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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 7, 2017

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

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

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[4] 1 January 2016.

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FILED 7 APRIL 2015

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APPEAL AND ERROR

Appeal and Error—appealability—de facto party—no prejudice—A juvenile suffered no prejudice as a result of the Department of Social Services' (DSS) participation during the 10 October 2013 hearing because the issue of whether the court erred by recognizing DSS as a *de facto* party in its 23 May 2014 order was unnecessary to this determination and was not properly preserved for review. **In re M.B., 140.**

APPEAL AND ERROR—Continued

Appeal and Error—appealability—mootness—voluntary admission of minor into treatment facility—capable of repetition—Although juvenile's appeal from a 22 October 2013 order continuing his readmission to a psychiatric residential treatment facility for up to 30 days where the juvenile was subsequently discharged before its expiration would normally be dismissed as moot, it was not moot because orders of voluntary admission of a minor to a 24-hour facility are "capable of repetition, yet evading review" given their short duration. The State has a great interest in preventing unwarranted admission of juveniles into these treatment facilities. **In re M.B., 140.**

Appeal and Error—appealability—writ of certiorari—incorrect date on notice of appeal—A juvenile's petition for a writ of certiorari as to the 22 October 2013 order based on an incorrect date was unnecessary, and thus was dismissed because a notice of appeal is not defective if intent to appeal can be fairly inferred. **In re M.B., 140.**

Appeal and Error—appealability—writ of certiorari—notice of appeal—proper party—extraordinary writs—jurisdiction—A juvenile's petition for certiorari review as to the district court's 23 May 2014 order recognizing the Department of Social Services as a proper party was denied. Instead of filing notice of appeal from this order and moving to consolidate it with the already-pending appeal of the 22 October 2013 order, the juvenile's appellate counsel elected to pursue relief by petitioning for extraordinary writs from this Court. Consequently, the juvenile failed to meet the requirements of N.C.R. App. P. 3 and the Court of Appeals lacked jurisdiction to review the 23 May 2014 order. **In re M.B., 140.**

Appeal and Error—failure to cite authority—The Court of Appeals declined to address the County's argument that the Property Tax Commission erred on remand by accepting the Taxpayer's argument that the County had already lost its case. The County cited no authority in support of its contention. **In re Appeal of Parkdale Mills, 130.**

Appeal and Error-motion to supplement record—denied—The Court of Appeals denied both motions to supplement the record in written orders filed 20 January 2015, reasoning that neither the 31 October 2013 order nor the subsequent abuse, neglect, and dependency orders were available to or relied upon by the district court when it concurred in a juvenile's readmission to a 24-hour psychiatric residential treatment facility after the 10 October 2013 hearing. **In re M.B., 140.**

ATTORNEY FEES

Attorney Fees—statutory lien—scant record on appeal—The Court of Appeals held that the trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 44A-35 to the prevailing party in a contract dispute, but the prevailing party was not entitled to attorney fees incurred on appeal. Neither party included transcripts or other evidence from the hearing on the underlying action or attorney fees. **R & L Constr. of Mt. Airy, LLC v. Diaz, 194.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Confessions and Incriminating Statements—recording of jailhouse call—The trial court did not abuse its discretion in a first-degree murder case by admitting into evidence the recording of the jailhouse telephone call defendant placed to his father.

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

It was direct evidence showing defendant shot the victim and he knew it. It was particularly probative in light of defendant's defense that his actions were a result of his diagnosed intermittent explosive disorder and not premeditated and deliberate. The statements made immediately after defendant's arrest put into context defendant's responses in which he admitted shooting the victim. **State v. Mitchell, 246.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—failure to object—A defendant in an assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense case did not receive ineffective assistance of counsel because his trial counsel's failure to object to the officer's testimony and failure to object to the striking of the defense witness's testimony did not prejudice him. **State v. Gillespie, 238.**

CRIMINAL LAW

Criminal Law—clerical error—remanded for correction—A clerical error on the Additional File No.(s) and Offense(s) form attached to the judgment, which did not affect defendant's sentences for the charges of assault inflicting serious injury by strangulation; second degree kidnapping; and second degree sexual offense, was remanded for correction of the clerical error in the judgment. **State v. Gillespie, 238.**

EMPLOYER AND EMPLOYEE

Employer and Employee—deputy sheriff—policymaking position—termination for political reasons—freedom of speech—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons. **McLaughlin v. Bailey, 159.**

Employer and Employee—detention officer—objective reasonableness of termination—no specific evidence of improper motivation—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. The Court of Appeals did not need to determine whether plaintiff's termination was for political reasons because plaintiff failed to offer any evidence that he would not have been fired for violations of the rules and policies of the sheriff's department in carrying out his job duties. **McLaughlin v. Bailey, 159.**

Employer and Employee—statutory prohibition on termination for political reasons—not applicable to employees of sheriff—The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employees' action for wrongful termination of employment. Plaintiffs' terminations did not violate N.C.G.S. § 153A-99 because plaintiffs, as employees of the sheriff, were not employees of the county. **McLaughlin v. Bailey, 159.**

EVIDENCE

Evidence—current school expense funding—sufficiency of evidence—outside scope of proposed budget—Although defendant board of commissioners contended that the trial court erred in a case seeking additional school funding to plaintiff board of education by denying its motions for a directed verdict based on insufficient evidence, plaintiff presented evidence tending to show current expense funding was needed to meet state mandates and policies and capital outlay funding was needed to maintain and repair school facilities. However, having determined that much of plaintiff's evidence was outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year and should not have been admitted into evidence at trial, the case was remanded for a new trial. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm'rs, 274.**

Evidence—witness testimony—defendant's incriminating statements prior to crime—relevancy—state of mind—premeditation—deliberation—The trial court did not abuse its discretion in a first-degree murder case by allowing witnesses to testify that defendant made statements before the shooting that he had come to town that day to shoot someone to get the keys to his grandmother's car. The statements illustrated defendant's state of mind near the time of the shooting, which was relevant to the charge of first-degree murder under the theory of premeditation and deliberation. **State v. Mitchell, 246.**

FALSE PRETENSE

False Pretense—bad character evidence—post-arrest interview video—In defendant's trial for obtaining property by false pretenses, the trial court did not commit plain error by admitting a video recording of defendant's post-arrest interview with a police detective, which contained evidence of defendant's bad character. Defendant knew the contents of the video yet chose not to object—perhaps as part of his trial strategy—and he failed to meet his burden of showing that the trial court erred. Even assuming the trial court erred, in light of abundant other testimony that defendant actively sought to defraud elderly homeowners, defendant did not demonstrate prejudice. **State v. Barker, 224.**

False Pretense—bad character testimony—showed plan to defraud—In defendant's trial for obtaining property by false pretenses, the trial court did not err by admitting Rule 404(b) testimony from multiple witnesses tending to show that defendant actively sought to defraud elderly homeowners by falsely telling them their roofs needed repairs. This evidence was relevant for showing defendant's common plan, knowledge, intent, and lack of mistake, and the probative value outweighed the prejudicial effect. Furthermore, the trial court gave a limiting instruction to the jury. **State v. Barker, 224.**

False Pretense—indictment—misrepresentation—roof repairs—The Court of Appeals rejected defendant's argument that his indictments for obtaining property by false pretenses were facially invalid because they failed to "intelligibly articulate" defendant's misrepresentations. The indictments clearly stated that defendant told his elderly victims their roofs needed repairs when the roofs in fact did not need repairs. **State v. Barker, 224.**

False Pretense—jury instructions—specific misrepresentation and property—not required—In defendant's trial for obtaining property by false pretenses, the trial court did not err by failing to instruct the jury on the specific alleged misrepresentation made or the property received by defendant. The trial court properly

FALSE PRETENSE—Continued

gave the pattern jury instruction and was not required to specify the misrepresentation or property received. Even assuming error, there would be no plain error because the Court of Appeals has consistently found no error where a trial court has given the pattern jury instruction on obtaining property by false pretenses. **State v. Barker, 224.**

False Pretense—sufficiency of the evidence—misrepresentation—roof repairs—incomplete or substandard work—In defendant's appeal of his convictions for obtaining property by false pretenses, the Court of Appeals rejected his argument that the trial court erred by denying his motion to dismiss. In the light most favorable to the State, the evidence showed that defendant falsely told his elderly victims that their roofs needed repairs and then took their money only to perform incomplete or substandard work. **State v. Barker, 224.**

HOMICIDE

Homicide—first-degree murder—felony murder—discharging firearm into occupied property—motion to dismiss—sufficiency of evidence—The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence. The evidence supported the felony charge of discharging a firearm into occupied property. The State presented substantial evidence from which a jury could find at least one of the three shots defendant fired was "into" occupied property. Further, substantial evidence showed defendant was located outside the vehicle when he shot. **State v. Mitchell, 246.**

Homicide—first-degree murder—felony murder—jury charge—committing another felony during murder—The trial court did not err in a first-degree murder case by submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. The State presented substantial evidence that defendant discharged a firearm into occupied property. **State v. Mitchell, 246.**

