although the State concedes that defendant initially objected to the instruction, the State argues that defendant then waived his objection by later not objecting when the court gave a verbatim repetition of the contested instruction.

Because a "defendant is not prejudiced by . . . error resulting from his own conduct[,]" N.C. Gen. Stat. § 15A-1443(c) (2013), " 'a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review.' " *State v. Goodwin*, 190 N.C. App. 570, 574, 661 S.E.2d 46, 49 (2008) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)). In arguing invited error, the State relies exclusively on *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996).

In *Wilkinson*, the Supreme Court held that the defendant invited error regarding the instruction because the defendant "did not object to the charge as given," but instead "agreed at the charge conference to have the instruction given as it was" by saying, " 'That will be fine.' " *Id.* at 235, 474 S.E.2d at 395, 396. The Court held: " 'Since [the defendant] asked for the exact instruction that he now contends was prejudicial, any error was invited error.' " *Id.* at 214, 474 S.E.2d at 383 (quoting *State v. McPail*, 329 N.C. 636, 644, 406 S.E.2d 591, 596 (1991)).

In this case, however, defendant only assented when the trial court proposed re-reading the instructions in response to a direct jury question:

> [THE COURT:] [The question] says, need judge's guidelines . . . [regarding] the law on the first-degree murder charge . . . .

> . . . I understand his question to ask me to repeat the instructions, the substantive instructions for the two first-degree murder charges. And that's what I would propose to do.

Defendant responded to the trial court's proposal to repeat the instructions by stating, "If you wish to repeat them, that seems to make sense." The court then repeated the lying in wait instruction to the jury without further objection by defendant.

However, because the trial court had already decided the issue regarding the sufficiency of the evidence to support the lying in wait instruction, overruling defendant's objection, defendant did not invite error by failing to repeat that objection when the trial court proposed responding to the jury question by re-reading the exact same instructions the jury had already heard once. The State cites no authority, nor have we found any authority, holding that a defendant invites error when his objection to an instruction is overruled, and the defendant does not repeat that objection when the judge simply re-reads the instruction upon jury request. *Compare Goodwin*, 190 N.C. App. at 574, 661 S.E.2d at 49 ("[The defendant's] attorney specifically requested that the jury not be instructed as to self-defense, and thus [the] defendant [invited the error.]"). We therefore conclude that defendant did not invite error by failing to renew his objection, and the jury instruction issue is properly preserved for appellate review.

[2] We turn next to defendant's main contention that the trial court erred in instructing the jury on a lying in wait theory of murder due to insufficient evidence regarding defendant's intent. Defendant contends that the State must present evidence that "lying in wait was the perpetrator's 'means of' accomplishing a '*murder*' " and that, when lying in wait, defendant had a "deadly purpose" or " 'purpose to kill.' " (Quoting N.C. Gen. Stat. § 14-17(a) (2013); *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990).) Our Supreme Court has, however, held otherwise.

N.C. Gen. Stat. § 14-17(a) defines murder generally and provides in pertinent part that:

> A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined by G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping,

> burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . .

Our Supreme Court has construed the statute as separating first degree murder into four distinct classes:

> "(1) murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture; (2) murder perpetrated by any other kind of willful, deliberate and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon."

State v. Evangelista, 319 N.C. 152, 157, 353 S.E.2d 375, 380 (1987) (quoting *State v. Johnson*, 317 N.C. 193, 202, 344 S.E.2d 775, 781 (1986)).

North Carolina defines "first-degree murder perpetrated by means of lying in wait" as " 'a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim.' " *Leroux*, 326 N.C. at 375, 390 S.E.2d at 320 (quoting *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979)). Our Supreme Court has specifically held that "[p]remeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. The presence or absence of these elements is irrelevant." *Id.* "[L]ying in wait is a physical act" and "does not require a finding of any specific intent." *State v. Baldwin*, 330 N.C. 446, 461, 462, 412 S.E.2d 31, 40-41 (1992).

A requirement that the State prove a "deadly purpose" or a "purpose to kill" is no different than requiring proof of a deadly intent or an intent to kill. "Purpose" is a synonym for "intent" and, therefore, our Supreme Court's precedent forecloses defendant's contention.

As the Supreme Court has previously held, "[h]omicide by lying in wait is committed when: the defendant lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, intentionally assaults the victim, proximately causing the victim's death." *State v. Camacho*, 337 N.C. 224, 231, 446 S.E.2d 8, 12 (1994) (internal citations omitted). In other words, a defendant need not intend, have a purpose, or even expect that the victim would die. The only requirement is that the assault committed through lying in wait be a proximate cause of the victim's death.

Defendant points to references in Supreme Court opinions to a defendant's "purpose to kill" the victim. *See*, *e.g.*, *Allison*, 298 N.C. at 148, 257 S.E.2d at 425. The Court in *Allison*, however, referenced the "purpose to kill" only if the victim is aware of the defendant's presence: "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, *if he does know*, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait." *Id.* (emphasis added). *See also Leroux*, 326 N.C. at 375, 390 S.E.2d at 320 (holding that for lying in wait instruction, defendant "need not be concealed, nor need the victim be unaware of his presence[,]" but if victim does know of defendant's presence, then victim must be unaware of defendant's purpose to kill him). As our Supreme Court explained, *Leroux* and *Allison* hold "that a lying in wait killing requires some sort of ambush and surprise of the victim." *State v. Lynch*, 327 N.C. 210, 217, 393 S.E.2d 811, 815 (1990). Consequently, when the defendant is not concealed and the victim is aware of the defendant's presence, then the ambush and surprise required for lying in wait is supplied by the victim's lack of awareness that the defendant has a purpose or intent to kill the victim. Since, in this case, defendant does not dispute that he hid under a darkened staircase for the purpose of robbing the victim, there was no need of any further showing of ambush and surprise.

In support of his contention that the State must show a "deadly purpose," defendant also cites several secondary sources: *Homicide: What Constitutes "Lying in Wait,"* 89 A.L.R.2d 1140 § 1b (stating that lying in wait contains a "mental element[]" of "purpose or intent to inflict bodily injury or to kill" another), and 40 Am. Jur. 2d *Homicide* § 42 (using nearly identical language to describe "[w]hat constitutes lying in wait"). These authorities demonstrate that "purpose" and "intent" are synonymous -- therefore, those authorities define lying in wait in a manner inconsistent with our Supreme Court. However, "[the Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (internal quotation marks omitted).