Homicide—first-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to alleged insufficient evidence. The evidence presented by the State was sufficient to withstand defendant's motion. **State v. Mitchell, 246.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Hospitals and Other Medical Facilities—certificate of need—application—look back period—An administrative law judge correctly determined that the North Carolina Department of Health and Human Services' (the Agency) interpretation of the certificate of need law was not entitled to deference with regard to a look back period for providers already in North Carolina. The Agency required that the application include past activities for the 18 months prior to the application, but it only looked at the 18-month period prior to the decision. The Agency is prohibited by N.C.G.S. § 131E-182(b) from requiring an applicant to furnish more than is necessary for it to determine consistency with applicable standards, plans, and criteria, and the record is devoid of any explanation from the Agency for its practice of deviating from the time period in its own application process. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Hospitals and Other Medical Facilities—certificate of need—application criteria—agency interpretation—An administrative law judge's determination in a certificate of need proceeding that The Heritage conformed with the Department of Health and Human Services' (the Agency) Criterion 13(c) was reversed. An agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Here, the Agency's method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Hospitals and Other Medical Facilities—certificate of need—application criteria—reasoning behind conclusion—The Court of Appeals could not determine whether an administrative law judge erred by concluding that Liberty's application for a certificate of need was in conformity with the Department of Health and Human Services' Criterion 20. The final decision provided no substantive explanation of how this conclusion was reached and, indeed, came to logically inconsistent conclusions. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Hospitals and Other Medical Facilities—certificate of need—evidence of quality of care in other facilities—In a certificate of need proceeding, there was no evidence in the record to warrant a finding that an applicant purposely excluded evidence of the quality of care in the applicant's other facilities. **AH N.C. Owner LLC v. N.C. Dep't of Health & Hum. Servs., 92.**

Hospitals and Other Medical Facilities—certificate of need—findings and conclusions—quality of care record—An administrative law judge's (ALJ) failure to make findings and conclusions concerning a certificate of need applicant's actual record of providing care was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. A remand was necessary so that the ALJ could make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Hospitals and Other Medical Facilities—certificate of need—geographical scope of review—In a certificate of need case, an administrative law judge correctly concluded that the interpretation of Criterion 20 (geographic scope of application review) by the North Carolina Department of Health and Human Services (the Agency) was not based on a permissible construction of N.C.G.S. § 131E-183(a). The Agency's practice of only examining an applicant's quality of care record within the service area of the proposed project is longstanding and so warrants greater deference, but it must still be a permissible construction of the statute. Here, Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20, and there is no logical basis for disregarding information evidencing quality of care on a statewide level. Indeed such a policy actually contravenes one of the primary purposes of the certificate of need laws. **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

Hospitals and Other Medical Facilities—certificate of need—review of existing services—In certificate of need cases, one of the criterion (Criterion 20) to be considered by the North Carolina Department of Health and Human Services ("the Agency") is whether quality health care has been provided in the past

by an applicant already involved in the provision of health services. Historically, the Agency has confined its review geographically and temporally. The governing statute, N.C.G.S. § 131E-183(a)(20), does not provide guidance and the Agency's interpretation is entitled to deference if reasonable, but its weight depends on the Agency's thoroughness and "all those factors which give it power to decide." **AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs., 92.**

IMMUNITY

Immunity—judicial immunity—appointment of attorney as commissioner overseeing partition of property—quasi-judicial official—The trial court did not err by dismissing plaintiff's complaint on the grounds that defendant real estate attorney had judicial immunity when he was carrying out a partition by sale ordered by the trial court. Defendant, appointed as a commissioner by a clerk of superior court to oversee the partition of property held by co-tenants, was acting within the scope of his duties as a quasi-judicial official. Thus, his actions were covered by the rule of judicial immunity. **Price v. Calder, 190.**

INDICTMENT AND INFORMATION

Indictment and Information—injury to real property—victim—legal entity capable of owning property—The indictment charging defendant with injury to real property was invalid on its face because it contained no allegation that the victim, Katy's Great Eats, was a legal entity capable of owning property, and the name of the victim did not otherwise import a corporation or other entity capable of owning property. **State v. Spivey, 264.**

Indictment and Information—victim's name misspelled—corrected—The trial court did not err by allowing the State, after resting its case, to correct the name of the victim in the indictment that charged defendant with assault with a deadly weapon from "Christina Gibbs" to "Christian Gibbs." The misspelling appeared inadvertent and did not mislead or surprise defendant as to the nature of the charges against him. **State v. Spivey, 264.**

JUVENILES

Juveniles—psychiatric residential treatment facility—ordered into custody in a second county—jurisdiction—The Court of Appeals' already held in *In re Phillips*, 99 N.C. App. 159 (1990), that where a juvenile is ordered into the custody of one county department of social services and then admitted to a psychiatric residential treatment facility in another county, the district court in the second county has jurisdiction over the admission as long as it does not conflict with the order of the prior court. **In re M.B., 140.**

Juveniles—readmission to psychiatric treatment facility—sufficiency of evidence—no less restrictive measures available—The district court did not err by concurring in a juvenile's readmission to a psychiatric residential treatment facility (PRTF) based on alleged insufficient findings. There were no sufficient, less restrictive measures available for the juvenile's continued treatment. Further, the district court's order satisfied the requirements of N.C.G.S. § 122C-224.3 by indicating that it incorporated into its factual findings all matters set out in a therapist's court summary, which it in turn relied on for its conclusions that the juvenile was mentally ill,

JUVENILES—Continued

in need of continued treatment at a PRTF, and that less restrictive measures would not be sufficient. **In re M.B., 140.**

PROBATION AND PAROLE

Probation and Parole—probation revocation hearing—held after probation ended—no subject matter jurisdiction—The Court of Appeals vacated the trial court's order revoking defendant's probation because the trial court lacked subject matter jurisdiction. Defendant's offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, on 7 January 2014. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his sixty-month probationary period ended on or about 17 April 2012. **State v. Sanders, 260.**

REAL PROPERTY

Real Property—Property Tax Commission—conflicting evidence—The Property Tax Commission did not err by adopting findings contrary to the record. Both the County and the Taxpayer presented substantial evidence, and the Court of Appeals is not permitted to replace the judgment of the Commission with its own. **In re Appeal of Parkdale Mills, 130.**

Real Property—Property Tax Commission—remand order—additional hearings—plain language—On remand from the Court of Appeals, the Property Tax Commission did not err by failing to conduct additional hearings. The remand order stated that "the Commission shall conduct additional hearings *as necessary* and make further findings of fact and conclusions of law." By its plain language, the order did not mandate that the Commission conduct additional hearings. **In re Appeal of Parkdale Mills, 130.**

ROBBERY

Robbery—dangerous weapon—failure to instruct—extortion not a lesser-included offense—The trial court did not commit error, much less plain error, in a robbery with a dangerous weapon case by failing to instruct the jury on the charge of extortion. Defendant's contention that the crime of extortion was a lesser included offense of armed robbery failed the definitional test adopted by our Supreme Court. **State v. Wright, 270.**

SCHOOLS AND EDUCATION

Schools and Education—additional funding—evidence outside scope of proposed budget for pertinent fiscal year not allowed—The trial court erred by allowing plaintiff Union County Board of Education to present evidence of claimed needs outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year. N.C.G.S. § 115C-431(c) was never intended to open the door to allow the fact finder to consider evidence outside the scope of the proposed budget and award funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm'rs, 274.**

SCHOOLS AND EDUCATION—Continued

Schools and Education—additional funding—requested instructions—proposed budget—students performing below grade level—The trial court did not err in a case seeking additional school funding to a board of education by failing to issue requested instructions limiting the jury's consideration to the proposed budget for the 2013-2014 fiscal year. The instructions closely followed the language of N.C.G.S. § 115C-431 and were not overly broad. However, the trial court erred by instructing the jury that students performing below grade level were not obtaining a sound basic education since the instructions likely misled the jury. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm'rs, 274.**

Schools and Education—appropriation of funds—legal standard—harmless error—The trial court did not abuse its discretion in a case requesting the appropriation of additional funds to a board of education by allowing plaintiff to argue an alleged improper legal standard in plaintiff's opening statements. While plaintiff's argument was technically correct, plaintiff's statement of the standard to the jury was misleading. However, as a result of the trial court's instructions and the verdict sheets, defendant was not prejudiced and thus it was harmless error. **Union Cnty. Bd. of Educ. v. Union Cnty. Bd. of Comm'rs, 274.**

UTILITIES

Utilities—telephone pole attachment—cable provider—rates not just and reasonable—The Business Court did not err in its findings of fact and conclusion of law that the rates Rutherford Electric Membership Corporation (Rutherford) charged TWEAN (a cable service provider) between 2010 and 2013 for use of utility poles were not just and reasonable under N.C.G.S. § 62-350. Rutherford did not specifically challenge any of the order and opinion's factual findings, but instead contended that the Business Court misapprehended the General Assembly's intent in enacting N.C.G.S. § 62-350, leading to an absurd result. Rutherford offered several arguments in support of its position, none of which had merit. These involved use of the FCC Cable Rate, the effect of Rutherford's uniform class-based rates, the state law presumptions to which Rutherford referred, and Rutherford's failure to present any competent evidence that its rates were just and reasonable. **Rutherford Elec. Membership Corp. v. Time Warner Entm't, 199.**

Utilities—telephone pole attachment—negotiation of rates—The Business Court did not err by concluding that Rutherford Electric Membership Corporation violated N.C.G.S. § 62-350 when it unilaterally raised the pole attachment rates of TWEAN (a cable service provider) without negotiation. The plain language of N.C.G.S. § 62-350 requires a utility pole owner to allow CSPs to attach to their poles at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements. **Rutherford Elec. Membership Corp. v. Time Warner Entm't, 199.**

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.