With respect to the sufficiency of the evidence to support a lying in wait instruction under controlling Supreme Court precedent, our Supreme Court has upheld inclusion of the instruction in similar cases involving an intent to ambush a victim for the purpose of committing a robbery. *See*, *e.g.*, *State v. Richardson*, 346 N.C. 520, 527, 488 S.E.2d 148, 152 (1997) (upholding lying in wait instruction when evidence tended

to show defendant went to store where victim worked "so he could get some money," waited in a parked car until closing, attacked victim as she left store, killed her, then broke into store using victim's keys); *State v. Joyner*, 329 N.C. 211, 214, 404 S.E.2d 653, 654 (1991) (upholding lying in wait instruction when evidence tended to show defendant waited behind trailer, killed his victim, and later explained that "he had been thinking for a few days about robbing the victim but did not want to do so in a place where the victim could see him").

Here, over the course of several weeks defendant formulated a plan to rob the victim and then waited underneath a darkened staircase for the opportunity to do so. Like *Richardson*, where the initial rationale for the concealed attack on the victim was to "get some money" but nevertheless ended in murder, 346 N.C. at 527, 488 S.E.2d at 152, here, the attack by defendant also was for the purpose of robbery but ended in murder. Consequently, viewing the evidence in the light most favorable to the State, the lying in wait instruction was sufficiently supported by the evidence.

[3] Additionally, defendant argues that at least one of the attempted robbery convictions should be arrested due to the merger doctrine. The merger doctrine provides that "when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder[.]" *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996). However, because the jury found defendant guilty of first degree murder based upon both felony murder and lying in wait, and we have upheld the conviction based on lying in wait, the trial court properly did not arrest judgment on defendant's conviction of attempted robbery. *See id.* at 122-23, 478 S.E.2d at 510 (holding that "defendant can only be punished for both murder and the underlying felony" if convicted "of first-degree murder under [multiple] theories").

No error.

Judges BRYANT and CALABRIA concur.

STATE v. PACE

[240 N.C. App. 63 (2015)]

STATE OF NORTH CAROLINA
v.
ROBERT ARTHUR PACE

No. COA14-802

Filed 17 March 2015

1. Evidence—hearsay—opinion—minor sex assault victim's changed demeanor—no plain error or abuse of discretion

The trial court did not commit plain error in a first-degree rape and indecent liberties with a child case by allowing the victim's mother to provide certain hearsay testimony, nor did it abuse its discretion in allowing the mother to offer an opinion as to changes she observed in her daughter's behavior after the assault. The mother's response constituted a shorthand statement of fact and therefore did not qualify as improper lay opinion testimony under Rule 701. Further, it was improbable that the jury's finding of guilt would have differed if the trial court had excluded the testimony.

2. Jury—jury instruction—use of iPads and tablet computers by jurors for notetaking

The trial court did not commit plain error in a first-degree rape and indecent liberties with a child case by giving its jury instruction on the use of iPads and tablet computers after authorizing their use by the jurors for note-taking purposes.

3. Sentencing—aggravated sentence—remanded for resentencing

The trial court erred in a first-degree rape and indecent liberties with a child case by sentencing defendant to an aggravated sentence. The case was remanded to the trial court for resentencing with instructions to conduct further proceedings.

Appeal by Defendant from judgments entered 5 December 2013 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Margaret A. Force, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for the Defendant.

DILLON, Judge.

Robert Arthur Pace ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of first-degree rape and indecent liberties with a child. We find no error in part and we vacate in part with instructions to the trial court to conduct further proceedings consistent with this opinion.

I. Background

The evidence tended to show the following: On 16 September 1989, an unknown male intruder broke into the room where the victim, a female, was sleeping. The victim was seven years old at the time. The intruder ordered the victim to turn over on her stomach; he pulled down her panties; he licked her anal area; and he began to penetrate her vaginally and anally while holding the blade of a knife to her nose. When he had finished, he escaped out the window.

The victim's mother took her to the emergency room after the incident. While there, a doctor examined the victim and also processed a rape kit, sealing it and handing it over to police.

Thereafter, the case went cold for many years. In 2013, however, an agent with the State Bureau of Investigation ("SBI") determined that DNA present on the victim's panties, stored with the rape kit, matched a DNA profile now present in CODIS, the State's Combined DNA Index System, a database of DNA samples taken from convicted offenders. Based on that match, the State came to suspect Defendant. The State obtained an additional sample of Defendant's DNA to compare to the DNA detected on the victim's panties. Based on that comparison, the SBI agent confirmed the match.

Defendant was indicted on various charges in connection with the 1989 attack. He was tried by a jury, which found him guilty of one count of first-degree rape and one count of taking indecent liberties with a child.

The trial court entered separate judgments on each conviction, sentencing Defendant to life in prison for first-degree rape and an additional ten years in prison for indecent liberties, and ordering that the sentences run consecutively. Defendant entered his notice of appeal in open court.[1]

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1. Defendant appears to have entered his notice of appeal prematurely, after the jury returned its verdict but before the court imposed a sentence, and has, therefore, petitioned this Court for writ of certiorari. We hereby grant Defendant's petition.

II. Analysis

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

A. Evidentiary Issues

[1] Defendant's first argument concerns the trial testimony of the victim's mother. Specifically, Defendant contends that the trial court committed plain error in allowing her to provide certain hearsay testimony and that the court abused its discretion in allowing her to offer an opinion as to changes she observed in her daughter's behavior after the assault. We disagree.

"Unpreserved error . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury's finding[.]" *Id.* at 518, 723 S.E.2d at 334 (internal marks and citation omitted) (emphasis added).

In the present case, the victim's mother testified that when she took her daughter to counseling, she was told, "[s]omething violent has happened to her." Assuming, *arguendo*, that this testimony constituted inadmissible hearsay – as evidence that the alleged sexual assault in fact occurred, see N.C. Gen. Stat. § 8C-1, Rules 801, 802 (2013), Defendant failed to object to this testimony, and we do not believe the trial court's failure to strike the testimony on its own motion had a *probable* impact on the jury's verdict. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Rather, the State presented substantial, uncontradicted evidence that the assault in fact occurred and that Defendant was the perpetrator. The victim described the assault in detail during her testimony. The emergency room doctor testified to the presence of "lacerations or large bruises" on the victim. The State tendered experts in DNA analysis and forensic serology who both testified to the presence of semen on the victim's panties. One expert in DNA analysis stated that the sperm found on the victim's panties matched Defendant's DNA, and that "[t]he probability of randomly selecting an unrelated individual with a DNA profile that matches the DNA profile obtained from the sperm fraction from the cutting from the [victim's] panties is one in greater than one trillion, which is more than the world population[.]"

In light of this evidence, we do not believe it is *probable* that the jury's finding of guilt would have differed if the trial court had excluded

the complained-of testimony. Accordingly, Defendant's contention is overruled.

Defendant contends in the alternative that the complained-of testimony constituted impermissible vouching. Again, based on the other evidence in the record, we do not believe it is *probable* that the jury's finding of guilt would have differed if the trial court had excluded the complained-of testimony. Accordingly, Defendant's contention in the alternative is also overruled.

Defendant next contends that the trial court abused its discretion in allowing the victim's mother to testify about changes she observed in her daughter that she believed were a direct result of the assault, claiming such testimony constituted improper lay opinion testimony. We disagree.

We review a trial court's rulings on the admissibility of lay opinion testimony for an abuse of discretion. *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259-60 (2011). Rule 701 of the North Carolina Rules of Evidence limits admissible lay opinion testimony 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-1, Rule 701 (2013).

However, we have long recognized that Rule 701 does not render "shorthand statement[s] of fact" inadmissible. *State v. Wade*, 155 N.C. App. 1, 14, 573 S.E.2d 643, 652 (2002) (internal marks omitted). A "shorthand statement of fact" has been defined as "the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." *Id.* (internal marks omitted). While themselves opinions, we have explained that

> [a]llowance of opinions in the form of a 'shorthand statement of fact' is premised upon the notion that a description of all the underlying detailed facts that helped to form the witness' opinion may be possible, but is not practical due to the inherent difficulties in articulating one's analytical thought processes.

State v. Lesane, 137 N.C. App. 234, 244, 528 S.E.2d 37, 44 (2000).

In the present case, the following colloquy transpired on direct examination of the victim's mother:

> [PROSECUTOR]: And what other changes did you observe in her that you believe are a direct result of her being sexually assaulted?
>
> [DEFENDANT[2]]: Objection, Your Honor.
>
> THE COURT: Objection overruled.
>
> [PROSECUTOR]: You can answer.
>
> [VICTIM'S MOTHER]: She was mean. She was—she didn't want to do things. She was—wanted to fight. She was violent. She just—all these things.

Defendant characterizes this testimony as generally inadmissible because it states a conclusion or inference properly reserved to the jury or alternately as vouching for the credibility of a lay diagnosis of some malady about which only an expert witness would be properly qualified to opine. However, we believe the context surrounding the response demonstrates that the witness was merely describing the differences she observed in her daughter's behavior after being sexually assaulted. While "a description of all the underlying detailed facts that helped to form the witness'[s] opinion may [have been] possible," we do not believe it would be practical to require such a description. *Id.* at 244, 528 S.E.2d at 44. We hold that the victim's mother's response to the objected-to question constituted a shorthand statement of fact and therefore did not qualify as improper lay opinion testimony under Rule 701. Accordingly, Defendant's contention is overruled.

B. Jury Instructions

[2] Defendant next argues that the trial court committed plain error by giving a fatally inadequate jury instruction on the use of iPads and tablet computers after authorizing their use by the jurors for note-taking purposes. We disagree.

North Carolina law affords the presiding judge considerable discretion over the manner in which to conduct a trial. *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). "Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion." *Id.* Whether to allow the jurors to take notes, for example, "is a discretionary decision

2. Defendant waived his right to counsel, representing himself at trial.

made by the trial court." *State v. Crawford*, 163 N.C. App. 122, 127, 592 S.E.2d 719, 723 (2004).

In the present case, the trial court provided the jury with preliminary instructions, allowing them to take notes during the trial. The court had also previously admonished the jury "not [to] look up some topic on the internet, or . . . visit any social media site."

During the first day of trial, the trial court further instructed the jury as follows regarding note-taking:

> A question has been raised by a juror as to whether notes may be taken on an electronic device such as an iPad or a tablet as opposed to pen and paper. In my discretion, I will allow that. Just abide by the same instructions that I've given you concerning notes.

Defendant does not challenge the trial court's decision authorizing the jurors' use of iPads or tablet computers for note-taking purposes. *See id.* Rather, Defendant contends that the court's instructions concerning the use of these electronic devices were fatally defective, constituting plain error, recasting as instructional error subject to plain error review a decision we otherwise would review for an abuse of discretion. *Compare id. with Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

To establish the requisite prejudice resulting from this alleged instructional error, Defendant requests that we take judicial notice of common features of iPads and tablet computers; for example, that these devices have the capabilities to allow their users to communicate with others, to access information, and to record. In the present case, however, even if we were to take judicial notice of the capabilities of iPads and tablet computers, such notice would not alter our conclusion regarding Defendant's argument because our review of the record reveals no prejudice. While true that iPads and other tablet computing devices have a range of capabilities a simple pen and paper do not, the record does not even *hint* at any specific prejudice resulting from the trial court's failure to educate the jurors more thoroughly about the wonders of the technology or to clarify or provide more detail in its instructions regarding the jurors' use of that technology.

Based on our review of the record, we do not believe it is reasonably possible – much less reasonably probable - that the jury's finding of guilt would have differed if the trial court's instructions regarding note-taking had differed. Therefore, assuming, *arguendo*, that the court's failure to instruct the jury more fully regarding the use of iPads and tablet

computing devices constituted error, we hold that it did not constitute plain error. Accordingly, this argument is overruled.

C. Sentencing

[3] Finally, Defendant argues – and the State concedes - that the trial court erred in imposing an aggravated sentence of ten (10) years for his indecent liberties conviction and that the matter should be remanded for resentencing. However, Defendant and the State disagree as to the *scope* of the resentencing hearing. Defendant contends that this Court should instruct the trial court on remand to impose a presumptive sentence (3 years) for the indecent liberties conviction. The State, however, contends that the trial court should be free to impose an aggravated sentence (10 years) based on a proper finding of aggravating factors.

For the reasons stated below, we hold that the trial court erred in sentencing Defendant to an aggravated sentence, and we remand the matter for resentencing with instructions to the trial court to conduct further proceedings consistent with this opinion.

1. Statutory Error

Defendant first contends – and the State concedes - that the trial court committed a statutory error in imposing the sentence it did. We agree.

Alleged statutory errors present questions of law, which we review *de novo*. *State v. McLean*, ___ N.C. App. ___, ___, 753 S.E.2d 235, 238 (2014). Relevant to the present case, the sentencing regime applicable to crimes committed in North Carolina in 1989 is the Fair Sentencing Act. Under the Fair Sentencing Act, "the judge must specifically list . . . each matter in aggravation or mitigation," and "find that the factors in aggravation outweigh the factors in mitigation" before imposing an aggravated sentence. N.C. Gen. Stat. § 15A-1340.4(b) (1989). Under the Fair Sentencing Act, indecent liberties with a child is a Class H felony with a presumptive sentence of three years and a maximum, aggravated sentence of ten years. *State v. Lawrence*, 193 N.C. App. 220, 223, 667 S.E.2d 262, 264 (2008).

Here, the indecent liberties judgment simply lists an offense date of 16 September 1989 and then purports to sentence Defendant to ten years in prison without indicating that the court considered the aggravating and mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.4(a) (1989); without listing findings in aggravation or mitigation; and without making a finding that the factors found in aggravation outweighed

those in mitigation. *See id.* § 15A-1340.4(b). This constitutes reversible error. Accordingly, we vacate the judgment imposing this sentence and remand for resentencing.