AH N.C. OWNER LLC v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[240 N.C. App. 92 (2015)]

AH North Carolina OWNER LLC D/B/A THE HERITAGE OF RALEIGH, Petitioner
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, AND HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC; AND BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC, Respondent-Intervenors

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HILLCREST CONVALESCENT CENTER, INC., Petitioner
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, AND E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, Respondent-Intervenors

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LIBERTY HEALTHCARE PROPERTIES OF WEST WAKE COUNTY, LLC, LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WEST WAKE COUNTY, LLC, LIBERTY HEALTHCARE PROPERTIES OF WAKE COUNTY LLC, AND LIBERTY COMMONS NURSING AND REHABILITATION CENTER OF WAKE COUNTY, LLC, Petitioner
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent AND HILLCREST CONVALESCENT CENTER, INC.; E.N.W., LLC AND BELLAROSE NURSING AND REHAB CENTER, INC.; BRITTHAVEN, INC. AND SPRUCE LTC GROUP, LLC; AND AH NORTH CAROLINA OWNER LLC D/B/A THE HERITAGE OF RALEIGH, Respondent-Intervenors

No. COA13-1126

Filed 7 April 2015

1. Hospitals and Other Medical Facilities—certificate of need—review of existing services

In certificate of need cases, one of the criterion (Criterion 20) to be considered by the North Carolina Department of Health and Human Services ("the Agency") is whether quality health care has been provided in the past by an applicant already involved in the

provision of health services. Historically, the Agency has confined its review geographically and temporally. The governing statute, N.C.G.S. § 131E-183(a)(20), does not provide guidance and the Agency's interpretation is entitled to deference if reasonable, but its weight depends on the Agency's thoroughness and "all those factors which give it power to decide."

2. Hospitals and Other Medical Facilities—certificate of need—geographical scope of review

In a certificate of need case, an administrative law judge correctly concluded that the interpretation of Criterion 20 (geographic scope of application review) by the North Carolina Department of Health and Human Services (the Agency) was not based on a permissible construction of N.C.G.S. § 131E-183(a). The Agency's practice of only examining an applicant's quality of care record within the service area of the proposed project is longstanding and so warrants greater deference, but it must still be a permissible construction of the statute. Here, Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20, and there is no logical basis for disregarding information evidencing quality of care on a statewide level. Indeed such a policy actually contravenes one of the primary purposes of the certificate of need laws.

3. Hospitals and Other Medical Facilities—certificate of need—application—look back period

An administrative law judge correctly determined that the North Carolina Department of Health and Human Services' (the Agency) interpretation of the certificate of need law was not entitled to deference with regard to a look back period for providers already in North Carolina. The Agency required that the application include past activities for the 18 months prior to the application, but it only looked at the 18-month period prior to the decision. The Agency is prohibited by N.C.G.S. § 131E-182(b) from requiring an applicant to furnish more than is necessary for it to determine consistency with applicable standards, plans, and criteria, and the record is devoid of any explanation from the Agency for its practice of deviating from the time period in its own application process.

4. Hospitals and Other Medical Facilities—certificate of need—evidence of quality of care in other facilities

In a certificate of need proceeding, there was no evidence in the record to warrant a finding that an applicant purposely excluded evidence of the quality of care in the applicant's other facilities.

5. Hospitals and Other Medical Facilities—certificate of need—findings and conclusions—quality of care record

An administrative law judge's (ALJ) failure to make findings and conclusions concerning a certificate of need applicant's actual record of providing care was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. A remand was necessary so that the ALJ could make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record.

6. Hospitals and Other Medical Facilities—certificate of need—application criteria—reasoning behind conclusion

The Court of Appeals could not determine whether an administrative law judge erred by concluding that Liberty's application for a certificate of need was in conformity with the Department of Health and Human Services' Criterion 20. The final decision provided no substantive explanation of how this conclusion was reached and, indeed, came to logically inconsistent conclusions.

7. Hospitals and Other Medical Facilities—certificate of need—application criteria—agency interpretation

An administrative law judge's determination in a certificate of need proceeding that The Heritage conformed with the Department of Health and Human Services' (the Agency) Criterion 13(c) was reversed. An agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. Here, the Agency's method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference.

Appeal by respondent and cross-appeals by petitioner AH North Carolina Owner LLC d/b/a The Heritage of Raleigh and respondent-intervenor from Final Decision entered 20 June 2013 by Administrative Law Judge Augustus B. Elkins, II in the Office of Administrative Hearings. Heard in the Court of Appeals 23 April 2014.

Parker Poe Adams & Bernstein LLP, by Renee J. Montgomery, Robert A. Leandro, and Dac Cannon, for petitioner The Heritage.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, and Tobias S. Hampson, for petitioner Liberty.

Roy Cooper, Attorney General, by June S. Ferrell, Special Deputy Attorney General, for respondent DHHS.

Smith Moore Leatherwood LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondent-intervenor Britthaven.

DAVIS, Judge.

North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("the Agency"); AH North Carolina Owner LLC d/b/a The Heritage of Raleigh ("The Heritage"); and Britthaven, Inc. and Spruce LTC Group, LLC (collectively "Britthaven") appeal from the Final Decision of the administrative law judge awarding a certificate of need ("CON") to Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC (collectively "Liberty") and denying Britthaven's and The Heritage's applications for a CON. After careful review, we vacate and remand for further proceedings consistent with this opinion.

Factual Background

In the 2011 State Medical Facilities Plan ("SMFP"), the North Carolina State Health Coordinating Council identified a need for 240 additional nursing facility beds in Wake County. In response to this need determination, The Heritage, Britthaven, Liberty, Hillcrest Convalescent Center, Inc. ("Hillcrest"), E.N.W., LLC and BellaRose Nursing and Rehab Center (collectively "BellaRose"), and 11 other applicants[1] applied for a CON with the Agency to either expand their existing facilities or build new facilities in order to provide the additional beds.

The Heritage submitted an application to expand the campus of its existing senior living community to add a 90-bed nursing facility. Britthaven filed an application that proposed the development of a new

1. These additional 11 applicants were not parties in the contested case in the Office of Administrative Hearings ("OAH") and are not relevant to the present appeal.

120-bed nursing facility in the Brier Creek area. Hillcrest also sought in its CON application to develop a new 120-bed nursing facility. Liberty's application proposed the development of a 130-bed nursing facility in North Raleigh, comprised of 120 new nursing care beds and 10 beds relocated from its Capital Nursing Rehabilitation Center location. BellaRose's application entailed the development of a 100-bed nursing facility on Rock Quarry Road in Raleigh.

In September 2011, the Agency began conducting a competitive review of each of the applications, and on 3 February 2012, it issued its findings and conclusions. The Agency determined that the applications of The Heritage, Hillcrest, and Liberty failed to conform to all applicable statutory review criteria and, therefore, could not be approved. The Agency approved the applications of Britthaven and BellaRose and awarded certificates of need to them for 120 and 100 nursing care beds, respectively.[2]

The Heritage, Hillcrest, and Liberty each filed a petition for a contested case hearing challenging the Agency's decision. The Heritage's petition challenged the Agency's decision to disapprove its application and to approve the applications of Britthaven and BellaRose. Hillcrest's petition challenged the disapproval of its application and the approval of the applications of Britthaven and BellaRose. Liberty's petition challenged the disapproval of its application and the approval of Britthaven's application but did not challenge the approval of BellaRose's application.

Britthaven and BellaRose both intervened in the contested cases of The Heritage, Hillcrest, and Liberty. The Heritage, Hillcrest, and Liberty each intervened in the contested cases of the other petitioners. The parties filed a joint motion to consolidate the contested cases, and on 2 July 2012, Administrative Law Judge Augustus B. Elkins, II ("the ALJ") entered an order consolidating the cases for hearing.

The ALJ heard the matter beginning on 1 October 2012. On 20 June 2013, the ALJ entered a final decision ("the Final Decision") affirming the Agency's award of a CON to BellaRose, reversing the Agency's award of a CON to Britthaven, and reversing the Agency's denial of a CON to Liberty. The Final Decision also upheld the Agency's denial of a CON

2. The Agency also awarded a CON to Universal Properties/Fuquay Varina, LLC and Universal Health Care/Fuquay Varina, Inc. (collectively "Universal") to add 20 nursing care beds to its existing nursing care facility. The Agency's decision to approve the 20 additional beds for Universal was not at issue in the contested case and is not an issue in this appeal.

to The Heritage and Hillcrest. The Agency, The Heritage, and Britthaven filed timely notices of appeal to this Court.[3]

Analysis

"The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit." *Hope-A Women's Cancer Ctr., P.A. v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 276, 281, 691 S.E.2d 421, 424 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 87, 706 S.E.2d 254 (2011). Accordingly, health care providers seeking to offer new nursing facility beds must submit an application to the Agency describing the proposed project and receive authorization from it to proceed with the development of such a project. *See* N.C. Gen. Stat. §§ 131E-176(3), 131E-178 (2013).