2. Scope of Resentencing Hearing on Remand

Determining the proper scope of the resentencing hearing is complicated by the fact that this case belongs to a small universe of cases which are subject to *both* the Fair Sentencing Act – *see State v. Mickey*, 347 N.C. 508, 513, 495 S.E.2d 669, 672 (1998) (stating that the Fair Sentencing Act applies to those *offenses* committed before 1 October 1994) – and the requirements flowing from the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004), which apply prospectively to cases pending on direct review and not final on 24 June 2004, irrespective of the offense date. *State v. Hasty*, 181 N.C. App. 144, 146-47, 639 S.E.2d 94, 95-96 (2007).

Our resolution of the issue requires an understanding of the effect of *Blakely* on our law and its impact on our application of the Fair Sentencing Act in current prosecutions of pre-1994 crimes. The version of the Fair Sentencing Act applicable to Defendant's indecent liberties offense committed in 1989 provides sixteen (16) factors which may be considered to enhance the punishment of a defendant convicted of certain felonies. N.C. Gen. Stat. § 15A-1340.4(a)(1) (1989). Fifteen (15) of the factors deal with characteristics of the crime of which the defendant was convicted, such as whether the crime was "especially heinous, atrocious, or cruel," or whether the defendant was armed at the time the offense was committed. *Id.* The remaining factor is the fact of the defendant's prior conviction for an offense punishable by more than sixty (60) days' confinement. *Id.*

Prior to *Blakely*, it was the trial judge who determined the existence of aggravating factors by the preponderance of the evidence. *State v. Jones*, 314 N.C. 644, 648, 336 S.E.2d 385, 387-88 (1985). The aggravating factors were not considered "elemental facts" which had to be found "beyond a reasonable doubt." *Id.* at 648, 336 S.E.2d at 388. Though the Fair Sentencing Act was replaced by the General Assembly in 1994 with the Structured Sentencing Act, it still has application to prosecutions for offenses committed prior to its repeal. *Mickey, supra.*

In 2004, the United States Supreme Court handed down its decision in *Blakely*. In *Blakely*, the Court held that, under the Sixth Amendment right to a jury trial, any factors which could be used to enhance a defendant's sentence *other than the fact of prior conviction* had to be found

beyond a reasonable doubt by a jury. 542 U.S. at 301-04, 124 S. Ct. 2536-38. In the wake of *Blakely*, based on the United States Supreme Court's previous decision in *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed.2d 649 (1987), we held that *Blakely*'s mandate applied prospectively to proceedings pending on direct appeal and not final as of 24 June 2004. *Hasty*, 181 N.C. App. at 146-47, 639 S.E.2d at 95-96. Therefore, even though the Fair Sentencing Act applies to the present proceeding – as Defendant committed the offense in 1989 – the *Blakely* mandate also applies, as the proceeding was not commenced until well after 2004.

The replacement of the Fair Sentencing Act with the Structured Sentencing Act brought a number of changes to the procedure and treatment of aggravating factors in our State, many in response to *Blakely*. *See*, *e.g.*, 2005 N.C. Sess. Law 145. Under the current law, there are twenty-nine (29) aggravating factors which must be considered by a jury. N.C. Gen. Stat. § 15A-1340.16 (2013). The fact of prior conviction is still used to enhance a defendant's punishment; however, it is no longer considered an aggravating factor, but rather is used to determine a defendant's prior record level. *See id.* § 15A-1340.14.

Regarding notice, the Fair Sentencing Act did not contain any provision requiring the State to provide advance notice of its intent to seek an aggravated sentence. However, the Structured Sentencing Act, pursuant to an amendment to that Act passed by the General Assembly in response to *Blakely*, requires that the State provide a defendant with "written notice of its intent to prove the existence of" aggravating factors "at least 30 days before trial[.]" N.C. Gen. Stat. § 15A-1340.16(a6) (2013). However, this statutory notice requirement does not apply to proceedings for crimes committed prior to 30 June 2005. *State v. Henderson*, 201 N.C. App. 381, 389, 689 S.E.2d 462, 467-68 (2009).

Notwithstanding that the thirty (30) day statutory notice requirement does not apply to the current proceeding – as the offense date was in 1989 - our Supreme Court has held that under the Sixth Amendment, a defendant is otherwise entitled to "'*reasonable notice*' sufficient to ensure that [the defendant] [is] afforded an opportunity to defend against the charges [brought against him]," *State v. Hunt*, 357 N.C. 257, 271, 582 S.E.2d 593, 602 (2003) (emphasis in original), and stated that this "reasonable notice" requirement applies to aggravating factors. *Id.* at 275-76, 582 S.E.2d at 605.

In the present case, Defendant argues that his right to "reasonable notice" was violated. We do not believe Defendant's Sixth Amendment right to "reasonable notice" is violated where the State provides no prior

notice that it seeks an enhanced sentence based on the fact of prior conviction. It *appears* from the record on appeal that this was the sole basis relied upon by the State in the initial sentencing hearing.[3] Accordingly, we hold that the trial court on remand may impose an aggravated sentence on the indecent liberties conviction based on a finding by a preponderance of the evidence that Defendant had a prior conviction qualifying as an aggravating factor pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1989). However, if the State intends to present evidence of any aggravating factors *other than the fact of prior conviction*, we hold that it must first satisfy the trial court that it provided Defendant with constitutionally adequate notice.

III. Conclusion

We find no reversible error regarding the testimony by the victim's mother or in the instructions regarding the use of iPads or tablet computers by the jury. We hold, however, that the trial court erred by imposing an aggravated sentence for Defendant's conviction for taking indecent liberties with a child. We vacate the judgment imposing that sentence and remand the case to the trial court with instructions to conduct further proceedings consistent with this opinion.

Further, as the State points out, the trial court misidentified the class of each felony on the judgments, mistakenly identifying the class under current law rather than under 1989 law. Accordingly, on remand the trial court shall correct the Judgment and Commitment for the first degree rape offense to reflect the offense as a class "B" felony rather than a class "B1" felony; and the trial court shall correct the Judgment and Commitment for the indecent liberties offense to reflect a class "H" felony rather than a class "F" felony. *See* N.C. Gen. Stat. § 14-27.2(b) (1989); id. § 14-1.1(a)(2); id. § 14-202.1(b).

NO ERROR in part; VACATED in part; and REMANDED.

Judges BRYANT and DIETZ concur.

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3. The record is not entirely clear on this point.

STATE v. SMITH

[240 N.C. App. 73 (2015)]

STATE OF NORTH CAROLINA
v.
MICQUAN SMITH

No. COA14-915

Filed 17 March 2015

Satellite-Based Monitoring—supporting evidence—sufficient

The trial court did not err by ordering defendant to be subject to Satellite-Based Monitoring where defendant contended that his prior offenses should not have been considered in the trial court's findings, but there was evidence in the record to support the remainder of the trial court's findings with respect to the age of the alleged victims, the temporal proximity of the events, and defendant's increasing sexual aggressiveness.