When deciding whether to issue a CON, a two-step process is generally applied. First, the Agency must determine whether the applications submitted meet the criteria set forth in N.C. Gen. Stat. § 131E-183(a). *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 57, 625 S.E.2d 837, 844 (2006). Second, "where the Agency finds more than one applicant conforming to the applicable review criteria, it may [then] conduct a comparison of the conforming applications to determine which applicant should be awarded the CON." *Id.* at 58, 625 S.E.2d at 845.

Following the Agency's decision to issue a certificate of need to a particular applicant, the remaining applicants that were not selected are entitled to a contested case hearing in the OAH for a review of the Agency's decision. *See Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 762 S.E.2d 468, 471 (2014) ("After the Agency decides to issue, deny, or withdraw a CON . . . any affected person as defined by section 131E-188(c) shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the General Statutes." (citation, quotation marks, and brackets omitted)), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (filed Mar. 5, 2015) (No. 353P14). N.C. Gen. Stat. § 150B-23 requires the party seeking a contested case hearing to file a petition stating facts which tend to establish that

3. Hillcrest did not appeal from the Final Decision and thus is not a party to this appeal. Britthaven and The Heritage do not challenge the ALJ's conclusion that the Agency properly awarded a CON to BellaRose, and consequently, BellaRose is also not a party to this appeal.

> the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;
>
> (4) Acted arbitrarily or capriciously; or
>
> (5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-23(a) (2013).

Accordingly, in a contested case hearing, "[t]he administrative law judge must . . . determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, as well as whether the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 751 S.E.2d 244, 248 (2013) (citation, quotation marks, and emphasis omitted); *see also Surgical Care Affiliates*, ___ N.C. App. at ___, 762 S.E.2d at 471 (explaining that "[t]his Court has interpreted subsection (a) to mean that the ALJ in a contested case hearing must determine whether the petitioner has met its burden in showing that the agency substantially prejudiced the petitioner's rights. . . . [and] that the agency erred in one of the ways described above" (citation, quotation marks, and brackets omitted)).

In 2011, the General Assembly amended the Administrative Procedure Act ("APA"), conferring upon administrative law judges the authority to render final decisions in challenges to agency actions, a power that had previously been held by the agencies themselves. *See* 2011 N.C. Sess. Laws 1678, 1685-97, ch. 398, §§ 15-55. Prior to the enactment of the 2011 amendments, an ALJ hearing a contested case would issue a recommended decision to the agency, and the agency would then issue a final decision. In its final decision, the agency could adopt the ALJ's recommended decision *in toto*, reject certain portions of the decision if it specifically set forth its reasons for doing so, or reject the ALJ's recommended decision in full if it was clearly contrary to the preponderance of the evidence. *See* N.C. Gen. Stat. § 150B-36, *repealed by* 2011 N.C. Sess. Laws 1678, 1687, ch. 398, § 20. As a result of the 2011 amendments, however, the ALJ's decision is no longer a recommendation to

the agency but is instead the final decision in the contested case. N.C. Gen. Stat. § 150B-34(a).

Under this new statutory framework, an ALJ must "make a final decision . . . that contains findings of fact and conclusions of law" and "decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." *Id.*

Our review of an ALJ's final decision is governed by N.C. Gen. Stat. § 150B-51, which provides, in pertinent part, as follows:

> (b) The court reviewing a final decision[4] may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4)

4. In certificate of need cases, an appeal from a final decision proceeds directly to this Court. *See* N.C. Gen. Stat. § 131E-188(b) (2013) ("Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a)."); N.C. Gen. Stat. § 7A-29(a) (explaining that "appeal as of right lies directly to the Court of Appeals" from final decisions issued under N.C. Gen. Stat. § 131E-188(b)).

> of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2013).

In the present case, the ALJ determined that the Agency erred by incorrectly applying Criterion 20 and Criterion 13(c) of N.C. Gen. Stat. § 131E-183(a) in its review of the applications for the nursing facility beds at issue. The ALJ concluded that as a result of the Agency's erroneous application of these two criteria, the Agency improperly determined that (1) The Heritage's and Liberty's applications were nonconforming with the review criteria; and (2) Britthaven's application was conforming with the review criteria. The ALJ also found that Liberty had met its burden of showing that it was substantially prejudiced by the Agency's errors.

Consequently, the ALJ reversed the Agency's award of a CON for 120 nursing facility beds to Britthaven and ordered that the CON instead be issued to Liberty. With respect to The Heritage, the ALJ concluded that it had failed to demonstrate that it was substantially prejudiced by the Agency's erroneous disapproval of its application because it was "not one of the three most effective applications in the Review" and, therefore, would not have been approved even if the Agency had found it to be conforming. We address each of these determinations by the ALJ in turn.

I. Criterion 20

[1] Criterion 20 states that "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past." N.C. Gen. Stat. § 131E-183(a)(20) (2013). Because the General Assembly has not articulated with specificity how the Agency should determine an applicant's conformity with Criterion 20, the Agency was authorized to establish its own standards in assessing whether an applicant that was already involved in providing health care services had provided quality care in the past. *See* N.C. Gen. Stat. § 131E-177(1) (2013) (explaining that Agency is empowered to "establish standards and criteria or plans required to carry out the provisions and purposes of [the certificate of need statutes]").

Historically, in determining an applicant's conformity with Criterion 20, the Agency has confined its review to the applicant's facilities within the proposed service area — which, in nursing home reviews, is the county where the proposed facility is to be located. The Agency would then ascertain whether the applicant's facility (or facilities) within that county, if any, had received any citations for substandard quality of care during the 18-month period immediately preceding the Agency's decision. If the applicant did not have any existing facilities within that county, the Agency deemed Criterion 20 "not applicable" to the applicant.

In its petition for a contested case and during the contested case hearing, Liberty contended that the Agency "exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, and failed to act as required by law or rule" in determining that its application did not conform to Criterion 20 and that Britthaven's application was, conversely, in conformity with Criterion 20. In making these assertions, Liberty argued that (1) the Agency arbitrarily limited its analysis of whether quality care had been provided in the past solely to the applicants' facilities within Wake County; and (2) Britthaven's application failed to "adequately evidence that quality care had been provided in the past as required by Criterion 20." Liberty also contended in the contested case hearing that the Agency used an incorrect "look back period" for assessing an applicant's quality of care history.

The ALJ agreed with Liberty's contentions and concluded in his Final Decision that (1) Criterion 20 requires an examination of the quality of care record of the applicant's facilities *statewide*; (2) the relevant time period when assessing an applicant's past quality of care is the 18 months prior to the submission of the applicant's application through the date on which the Agency renders its decision; and (3) Britthaven failed to show conformity with Criterion 20 because the portion of its application addressing quality of care issues at its existing facilities was incomplete and misleading. For these reasons, the ALJ concluded that Britthaven's application was nonconforming with Criterion 20.

In their appeal to this Court, the Agency and Britthaven contend that in making these determinations, the ALJ exceeded his statutory authority and made an error of law by substituting his interpretation of Criterion 20 for the Agency's interpretation. Specifically, they contend that the ALJ failed to give any deference to the Agency's interpretation of this criterion and improperly conducted a *de novo* review in excess of his limited authority pursuant to N.C. Gen. Stat. § 150B-23(a) as interpreted by this Court in *Britthaven, Inc. v. N.C. Dep't of Human Res.*,

118 N.C. App. 379, 382-83, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). Because the Agency and Britthaven assert errors under subsections (2) and (4) of N.C. Gen. Stat. § 150B-51(b), we review the ALJ's determinations regarding the scope of Criterion 20 *de novo*. N.C. Gen. Stat. § 150B-51(c) ("With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review.").

"It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844; *see also Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 13, 647 S.E.2d 651, 659 (explaining that "an agency's interpretation of a statutory term is entitled to deference when the term is ambiguous and the agency's interpretation is based on a permissible construction of the statute" (citation and quotation marks omitted)), *disc. review denied*, 361 N.C. 692, 654 S.E.2d 477 (2007).

Here, the statute at issue — N.C. Gen. Stat. § 131E-183(a)(20) — charges the Agency with determining whether an applicant already involved in the provision of health services has "provide[d] evidence that quality care has been provided in the past" but does not provide guidance for how the Agency is to assess compliance with this criterion. As such, in order to evaluate whether Liberty had met its burden of demonstrating that the Agency's application of Criterion 20 constituted error as defined in N.C. Gen. Stat. § 150B-23(a) that substantially prejudiced Liberty's rights, the ALJ was required to determine whether the process used by the Agency in assessing compliance with Criterion 20 was based on a permissible construction of the statute. *See Cty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998) ("If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (citation, quotation marks, and brackets omitted)), *disc. review denied*, 350 N.C. 92, 528 S.E.2d 361 (1999).

In his Final Decision, the ALJ concluded that the geographic scope chosen by the Agency to assess compliance with Criterion 20 was not based upon a permissible interpretation of N.C. Gen. Stat. § 131E-183(a)(20). The ALJ made the following findings of fact on this issue:

1. The General Assembly has found that to promote the general welfare and health of its citizens, CON applicants for new health services must be evaluated as to the quality of care they will provide. N.C.G.S. § 131E-175(7). Criterion 20 requires that "[a]n applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past."

2. Criterion 20 serves to benefit future residents of a proposed nursing facility by ensuring that an existing provider cannot be awarded a CON unless it can demonstrate that it is currently providing quality care at its existing facilities. Criterion 20 is especially important in nursing home reviews because the residents of nursing facilities have serious medical issues and are completely dependent on the facility to meet their care needs 24 hours a day.

3. All CON applicants are required to demonstrate how a project will promote quality in the delivery of health care services. Safety and quality are the first basic principle[s] that govern the health care planning process in the State Medical Facilities Plan.

4. Criterion 20 does not specify what geographic area the Agency must consider when evaluating whether an applicant has provided quality care in the past. In other statutory criteria, the legislature has specifically limited the relevant geographic area under consideration to the "service area" at issue. (N.C. Gen. Stat. §§ 131E-183(13)(a), (18a)).

5. It is the Agency's practice in considering Criterion 20, to limit the geographic scope of its review of substandard quality of care deficiencies to only facilities operated in the service area where the proposed project is to be located. For nursing home reviews, the service area is a single county.

6. In this review, the Agency only considered the applicants' history of providing quality care in Wake County. The Agency ignored quality of care by an applicant in other counties.

7. The Agency's interpretation of the geographic scope of the statute has resulted in it determining that Criterion 20

is not applicable to applicants that operate nursing facilities outside of the county where the proposed project is to be located.

8. The language of Criterion 20 does not expressly limit or even suggest that the geographic scope of the Agency's review should be limited to only those facilities operated in the county where the proposed project is to be located. Instead, Criterion 20 makes clear that all existing providers must demonstrate that they have provided quality care in the past.

9. The Agency provided no reasonable basis for ignoring an applicant's quality track record outside the county in determining conformity with Criterion 20. When asked why the Agency excluded facilities outside the county where the proposed project was to be located, the Assistant Chief of the Agency agreed that it was historical practice and that she did not know why. Mike McKillip, Project Analyst at the Agency's CON Section, testified that he did not know why the Agency has traditionally limited its Criterion 20 analysis to the county at issue in the review.

10. Craig Smith, Chief of the CON Section, testified that it was possible that the Agency would consider quality issues in other counties when determining conformity with Criterion 20, but the Agency would only do so if the Agency determined that the applicant had severe quality issues. However, the evidence shows two examples of nursing home reviews in which the Agency looked outside the county to determine conformity with Criterion 20. In each instance, the applicant had no quality issues that would have resulted in nonconformity with Criterion 20.

. . . .

26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. The specified quality-related events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines."

. . . .

> 38. The Agency is obligated to review applications and determine whether they are consistent with the statutory review criteria. N.C. Gen. Stat. § 131E-183(a).
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> 39. In reviewing whether applications submitted in this case conformed to Criterion 20, Mike McKillip, Project Analyst at the Agency's CON Section, sent an e-mail dated December 20, 2011 to Beverly Speroff, Chief of the Agency's Nursing Home Licensure and Certification Section. The e-mail included a list of the applicants' existing facilities in Wake County and asked whether any of those facilities had quality of care problems since August 2010.
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> 40. Ms. Speroff responded to Mr. McKillip's e-mail and stated which of the facilities identified by Mr. McKillip, "had certification deficiencies constituting substandard quality of care during this period." Ms. Speroff's e-mail did not contain any details about the certification deficiencies. Ms. Speroff's e-mail also did not contain any information regarding whether the applicants' remaining facilities in North Carolina had experienced any quality of care issues.
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> 41. Mr. McKillip and Martha Frisone, Assistant Chief of the Agency's CON Section, both testified that the Agency's determination of whether the applications in this review conformed to Criterion 20 was based entirely on Ms. Speroff's e-mail.

(Certain citations omitted.)

Based on these findings, the ALJ made the following pertinent conclusions of law:

> 24. The Agency erred and acted in contradiction of law by limiting the geographic scope of Criterion 20 to facilities located in the county where the proposed project was to be located in determining conformity with Criterion 20.
>
> 25. In considering the geographic scope of Criterion 20, the first step is to review the plain language of the statute to determine if it explicitly supports the Agency's interpretation. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574-75, 573 S.E.2d 118, 121 (2002).

26. Nothing in the plain language of Criterion 20 suggests that the General Assembly intended the Agency to limit its review of past quality of care provided by existing providers to facilities located in the county where the proposed facility would be located. Moreover, the language of Criterion 20 does not support a reading of the statute that allows the Agency to ignore existing health service providers on the basis that the services are provided outside the county where the proposed project is to be located. Instead, the plain language of Criterion 20 very explicitly states, without qualification, that if the applicant is an existing provider of health service[s], that provider must demonstrate that it has provided quality of care in the past. N.C.G.S. § 131E-183(a)(20).

27. The Agency and Britthaven contend that since the service area for the need allocation is Wake County, Criterion 20 should be interpreted to limit quality of care review to Wake County. However, a bedrock principle of statutory construction is that the court must consider a statute as a whole and presume that the legislature understood its choice of words when drafting the statute. *Housing Auth. of Greensboro v. Farabee*, 284 N.C 242, 245, 200 S.E.2d 12, 15 (1973); *see also N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. 763, 768, 675 S.E.2d 709, 711 (2009) (if legislation includes particular language in one section but omits it in another, it is presumed the legislature acted intentionally).

28. Unlike Criterion 20, in enacting Criterion 13(a), the General Assembly limited the use of the comparison to be made by the Agency to the "applicant's service area." N.C.G.S. § 131E-183(a)(13)(a). Similarly in Criterion 18, the applicant must only demonstrate the effects on competition in the proposed "service area." N.C.G.S. § 131E-183(a)(18). If the General Assembly had intended to limit the Agency's consideration of quality to only the proposed "service area," which in this case is Wake County, it would have included such language in Criterion 20 as it did in Criteria 13(a) and 18. *Farabee*, 284 N.C. at 245, 200 S.E.2d at 15; *N.C. Dept. of Revenue v. Hudson*, 196 N.C. App. at 768, 675 S.E.2d at 711.

29. In interpreting a statute, a court should also consider the policy objectives prompting passage of the statute and

should avoid a construction which defeats or impairs the purpose of the statute. *O & M Industries v. Smith Engineering Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 349 (2006).

30. The General Assembly has unambiguously determined that the general welfare and protection of lives and health of the citizens of North Carolina require that proposed health services be reviewed and evaluated as to quality of care. N.C.G.S. § 131E-183(a)(20). The CON Section's interpretation of Criterion 20 impairs the purpose of the statute by restricting the Agency's quality review to such a limited and arbitrary geographic area.

31. While traditionally the interpretation of a statute by an agency created to administer the statute is accorded some deference, "those interpretations are not binding, and the weight of such an interpretation in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade. T*otal Renal Care of North Carolina, LLC v. North Carolina Dept. of Health and Human Services, Div. of Facility Services, Certificate of Need Section*, 171 N.C. App. 734, 615 S.E.2d 81 (2005). The Agency's interpretation of the geographic scope of Criterion 20 is not based on thorough consideration or valid reasoning.

32. The nursing facility application form requires applicants to provide state-wide quality of care information. N.C.G.S. § 131E-182(b) requires that applicants "be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. § 131E-183 and with duly adopted standards, plans and criteria." By creating a policy that ignores and treats as irrelevant the state-wide quality of care information that has been requested in the application form, the Agency has erred and acted contrary to N.C.G.S. § 131E-182(b).

33. A state-wide review of all of the nursing facilities operated by an applicant is consistent with the importance that the General Assembly placed on awarding CONs to quality

providers when it created the CON statute. (*See* N.C.G.S. § 131E-175(7); *see also* Agency Ex. 818, p. 2, CON Basic Principle No. 1).

34. The Agency's policy of ignoring quality issues that exist outside the county under review is inconsistent with the importance that the General Assembly has placed on quality in the CON statute and is not in the best interest of future nursing home patients.

35. N.C.G.S. § 131E-182(b) and the CON Section's Nursing Facility Application provides an additional justification for finding that the Agency was required to conduct a state-wide review of quality in this case.

36. N.C.G.S. § 131E-182(b) requires that the Agency only request information in its application form that is necessary to determine whether the proposed project is consistent with the review criteria.

37. The nursing facility application created by the CON Section specifically requires applicants to provide quality information for all facilities the applicant owns or operates in North Carolina and does not limit its request only to the county where the proposed project will be located. (Joint Ex. 6).

38. Based on the language of N.C.G.S. § 131E-182(b), by requesting survey history for all facilities in the state, the Agency has determined that state-wide information is necessary to determine conformity with Criterion 20. It is unreasonable and contrary to N.C.G.S. § 131E-182(b) for the Agency to request information from applicants and ignore that information.