Appeal by defendant from judgments entered 17 March 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 2015.

Roy Cooper, *Attorney General*, *by Joseph Finarelli*, *Special Deputy Attorney General*, *for the State.*

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

STEELMAN, Judge.

Where the trial court's additional findings of fact were supported by competent record evidence, the trial court did not err in imposing satellite-based monitoring.

I. Factual and Procedural Background

On 6 January 2014, Micquan Smith (defendant) pled guilty to indecent liberties with a minor and attempted first-degree burglary, based on offenses committed on 10 July 2013. The trial court deferred sentencing to determine whether satellite-based monitoring (SBM) was required. On 7 February 2014, the State presented evidence that in January of 2012, defendant pled guilty to assault on a child under twelve, and that in September of 2012, defendant was charged with indecent liberties with a minor and indecent exposure, although these charges were voluntarily dismissed by the State prior to trial.

On 7 March 2014, the State presented the results of the Static-99 examination of defendant, which indicated that he had six points, and fell within the "High" risk category. One point was assigned for the January 2012 conviction, and one for the September 2012 charges. The officer who administered the examination, however, testified that she would have given defendant only five points, placing him in the "Moderate-High" risk category. The trial court found the initial examination to be in error, and that defendant's Static-99 did not place him in the "High" risk category. The trial court then made the following findings:

> Find that although the Static 99R takes into account prior convictions it does not explicitly consider the short duration between the criminal acts themselves,
>
> That is: lst 1-28-12 Picking up a 5 year old girl.
>
> 2nd 9-22-12 Exposure on a playground to a 5 year old, 3 year old and a 1 year female.
>
> 3rd 7-10-13 B&E physically break into a residence and commit an Indecent Liberties to wit being in bed with a young female child.
>
> That the three evidences [sic] a pre-dereliction [sic] towards young pre-pubescent females a particularly vulnerable population.
>
> That two of the occasions the young female children were being loosely supervised in open, public areas when approached by the defendant. In the third most recent case the defendant broke into a residential structure to gain access to the young victim. That the three incidences [sic] evidence a pattern of sexual increasing aggressiveness on the part of the defendant in his acting out with the young female victims.

Defendant was sentenced to consecutive active sentences of 23-40 months imprisonment for first-degree burglary and 15-27 months imprisonment for indecent liberties with a child. The trial court ordered that defendant be subject to SBM for 20 years following his release from prison.

Defendant appeals.

II. Standard of Review

On appeal from an order imposing SBM, "we review the trial court's findings of fact to determine whether they are supported by competent

record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004), *cert. denied*, 543 U.S. 1156, 161 L.Ed.2d 122 (2005)).

III. Findings of Fact

In his sole argument on appeal, defendant contends that the trial court's additional findings of fact are not supported by competent record evidence, and that the trial court erred in ordering defendant to be subject to SBM. We disagree.

We have held that, if the only evidence presented to the trial court is a STATIC-99 risk assessment of "Moderate," the trial court errs in imposing SBM.[1] *Kilby*, 198 N.C. App. At 369-70, 679 S.E.2d at 434. If the State presents additional evidence, and the trial court makes additional findings, then the trial court may order SBM. *State v. Morrow*, 200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (2009).

The trial court's findings state that: (1) defendant committed multiple acts, (2) they were close together in time, (3) that all of the subjects of the incidents were young girls, (4) that two of the incidents involved public places, and one involved breaking into a private residence, and (5) that the incidents show that defendant's aggressive conduct was escalating.

Defendant contends that his prior offenses should not have been considered at all in the trial court's findings. We have previously held that the trial court is not to consider matters already included in the STATIC-99 assessment:

> The purpose of allowing the trial court to make additional findings is to permit the trial court to consider factors not part of the STATIC-99 assessment. In *Morrow*, we held that, where an offender is determined to pose only a low or moderate risk of reoffending, the State must offer additional evidence, and the trial court make additional findings, in order to justify a maximum SBM sentence. *See Morrow*, 200 N.C. App. at 132, 683 S.E.2d at 761; *Jarvis*, ___ N.C. App. at ___, 715 S.E.2d at 259. To allow these

1. We note that the STATIC-99 risk assessment has four categories: Low, Moderate-Low, Moderate-High, and High. We hold that Moderate-High still constitutes "Moderate" for the purposes of our precedent.

> "additional findings" to include matters already addressed in the STATIC-99 assessment would obviate the utility of the assessment. We hold that these "additional findings" cannot be based upon factors explicitly considered in the STATIC-99 assessment.

State v. Thomas, ___ N.C. App. ___, ___, 741 S.E.2d 384, 387 (2013). Even assuming *arguendo* that the charges from January and September 2012 were otherwise admissible, they were part of the STATIC-99 assessment, and the trial court was not permitted to rely upon them as factors in its final determination on the appropriateness of SBM. Further, we note that the September 2012 charges were dismissed; we have previously held that mere accusations of crimes, absent a conviction, "are generally inadmissible even if evidence that [the witness] actually committed the crimes would have been admissible." *State v. Johnson*, 128 N.C. App. 361, 369, 496 S.E.2d 805, 810 (1998) (quoting *State v. Mills*, 332 N.C. 392, 407, 420 S.E.2d 114, 121 (1992)). As such, even in the absence of the STATIC-99, the September 2012 charges could not have been relied upon by the trial court.

However, there was evidence in the record to support the remainder of the trial court's findings, with respect to the age of the alleged victims, the temporal proximity of the events, and defendant's increasing sexual aggressiveness. We have held that "when the trial court is making its determination of whether the defendant requires the highest possible level of supervision, the court 'is not limited to the DOC's risk assessment' and should consider 'any proffered and otherwise admissible evidence relevant to the risk posed by a defendant[.]' " *State v. Green*, 211 N.C. App. 599, 603, 710 S.E.2d 292, 295 (2011) (quoting *Morrow*, 200 N.C. App. at 131, 683 S.E.2d at 760-61). These factors were not part of the STATIC-99 evaluation, and the trial court was not barred from considering them. We hold that the trial court did not err in considering this evidence, making findings of fact based on this evidence, and imposing the requirement of post-sentence SBM.

Because the trial court made additional findings of fact that were supported by competent record evidence, we hold that it did not err in ordering defendant to be subject to SBM following his release from incarceration.

AFFIRMED.

Judges DIETZ and INMAN concur.

STATE v. WAINWRIGHT

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

STATE OF NORTH CAROLINA
v.
JAMIE COLE WAINWRIGHT

No. COA14-1036

Filed 17 March 2015

1. Motor Vehicles—driving while impaired—pretrial motion to quash unsigned citation

The trial court did not err by denying defendant's pretrial motion to quash the citation which charged him with driving while impaired even though he did not sign the citation and the officer did not certify the delivery of the citation as mandated by N.C.G.S. § 15A-302(d) (2013). By the plain language of the statute, the officer was only required to sign and date the document if defendant refused to sign.