39. Based on the above, the Agency was required to consider quality information on a statewide basis. The Agency failed to meet this requirement by only considering quality information relating to Wake County facilities.

. . . .

47. In order to fulfill its obligation of determining whether applications are consistent with statutory review criteria, the Agency must perform a meaningful analysis.

48. To perform a meaningful analysis of whether an applicant conforms to Criterion 20, the Agency must analyze and give due regard to the information available to it that is reasonably related to an applicant's history of providing quality care.

49. In this case, the Agency did not analyze or give due regard to the information available to it that is reasonably related to the applicants' history of providing quality care. Specifically, the Agency did not analyze or give due regard to the public comments regarding the quality issues at Britthaven facilities or any of the other Applicants across the State. Likewise the Agency did not analyze information available to it related to any of the Petitioners' histories of providing quality of care throughout the State.

50. By failing to analyze or give due regard to the substantial information available to the Agency that was reasonably related to the applicants' history of providing quality care, the Agency failed to perform a meaningful analysis of whether the applications conformed to Criterion 20.

51. By failing to perform a meaningful analysis of whether the applications conformed to Criterion 20, the Agency failed to fulfill its obligation of determining whether the applications were consistent with Criterion 20.

The ALJ also concluded that the Agency had utilized the incorrect time frame in its assessment of the applicants' conformity with Criterion 20. Specifically, the ALJ found that while the application form developed by the Agency required applicants to provide quality of care information for the 18 months *immediately preceding the submittal of the application*, it was the Agency's practice "to only consider substandard quality of care occurring eighteen (18) months *prior to the issuance of the CON Section's decision*." (Emphasis added.)

The ALJ determined that the Agency's policy of ignoring approximately four months of quality of care data contained in the applications was contrary to N.C. Gen. Stat. § 131E-182(b), which provides that an application form shall require such information as the Agency "deems necessary to conduct the review" and that "[a]n applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly

adopted standards, plans and criteria." N.C. Gen. Stat. § 131E-182(b) (2013). As such, the ALJ concluded that the appropriate look back period for assessing an applicant's compliance with Criterion 20 extended from 18 months prior to the submission of the application up to the date that the Agency issued its decision.

As discussed above and as the ALJ noted in his Final Decision, an agency's interpretation of a statute that it is tasked with administering should be accorded some deference by the reviewing tribunal. *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008). The agency's interpretation is only entitled to such deference, however, if it is both reasonable and based on a permissible construction of the statute. *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844. The weight given to the agency's interpretation by a reviewing court depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463 (citation and quotation marks omitted). Therefore, we must consider whether deference should be accorded to the Agency's interpretation of (1) the appropriate geographic scope of the quality of care assessment required under Criterion 20; and (2) the length of the look back period under Criterion 20. We address each in turn.

A. Geographic Scope

[2] With regard to the geographic scope of the quality of care evaluation, we agree with the ALJ's conclusion that the Agency's interpretation of Criterion 20 was not based on a permissible construction of N.C. Gen. Stat. § 131E-183(a). "The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (internal citations omitted); s*ee also Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 ("The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." (citation and quotation marks omitted)), *disc. review denied*, 363 N.C. 374, 678 S.E.2d 665 (2009).

It is clear from the testimony offered at the contested case hearing that the Agency's practice of only examining an applicant's quality of

care record within the service area of the proposed project is longstanding. Assistant Chief of the CON Section Martha Frisone ("Frisone") testified that evaluating the applicant's quality of care "track record" for only those facilities within the proposed service area had been the practice of the Agency for at least the 18 years she had been employed by the Agency and that she was trained to follow this practice upon her hiring. She explained that when the Agency is "doing a review and we're looking at Criterion 20, the first question we ask is does this project involve an existing facility. And if so, we will inquire about the quality of care track record at that facility, and then we will look at affiliated facilities in the same county." Frisone further testified that under this method of assessing conformity with Criterion 20, if an applicant does not have any existing facilities within the proposed service area, the Agency will find that Criterion 20 is "not applicable" to that applicant.

A longstanding and consistent interpretation of a statute by an administrative agency warrants greater deference than an inconsistent or novel interpretation. *See Martin*, 194 N.C. App. at 724, 670 S.E.2d at 635 (explaining that "consistently held agency view" was entitled to significantly more deference than an interpretation that conflicts with an earlier agency interpretation). However, courts will not defer to an agency's interpretation of a statute that is an impermissible construction of the statute. *Craven Reg'l*, 176 N.C. App. at 58, 625 S.E.2d at 844.

As the ALJ noted, certain review criteria in N.C. Gen. Stat. § 131E-183(a) are specifically limited to the service area of the proposed project. Criterion 18a, for example, requires the applicant to "demonstrate the expected effects of the proposed services on competition *in the proposed service area* . . . ." N.C. Gen. Stat. § 131E-183(a)(18a) (emphasis added). Criterion 20, on the other hand, contains no such geographic limitation.

It is well established that in order to determine the legislature's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each. *Cape Hatteras Elec. Membership Corp. v. Lay*, 210 N.C. App. 92, 101, 708 S.E.2d 399, 404 (2011). Furthermore, as this Court has previously explained, "[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (citation, quotation marks, and brackets omitted).

Consequently, it is legally significant that the General Assembly made no mention of the service area of the proposed project in Criterion 20. As such, basic principles of statutory construction support the ALJ's conclusion that the General Assembly did not intend for the Agency's evaluation of an applicant's past quality of care to be limited to the service area of the proposed project.

In addition, "under no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation, quotation marks, and alteration omitted). In addition to controlling health care costs and avoiding the costly and unnecessary duplication of health service facilities, a primary reason for the existence of the CON laws is to protect the health and well-being of the citizens of North Carolina. N.C. Gen. Stat. § 131E-175(7). Indeed, the General Assembly made specific findings explaining the underlying purpose of requiring health care entities to obtain CONs and how the CON laws promote the general welfare of the public. In particular, the General Assembly stated

> [t]hat the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article . . . prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

Id. Thus, the clear intent of the General Assembly was to ensure that the quality of care history of an existing health care provider be subject to meaningful evaluation before that provider is allowed to offer additional services within North Carolina that are subject to the CON laws.

Here, the Agency's interpretation of Criterion 20 resulted in its determination that Criterion 20 was "not applicable" to several of the applicants simply because they did not have existing facilities in Wake County. Thus, the quality of care history of applicants such as The Heritage, which were already providing nursing care services within North Carolina but did not have any facilities in Wake County, was not assessed despite Criterion 20's mandate for the Agency to determine

whether an applicant already involved in the provision of health services has shown that quality care has been provided in the past. N.C. Gen. Stat. § 131E-183(a)(20).

We see no logical basis for disregarding such information evidencing quality of care on a statewide level. Indeed, we believe that such a policy actually contravenes one of the primary purposes of the CON laws. *See O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (stating that construction of statute which impairs or defeats purpose of statute should be avoided).

Significantly, the testimony from the contested case hearing demonstrates that Agency employees were unable to identify a plausible justification for its past interpretation of the geographic scope element of Criterion 20. Michael McKillip ("McKillip"), a project analyst for the Agency, admitted that he did not know why the Agency limited its analysis to the service area at issue, simply stating that it was just "how we review applications under Criterion 20." Likewise, Frisone testified that she did not know how the Agency initially formulated this interpretation of Criterion 20 but that it had been used for at least the past 18 years and "in that period of time, it has never been questioned that we should look statewide, nationwide, [or] worldwide when we're evaluating Criterion 20."

The inability of the Agency's own employees to provide a coherent rationale for its interpretation of the geographic scope of Criterion 20 provides additional support for our conclusion that no deference is owed to the Agency on this issue. *See Cashwell v. Dep't of State Treasurer*, 196 N.C. App. 81, 89, 675 S.E.2d 73, 78 (2009) (explaining that deference should only be accorded to agency interpretation "if the agency's interpretation of the law is not simply a 'because I said so' response . . . ." (citation, quotation marks, and alteration omitted)).

B. Look Back Period

[3] With regard to the look back period applicable to Criterion 20, we likewise conclude that the ALJ correctly determined that the Agency's interpretation was not entitled to deference. On this issue (unlike the issue of the appropriate geographic scope of Criterion 20), application of principles of statutory construction to N.C. Gen. Stat. § 131E-183(a) do not provide an answer. However, it is clear that the look back period the Agency utilizes in assessing an applicant's conformity with Criterion 20 differs from the temporal scope of the quality of care information it requires an applicant to provide in its application. By looking solely at the 18 month-period prior to its decision rather than to the 18 months

preceding the submission of the application, the Agency disregarded several months of quality of care data — information that it specifically required the applicants to report.

The ALJ found that the Agency's practice of ignoring this information was improper because N.C. Gen. Stat. § 131E-182(b) "prohibits the Agency from creating an application form that requires the applicant to furnish anything more than that which is necessary to a determination of whether the application is consistent with the applicable standards, plans and criteria." N.C. Gen. Stat. § 131E-182(b) states as follows:

> An application for a certificate of need shall be made on forms provided by the Department. The application forms, which may vary according to the type of proposal, shall require such information as the Department, by its rules deems necessary to conduct the review. An applicant shall be required to furnish only that information necessary to determine whether the proposed new institutional health service is consistent with the review criteria implemented under G.S. 131E-183 and with duly adopted standards, plans and criteria.