2. Motor Vehicles—driving while impaired—failure to reduce order—not required to enter written order

The trial court did not err in a driving while impaired case by failing to reduce the order denying defendant's motion to suppress to writing, and by allegedly failing to include specific findings of fact and conclusions of law. If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order.

3. Search and Seizure—motion to suppress evidence—investigatory stop of vehicle—probable cause

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress evidence obtained during an investigatory stop of his vehicle. The officer had probable cause to conduct an investigatory stop. Defendant swerved outside the lane of travel and almost struck the curb at 2:37 a.m. in an area with heavy pedestrian traffic and within close proximity to bars and nightclubs.

Appeal by defendant from judgment entered 26 March 2014 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 18 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the state.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant.

TYSON, Judge.

Defendant appeals from the denial of his motions to suppress the investigatory stop of his vehicle and to quash the citation charging him with driving while impaired. We affirm.

I. Background

Officer Chad Edwards was on duty in the early Sunday morning hours of 12 August 2007. Officer Edwards had four years of experience as a police officer, and had been employed by the East Carolina University Police Department for nearly a year. At approximately 2:37 a.m., Officer Edwards was standing beside his patrol car in the driveway of the Chancellor's residence on East Fifth Street. The Chancellor's residence is located directly across the street from the East Carolina University campus, three to four blocks from downtown Greenville. There are numerous bars and nightclubs located in the downtown area. The area around the Chancellor's residence is mostly comprised of student housing.

Officer Edwards was speaking with two women when he observed a grey Jeep Cherokee traveling toward downtown on East Fifth Street. The Jeep swerved to the right, crossed the white line marking the outside lane of travel, and almost hit the curb. The vehicle continued on East Fifth Street, and Officer Edwards observed nothing else unusual about the vehicle.

Officer Edwards testified he was concerned the vehicle would swerve again and strike a pedestrian. He stated pedestrian traffic in this immediate area was much heavier than normal. Students had moved back onto campus, but had not resumed their classes. The bars and nightclubs had stopped serving alcohol at 2:00 a.m., shortly before Officer Edwards observed the Jeep. Officer Edwards testified that one of the nightclubs located downtown has a capacity of 800 patrons, and it generally operated at full capacity on a Saturday night. About a dozen other establishments in the area serve alcohol. Many pedestrians were walking along the sidewalks on their way home from the bars and nightclubs in the downtown area. Officer Edwards testified some pedestrians were walking in the bicycle lane, and it was not unusual to observe some pedestrians walking in the road.

After he observed the grey Jeep swerve, Officer Edwards left the Chancellor's driveway and pulled into the roadway behind the vehicle.

He activated his blue lights and initiated a traffic stop. Officer Edwards, along with two other police officers, determined defendant, the driver, was impaired and arrested him. Defendant was transported to the Pitt County Detention Center and administered an Intoxilyzer test to determine his blood alcohol concentration. The Intoxilyzer test revealed a blood alcohol concentration of .11.

Defendant was tried before the Pitt County District Court on 12 November 2013, and was convicted of driving while impaired. He appealed the conviction to Pitt County Superior Court. Prior to trial, the Superior Court denied defendant's motion to suppress evidence obtained from the traffic stop and to quash the citation.

The case was tried before a jury and defendant was convicted of driving while impaired. The trial court found aggravating factors of a prior driving while impaired conviction within seven years, and defendant was driving with a revoked license at the time of his arrest. He was sentenced as a Level 1 offender to a term of eighteen months of supervised probation, and was ordered to serve an active term of thirty days in prison. Defendant appeals.

II. Issues

Defendant argues the trial court: (1) lacked jurisdiction to enter judgment on his driving while impaired conviction, because defendant did not sign the citation to acknowledge receipt and Officer Edwards did not certify delivery of the citation; (2) failed to enter a written order on the denial of his motion to suppress; and, (3) erred in denying his motion to suppress, because Officer Edwards did not form a reasonable articulable suspicion that defendant was impaired.

III. Motion to Quash the Citation

[1] Defendant asserts the trial court erred by denying his pretrial motion to quash the citation, which charged him with driving while impaired, because he did not sign the citation and Officer Edwards did not certify the delivery of the citation as mandated by N.C. Gen. Stat. § 15A-302(d) (2013). He argues Officer Edwards's failure to follow the procedure set forth in the statute for service of a citation divested the court of jurisdiction to enter judgment on his conviction for driving while impaired. We disagree.

a. Standard of Review

"An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d

462, 466 (1998) (citations omitted). This Court also reviews challenges to the jurisdiction of the trial court under a *de novo* standard. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

b. Statutory Requirements for Service of a Citation

"An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction." N.C. Gen. Stat. § 15A-302(b) (2013). The citation must:

> (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
>
> (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
>
> (3) Identify the officer issuing the citation, and
>
> (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

N.C. Gen. Stat. § 15A-302(c) (2013). The issuance of a citation requires the person to appear in court and answer a misdemeanor or infraction charge or charges, or waive his appearance. N.C. Gen. Stat. § 15A-302(a) (2013).

The manner of service of a citation is governed by N.C. Gen. Stat. § 15A-302(d), which provides:

> A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. If the cited person refuses to sign, the officer shall certify delivery of the citation by signing the original, which shall thereafter be filed with the clerk. Failure of the person cited to sign the citation shall not constitute grounds for his arrest or the requirement that he post a bond.

N.C. Gen. Stat. § 15A-302(d) (2013) (emphasis supplied).

The citation form includes a signature box for the defendant to sign to acknowledge receipt of a copy of the citation. The citation issued in this case is included in the record and does not bear defendant's signature. The citation form does not include an additional place for the

officer to sign, in the event the defendant refuses to sign for receipt of the document. Officer Edwards signed the citation, as issuing officer, pursuant to N.C. Gen. Stat. § 15A-301(a) (2) (2013). ("The citation must be signed and dated by the law-enforcement officer who issues it.").

The record indicates defendant was provided with a copy of the charges when he was brought before the magistrate. The Magistrate's Order, included on the citation, states defendant was arrested without a warrant, there is probable cause for the arrest, and that a copy of the order was delivered to defendant. The magistrate signed the order on 12 August 2007, the day of defendant's arrest.

Defendant argues that § 15A-302(d) requires Officer Edwards to have signed the citation a second time, because defendant did not sign to acknowledge receipt of a copy. We disagree.