The Agency's response to this finding is that N.C. Gen. Stat. § 131E-182(b) merely requires it to limit the information sought from applicants to that which "might be useful" in a review so as to prevent the Agency from engaging in a "fishing expedition." We agree with the ALJ's determination on this issue. Although the statute affords the Agency a measure of discretion in formulating the appropriate look back period, the Agency used that discretion by creating an application that requests information for the 18-month period preceding the submission of the application. The record is devoid of any explanation from the Agency of the basis for its practice of deviating from the time period referenced in its own application when applying Criterion 20. As such, we cannot say that the ALJ erred in his determination that the Agency is bound to utilize a look back period of 18 months preceding the date of the application's submission through the date of the Agency's decision.[5]

Having determined that the ALJ's conclusions as to the proper geographic and temporal parameters of Criterion 20 were not erroneous,

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5. We also agree with the ALJ's conclusion that this longer look back period is "reasonable and consistent with" the legislative purpose underlying Criterion 20 by offering a more comprehensive evaluation of a health care provider's past history of quality care in its provision of health services.

we must now examine the ALJ's specific application of Criterion 20 to Britthaven and Liberty.

C. Application of Criterion 20 to Britthaven

[4] In his Final Decision, the ALJ reversed the Agency's determination that Britthaven had demonstrated a history of quality care in conformity with Criterion 20, making the following findings of fact:

> 23. Criterion 20 puts the burden on the applicant to prove that it has provided quality care in the past: "An applicant already involved in the provision of health services shall provide evidence that quality care has been provided in the past."
>
> . . . .
>
> 26. In Section II, Question 6(a) of the nursing home CON application, the Agency asks the applicant to complete a table ("Table 6") and identify whether any of the applicant's existing facilities statewide have experienced any of a set of specified quality-related events. The specified quality-related events include "Substandard Quality of Care as Defined by [the Federal Government]" and "State and Federal Fines."
>
> . . . .
>
> 28. Although Britthaven identified 46 facilities in Table 6 of the Britthaven Application, it did not disclose that any of those facilities had experienced incidents of substandard quality of care. The evidence at the hearing revealed that, in fact, seven (7) Britthaven facilities had experienced eleven (11) events constituting substandard quality of care during the eighteen (18) months prior to the application date.
>
> 29. Max Mason, who prepared the Britthaven Application, testified at the hearing that Britthaven's events of substandard quality of care were purposefully not identified in the Britthaven Application because he knew that the Agency would only evaluate whether Britthaven's Wake County facility had provided quality care in the past, and none of Britthaven's eleven (11) events of substandard quality of care occurred at Britthaven's Wake County facility.

30. The Britthaven Application did identify several "State and Federal Fines." However, in response to Question 6(b), which asked for the circumstances surrounding all disclosed quality events, the Britthaven Application stated: "The penalties against the various facilities were assessed for alleged deficiencies. Except where otherwise noted, all matters are under appeal with CMS." The evidence at the hearing revealed that at least some of the disclosed fines were in fact not under appeal with CMS when Britthaven filed its application. At the hearing, Mr. Mason testified that the statement in the Britthaven Application indicating that all fines were under appeal was not true and was simply boilerplate language that Britthaven used in multiple CON applications.

31. Mr. Mason testified that although he is ultimately in charge of completing CON applications on behalf of Britthaven, he relies on a paralegal, Martha McMillan, to fill out Table 6 of the application. He does not independently verify her work, nor does he know the procedure she follows in filling out Table 6. He further testified that he was not familiar with her qualifications. To his knowledge, Ms. McMillan has no clinical training or experience with CMS surveys. Britthaven did not call Ms. McMillan as a witness at the hearing. Mr. Mason also testified that based on the Agency's longstanding practice of basing conformity determinations on the survey history of facilities within the same county as the proposed facility, he generally verifies the information provided by Ms. McMillan for any facilities in the same county where the proposed facility is to be located.

32. Mike McKillip, the analyst who performed the review in this case, testified that his interpretation of Table 6 of the Britthaven Application was that no Britthaven facility in North Carolina had an episode of Substandard Quality of Care.

33. Mr. McKillip testified that Britthaven should have identified which of its facilities had experienced events constituting substandard quality of care. He further testified that had Britthaven fully identified its events of substandard quality of care, he would likely have followed up on the

> disclosed issues. Craig Smith, Chief of the Agency's CON Section, testified that he expects the entire CON application to be completed in a complete and accurate manner.
>
> 34. Doug Suddreth, who was admitted as an expert in the development and operation of nursing homes, the preparation, review and analysis of CONs, health planning, facility management and design and how care practices and work care practices flow from such design, and who testified on behalf of Britthaven and BellaRose, opined that it was a mistake for Britthaven not to fully complete Table 6.

(Internal citations omitted.)

Based on these findings of fact, the ALJ made the following conclusions of law concerning the issue of whether Britthaven had complied with Criterion 20:

> 62. Britthaven had an obligation under the CON law and Agency regulations, as well as a responsibility to the citizens of this State, to fully, completely and truthfully fill out Table 6 of the CON application form. Britthaven's intentional failure to fully, completely and truthfully fill out Table 6 of the CON application form was misleading and contrary to its legal requirements.
>
> 63. Even if the Agency's traditional Criterion 20 analysis was limited to the county at issue in the review, Britthaven was not excused from its obligation to fully, completely and truthfully fill out Table 6 of the CON application form.
>
> 64. By failing to fully, completely and truthfully fill out Table 6 of the CON application form, Britthaven failed to meet its burden of proving that it provided quality care in the past under Criterion 20.
>
> 65. The Agency must conduct an assessment of all relevant information in support of and indeed in opposition to an application. To do so the Agency must be able to rely on all information requested within the application. Britthaven's intentional omissions regarding quality of care prevents the Agency from conducting that independent evaluation that it must to assure itself and indeed the public of a fair and honest judgment on the issue. The failure to provide that information necessarily prevents the required evaluation and necessarily makes the Agency's

> decision regarding Britthaven's past quality of care arbitrary and capricious.
>
> 66. Britthaven's failure to meet its requirement of proving that it provided quality care in the past under Criterion 20 renders the Britthaven Application nonconforming and therefore unapprovable.

On appeal, Britthaven argues that (1) the ALJ's characterization of the omissions from its application as intentional is not supported by the evidence; and (2) the ALJ erred as a matter of law in concluding that the omissions from its application necessarily rendered Britthaven nonconforming with Criterion 20. We agree.

At the contested case hearing, Maxwell Mason ("Mason") — who was responsible for overseeing CON-related matters for Britthaven, including the preparation of Britthaven's CON applications — testified that an employee, Martha McMillan ("McMillan"), prepared Table 6 in Britthaven's application. Mason stated that the table completed by McMillan appeared correct when he reviewed it but that he did not "go figure out where all the survey findings are and letters from Licensure and Certification and try to recreate the table" because McMillan was more familiar than he was with that data.

Mason further testified that he attempts to verify the accuracy of information provided to him in connection with CON applications "to the extent feasible." He further stated, however, that in light of the Agency's historical practice of examining only the facilities located in the service area of the proposed new project in its Criterion 20 review, he would personally conduct an inquiry into the quality of care history solely as to any facilities located within the particular service area at issue.

When specifically asked about whether Britthaven's omission of the "Xs" that should have been included in Table 6 to denote that a facility had been cited for substandard quality of care was deliberate, Mason responded that it was Britthaven's intention for its application to be both complete and accurate and that the omissions were inadvertent.

> There was no intent for there not to be Xs. As best I can understand it, there was some misunderstanding on the part of Ms. McMillan about how this table should be completed. But as I said, she's done it for a while and it never came to our attention that there was a problem. So that's all I can say about it. But I mean I certainly didn't tell anyone or consciously say let's remove Xs.

Liberty asserts that the ALJ's determination that Britthaven intentionally omitted this information is supported by substantial evidence because Mason also testified that Britthaven chose to provide responses with "less detail" to inquiries into the circumstances of fines that had been imposed on various Britthaven facilities. Mason's testimony on this issue was that the section of the application requesting the applicant to describe the circumstances of each fine imposed "doesn't prescribe specific expectations for the content" and that Britthaven provided "a general response" in that section "based on our experience of how the Agency reviews this information."

In our view, this testimony falls short of supporting a conclusion that Britthaven *intentionally* omitted key information from its application. Rather, it merely shows that Britthaven's answers in that section were not comprehensive explanations but rather general responses based on its assessment of "the extent of the response that's required."