"When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (quotation and citation omitted). The language of this statute is plain and unambiguous. The statute requires the officer to deliver a copy of the citation to the person charged. N.C. Gen. Stat. § 15A-302(d) (2013). The accused may, but is not required to, sign the original citation to acknowledge receipt. *Id.* By the plain language of the statute, the officer is only required to sign and date the document if the defendant refuses to sign. *Id.* While the practice of some officers is to write "refused to sign" or some other notation, if defendant refuses or is unable to sign the citation, this notation is not required by the statute.

Here, there is no evidence defendant refused to sign the citation. Defendant's motion to quash alleges he "was not requested to sign, and did not sign acknowledging receipt" of a copy of the citation. Even if the absence of defendant's signature on the citation was a conscious refusal, defendant has failed to show Officer Edwards failed to follow the procedure set forth in N.C. Gen. Stat. § 15A-302(d). Defendant's argument is overruled.

IV. Requirement of a Written Order

[2] Defendant argues the trial court erred by failing to reduce the order, denying his motion to suppress to writing, and by failure to include specific findings of fact and conclusions of law. We disagree.

a. Standard of Review

In ruling on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2013). "This statute has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing." *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009) (citing *State v. Shelly*, 181 N.C. App. 196, 205, 638 S.E.2d 516, 523, *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007)).

In reviewing the trial court's failure to set forth written findings of fact and conclusions of law, the appropriate standard of review is as follows:

> The trial court's ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria set forth in *Williams* have been met — (1) whether the trial court provided the rationale for its ruling on the motion to suppress from the bench; and (2) whether there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress, . . . and shall be binding on appeal if supported by competent evidence . . . . If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law, contrary to the mandate of section 15A-977(f), is fatal to the validity of its ruling and constitutes reversible error.

State v. Baker, 208 N.C. App. 376, 381-82, 702 S.E.2d 825, 829 (2010) (citations omitted).

b. Sufficiency of the Order

At the conclusion of the evidentiary hearing on defendant's motion to suppress, the court concluded: "After hearing arguments of [c]ounsel and reviewing the summary presented by [d]efense counsel, the Court finds that Officer Edwards had a reasonable suspicion to stop and denies the [d]efendant's motion." Defense counsel requested the court to "actually enter an order with the findings of facts and conclusions of law." The record does not indicate the court made any further findings of fact or conclusions of law to support the denial of defendant's motion to suppress, or that it entered a written order.

When ruling on a motion to suppress, our Supreme Court has recognized the importance of the trial court to establish a record, which allows for meaningful appellate review. "[I]t is always the better practice to find all facts upon which the admissibility of the evidence depends." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order. *Williams*, 195 N.C. App. at 555, 673 S.E.2d at 395. "If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress." *Id.* "If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995).

Here, the trial court ruled from the bench on defendant's motion to suppress. *See Williams*, 195 N.C. App. at 555, 673 S.E.2d at 394 (holding an order denying motion to suppress sufficient in the absence of a written order where the court ruled from the bench and there were no material conflicts in the evidence). Upon a full review of the transcript and record, we find no material conflicts in the evidence presented at the hearing on defendant's motion to suppress. When asked by the court whether defendant wished to put forth evidence, defendant responded that he did not.

Officer Edwards was the only witness to testify. Defendant does not cite any material conflicts in his testimony. "We, therefore, infer that the trial court made the findings necessary to support the denial of the motion to suppress." *Id.* The record is sufficient to permit appellate review of the denial of defendant's motion to suppress. Defendant's argument is overruled.

V. Motion to Suppress

[3] Defendant asserts the trial court erred by denying his motion to suppress and argues Officer Edwards was without probable cause to conduct an investigatory stop of his vehicle. We disagree.

a. Standard of Review

The standard of review for a motion to suppress "is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citations and quotations omitted), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003).

"The court's findings 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Id.* (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). "[T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

b. Reasonable Suspicion

"A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), *aff'd*, 362 N.C. 244, 658 S.E.2d 643, *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198, 129 S. Ct. 264 (2008). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)).

The reasonable suspicion standard is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645. (citation and quotation marks omitted). "Factors supporting reasonable suspicion are not to be viewed in isolation." *State v. Campbell*, 188 N.C. App. 701, 706, 656 S.E.2d 721, 725, *appeal dismissed*, 362 N.C. 364, 664 S.E.2d 311 (2008). Rather, reasonable suspicion exists when "the totality of the circumstances – the whole picture" supports the inference that a crime has been or is about to be committed. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008).

c. Swerving / Weaving

Officer Edwards observed defendant's vehicle at approximately 2:37 a.m. on a Sunday morning. Defendant was driving in an area comprised mainly of student housing, located three or four blocks from downtown and numerous bars and nightclubs. Those establishments stop serving alcohol at 2:00 a.m. Pedestrian traffic was heavy when Officer Edwards observed defendant driving.

Students were leaving the bars and nightclubs in downtown Greenville and were walking back to their dormitories or residences. Officer Edwards estimated that 100 or more students were walking from downtown to their residences between 2:00 and 3:00 a.m. Some

pedestrians were walking on the sidewalks and others were walking on the paved portion of the street.

Officer Edwards initiated the stop of defendant's vehicle based solely on his observation of defendant's "swerving" or "weaving" on a single occasion. While defendant was traveling down Fifth Street toward downtown, Officer Edwards observed him swerve to the right. Defendant's vehicle crossed the white line that marked the outside lane of travel and came within inches of the curb. Officer Edwards testified he was concerned defendant would swerve again and strike pedestrians.

This Court has determined that weaving within the lane of travel, standing alone, is insufficient to justify a traffic stop without the existence of additional facts to indicate the driver is impaired.

> [W]eaving can contribute to a reasonable suspicion of driving while impaired. However, in each instance, the defendant's weaving was coupled with additional specific articulable facts, which also indicated that the defendant was driving while impaired. *See, e.g.*, *State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane, plus driving only forty-five miles per hour on the interstate), *appeal dismissed*, *disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit), *appeal dismissed*, *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane five to six times, plus driving off the road); *State v. Thompson*, 154 N.C. App. 194, 571 S.E.2d 673 (2002) (weaving within lane, plus exceeding the speed limit).

State v. Fields, 195 N.C. App. 740, 744, 673 S.E.2d 765, 768, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 390 (2009).

Weaving, standing alone, "can be sufficient to arouse a reasonable suspicion of criminal activity when it is particularly erratic and dangerous to other drivers." *State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 892 (2013), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). *See also State v. Fields*, 219 N.C. App. 385, 723 S.E.2d 777 (2012) (officer had reasonable suspicion where defendant's weaving within his lane was so erratic that other drivers were maneuvering to avoid his car).

Under the totality of the circumstances, defendant's driving was dangerous to others due to the pedestrian traffic on the sidewalks and street as Officer Edwards described in his testimony. *Derbyshire*, __ N.C. App. __, 745 S.E.2d at 891. The undisputed evidence shows many pedestrians in the area at the time Officer Edwards observed defendant swerve right, cross the line marking the outside of his lane of travel and almost strike the curb.

d. Time and Place Factors

A defendant's driving at an unusual hour and his proximity to establishments that serve alcohol are additional factors the court can consider to determine whether the officer had reasonable suspicion to effectuate the stop. *Id.* (citing *Fields*, 195 N.C. App. at 744, 673 S.E.2d at 768). In *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 440-41 (2004), the defendant's weaving within his lane at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of driving while impaired. Similarly, in *State v. Watson*, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996), this Court upheld the trial court's finding of reasonable suspicion where the defendant was weaving within his lane and driving on the dividing line of the highway at 2:30 a.m. on a road near a nightclub.

The trial court is to consider "the totality of the circumstances – the whole picture" in determining whether the officer had a reasonable suspicion of impaired driving. *Styles*, 362 N.C. at 414, 665 S.E.2d at 440; *Campbell*, 188 N.C. App. at 706, 656 S.E.2d at 725. The swerving nature of defendant's driving outside the lane of travel and nearly striking the curb, the pedestrian traffic along the sidewalks and in the roadway, the unusual hour defendant was driving, and his proximity to bars and nightclubs, supports the trial court's conclusion that Officer Edwards had reasonable suspicion to believe defendant was driving while impaired. Defendant's argument is overruled.

VI. Conclusion

The trial court properly denied defendant's motion to quash the citation, where the officer signed as issuing the citation. Defendant presented no evidence he refused to sign the citation. N.C. Gen. Stat. § 15A-302(d). The record shows the magistrate signed and provided defendant with a copy of the charges.

In the absence of a written order, the record is sufficient to permit appellate review of the denial of defendant's motion to suppress. The trial court pronounced its ruling from the bench and no material conflicts exist in the evidence presented at the hearing.

The trial court properly denied defendant's motion to suppress. The officer had probable cause to conduct an investigatory stop of defendant's vehicle. Defendant swerved outside the lane of travel and almost struck the curb at 2:37 a.m. in an area with heavy pedestrian traffic and within close proximity to bars and nightclubs. The orders of the trial court denying defendant's motions to quash and motion to suppress are affirmed.

Affirmed.

Judges STEPHENS and HUNTER, JR. concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MARCH 2015)

CRIDER v. CATTIE No. 14-603	Mecklenburg (10CVS9704)	Affirmed
FIRST CITIZENS BANK, NA v. L & M REALTY & INV. PROP., INC. No. 14-718	Franklin (11CVD789)	Affirmed
IN RE C.E. No. 14-911	Forsyth (12JT162)	Affirmed
IN RE L.E. No. 14-1105	New Hanover (14JA16)	Affirmed
IN RE L.S.T. No. 14-1000	Haywood (14JA19-20)	Affirmed
IN RE S.C.B. No. 14-891	Cumberland (09JT553-554)	Affirmed
IN RE W.L.C. No. 14-950	Randolph (12JT61)	Affirmed
JONES v. JONES No. 14-236	Lee (12CVD442)	Affirmed
JONES v. JONES No. 14-507	Lee (13CVD817)	Affirmed
MASON v. CLINE No. 14-939	Catawba (11CVS861)	Reversed
MOORE v. McLAUGHLIN No. 14-967	Union (10CVD2518)	Affirmed and Remanded
STATE v. ALLEN No. 14-1253	Alamance (04CRS54678-79)	Reversed
STATE v. ASHFORD No. 14-882	Union (80CRS2109) (80CRS3175)	Affirmed
STATE v. ASKEW No. 14-411	Wake (12CRS212660)	Affirmed

STATE v. AVERY No. 14-988	Johnston (12CRS57334) (13CRS476)	No Error
STATE v. BRICE No. 14-1173	Catawba (09CRS54530-32)	Affirmed
STATE v. CLARK No. 14-637	Nash (12CRS53441)	No Error
STATE v. CURRY No. 14-1092	Mecklenburg (13CRS202638) (13CRS202640)	No Error
STATE v. DAVIS No. 14-1060	Sampson (13CRS52851) (14CRS46)	No Error
STATE v. FALLENBECK No. 14-1061	Mecklenburg (10CRS36987)	No Error
STATE v. FRASIER No. 14-894	Wilson (13CRS51468)	No Error
STATE v. GOVAN No. 14-999	Randolph (07CRS56709)	No Error
STATE v. HAMILTON No. 14-1005	Halifax (13CRS51640) (13CRS51694-95)	No Error in Part; Vacated and Remanded in Part; and New Trial in Part.
STATE v. HARDEN No. 14-970	Guilford (13CRS24704) (13CRS85908) (13CRS85912-14) (13CRS85916)	No prejudicial error
STATE v. HINSON No. 14-1112	Forsyth (13CRS12118) (13CRS53402)	No Error
STATE v. HOPPER No. 14-1130	Cleveland (02CRS56601-02)	Reversed
STATE v. ISENHOUR No. 14-1074	Cleveland (13CRS52746-47)	No Error
STATE v. JONES No. 14-799	Wake (12CRS207459)	No Error

STATE v. JORDAN No. 14-931	New Hanover (11CRS53884-85)	Vacated and Remanded
STATE v. JOYNER No. 14-957	Wayne (12CRS54615)	No Error
STATE v. LAFOUCADE No. 14-820	New Hanover (13CRS50091) (13CRS50117)	No Error
STATE v. MARSHALL No. 14-994	Wake (12CRS225100)	No Error
STATE v. MORRIS No. 14-1062	Halifax (13CRS53768)	Affirmed
STATE v. MURPHY No. 14-474	Nash (12CRS50961)	Vacated in part; remanded for resentencing in part
STATE v. OWENS No. 14-1103	Wake (04CRS47981-82) (04CRS47984-85)	Affirmed
STATE v. PHILEMON No. 14-491	Randolph (11CRS51515-17)	No error in part and reversed in part.
STATE v. PRICE No. 14-1054	Greene (13CRS153)	Reversed and Remanded
STATE v. RAMSEY No. 14-1095	Orange (11CRS53706) (12CRS50303)	Affirmed
STATE v. REXACH No. 14-1012	Onslow (10CRS53088) (10CRS53504) (10CRS57014-15)	Affirmed
STATE v. ROMERO No. 14-884	Forsyth (09CRS57873)	Affirmed
STATE v. RUFFIN No. 14-995	Wilson (10CRS4123)	Dismissed without prejudice
STATE v. WHITE No. 14-895	Forsyth (11CRS56748) (12CRS777)	No error in part, judgment arrested in part, and remanded for resentencing.

STATE v. WORTH No. 14-959	Rowan (09CRS4712) (09CRS50188)	No Error
WILLIAMS v. BEST CARTAGE, INC. No. 14-821	N.C. Industrial Commission (X68962)	Affirmed

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