We have carefully reviewed the record and have failed to identify evidence that would warrant a finding that Britthaven "purposefully" excluded information concerning the quality of care record of its facilities outside of Wake County.[6] Indeed, we note that toward the conclusion of the hearing, the ALJ appears to have expressed agreement with Britthaven's contention that there had not been any evidence presented of intentional omissions by any applicant. During the cross-examination of Frisone, the following interchange took place:

> [Counsel for The Heritage]: Would you consider it would be an issue if an applicant intentionally omits information?
>
> A. Well I–
>
> [Counsel for Britthaven]: (interposing) I just want to object, Your Honor. At this point I don't think there's been any evidence that anybody intentionally omitted anything.
>
> The Court: *And I agree with that*, but I think her question is fair. I'm not relating it to this specific – it's generally if it is found to be. Do you understand, Ms. Frisone? I'm not

6. It is worthy of mention that the ALJ separately determined that Liberty's application also contained various errors, which included the omission of three Liberty facilities from Table 6 of its application and an erroneous statement that it was awaiting the resolution of an "appeal from the findings of the survey at Liberty's Rowan County facility" when, in fact, the appeal had already been denied. The ALJ characterized these errors as "inadvertent" without articulating any basis for this characterization.

> taking it to mean this application itself at this point, but her question is in general.

(Emphasis added.)

[5] We next turn to the ALJ's ultimate conclusion that Britthaven's application was nonconforming with Criterion 20. As evidenced by the conclusions of law quoted above, the ALJ's determination that Britthaven failed to conform to Criterion 20 was based solely on Britthaven's incomplete responses in Table 6 of its application. On appeal, Britthaven and the Agency argue that the ALJ's failure to make findings and conclusions concerning Britthaven's actual record of providing care based on the information available to the Agency and the evidence offered at the contested case hearing was an error of law, rendering his conclusion of nonconformity arbitrary and capricious. Once again, we agree.

While the ALJ noted in his Final Decision that Britthaven had received 23 substandard quality of care citations from 12 surveys that were conducted at Britthaven's facilities during the relevant time period, the ALJ did not make any findings discussing the significance of these citations nor did he expressly base his finding of nonconformity on their existence or on any other aspect of Britthaven's actual survey history. Instead, the ALJ concluded that Britthaven's inaccuracies in its completion of Table 6 "necessarily prevent[ed]" the Agency from conducting its evaluation of past quality of care, and as a result, Britthaven could not meet its burden of demonstrating pursuant to Criterion 20 that it had provided quality care in the past.

We believe this conclusion is contradicted both by the testimony of Agency officials and by the ALJ's own determinations that (1) the Agency had "substantial information" before it concerning Britthaven's statewide quality of care record; and (2) the Agency is empowered to — and should — look beyond the application itself to determine an applicant's conformity with the review criteria.

At the hearing, Frisone explained that the Agency could find an application nonconforming based on an applicant's omissions or misrepresentations in the application *if* the information at issue could not be found elsewhere in the submitted materials or was not publicly available. She testified that the Agency is not confined to the information contained in an application and instead may use whatever evidence is available to it in assessing an applicant's conformity with the review criteria. She further testified that in this particular case "the omission is in section II(6)(a), and that is an area where we are going to corroborate or document that quality of care track record for those facilities that we're

going to look at by contacting the Licensure and Certification Section for publicly available information." She stated that, for this reason, Britthaven's failure to fully complete Table 6 would not have prevented the Agency from assessing its conformity with Criterion 20 and should not be grounds for finding the Britthaven application nonconforming with Criterion 20.

Similarly, Craig Smith ("Smith"), Chief of the CON Section, testified that the Agency will examine the information provided by an applicant as well as any additional information it obtains from other sources to determine the applicant's conformity with the review criteria. He also stated that he could not envision the Agency "being so draconian that we would disqualify somebody for omitting a response" when the Agency was nevertheless able to assess the applicant's conformity through other sources.

Moreover, in spite of his conclusion that Britthaven's omissions had prevented the Agency from meaningfully reviewing its quality of care record statewide, the ALJ specifically noted that other applicants had made the Agency aware of a number of the substandard quality of care citations at Britthaven facilities during the Agency's initial review of the applications. The ALJ also found that the Agency should have analyzed such information in performing its review of Criterion 20. This Court has previously recognized that the Agency may take into account information beyond that contained within the application itself in making its decision. *See In re Wake Kidney Clinic, P.A.*, 85 N.C. App. 639, 643-44, 355 S.E.2d 788, 790-91 (explaining that Agency can consider information not contained in CON application but otherwise made available to it in making determination of conformity with review criteria), *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987).

Notably, Frisone testified that the reason she did not look into these citations was because they did not occur in Wake County and the information the Agency had received during the public comment period did not "lead me to believe that we should vary from our practice of looking only at the facilities in Wake County." Thus, while the evidence supports a finding that the Agency *did not* examine Britthaven's record of quality of care outside of Wake County, it does not support the ALJ's conclusion that the Agency *could not* examine Britthaven's history of quality of care because of the omitted information on its application. To the contrary, the Agency's failure to conduct such an examination resulted from the Agency's own practice of confining its review of Criterion 20 to the service area of the proposed project.

Our conclusion that the ALJ erred in determining that Britthaven must be found nonconforming because its omissions prevented a meaningful analysis of Criterion 20 is not a departure from the well-established principle that "[t]he burden rests with the applicant to demonstrate that the CON review criteria are met." *Good Hope*, 189 N.C. App. at 549, 659 S.E.2d at 466. Rather, our holding is simply that the record does not support the ALJ's findings that (1) Britthaven intentionally submitted an application with misrepresentations and omissions; or (2) these misrepresentations and omissions precluded the Agency from conducting a meaningful review of Britthaven's application to assess conformity with Criterion 20.

For these reasons, we hold that the ALJ erred in summarily concluding that Britthaven was nonconforming without actually examining the quality of care provided by it in the past. As such, a remand is necessary so that the ALJ may make a substantive determination of whether Britthaven was in conformity with Criterion 20 based on its actual quality of care record.[7] *See* N.C. Gen. Stat. § 150B-51(b) ("The court reviewing a final decision may . . . remand the case for further proceedings.").

D. Application of Criterion 20 to Liberty

[6] The ALJ next concluded that the Agency erred — and, in so doing, substantially prejudiced Liberty's rights — by finding that Liberty's application was nonconforming with Criterion 20. The Agency had determined that Liberty was nonconforming and therefore unapprovable because its Wake County facility, Capital Nursing and Rehabilitation Center, "had certification deficiencies constituting substandard quality of care, including immediate jeopardy to resident health or safety." For this reason, pursuant to the Agency's historical practice of assessing conformity, it concluded that Liberty was nonconforming with Criterion 20.

In his findings, the ALJ noted that Liberty operated 17 facilities in North Carolina and had received 8 citations statewide for substandard quality of care from 4 surveys conducted during the pertinent look back period. Without addressing the particular circumstances surrounding Liberty's substandard quality of care citations or explaining his reasoning, the ALJ summarily concluded as a matter of law that "Liberty met

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7. We wish to emphasize that nothing herein should be construed as suggesting that this Court condones the submission of applications containing misrepresentations or omissions. We express no opinion as to the types of circumstances that would have to exist in order for an applicant's misrepresentations or omissions to justify a finding of nonconformity on that ground.

its burden at the hearing of establishing that it had provided quality care in the past in its existing North Carolina facilities." Britthaven, The Heritage, and the Agency argue that this conclusion was erroneous and unsupported by adequate findings of fact.

As discussed above, the ALJ's Final Decision rejected the Agency's historical approach to assessing conformity with Criterion 20, concluding that the Agency's restriction of its analysis to facilities within the county of the proposed project and utilization of a look back period consisting of only the 18 months immediately preceding the Agency's decision were incorrect. While we agree with the ALJ's analysis of the proper geographic and temporal scope of Criterion 20 in the abstract, the Final Decision is unclear as to how the ALJ actually applied these principles to Liberty and the particular information he relied upon in determining that Liberty's application was consistent with Criterion 20. Indeed, the only discernible support the Final Decision attempted to offer for its determination that Liberty met its burden of demonstrating conformity with Criterion 20 was the bare conclusion that

> Liberty identified and addressed the issues of substandard quality of care at its facilities and took steps to prevent similar problems in the future. The events constituting substandard quality of care at Liberty facilities were isolated and unrelated.

Fundamental to this Court's ability to review a final decision and analyze whether "the findings, inferences, conclusions, or decisions" of the ALJ are affected by errors of law or are arbitrary, capricious, or an abuse of discretion is the existence of adequate findings of fact. N.C. Gen. Stat. § 150B-51; *see generally*, *Mann Media*, *Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (explaining that lower tribunal must provide appellate court with "sufficient information in its order to reveal . . . the application of [its] review" (citation and quotation marks omitted)).

Here, we are presently unable to determine whether the ALJ erred in concluding that Liberty's application was in conformity with Criterion 20 because the Final Decision provides no substantive explanation of how it reached this conclusion. The ALJ made multiple findings suggesting that the Agency should expand the data sources it considers in assessing an applicant's quality of care track record, noting that the Agency "failed to consider any matters of positive quality of care." The ALJ also noted the Nursing Home Compare data, the CMS Quality Score, and other evidence presented by the parties comparing the

number of substandard quality of care citations an applicant has received to the total number of patient days of care provided by the applicant. However, the ALJ made no mention of whether such information factored into his assessment of Liberty's quality of care record and offered no explanation as to the actual basis for his conclusion.

Throughout the hearing, the parties raised various possible methods of assessing an applicant's conformity with Criterion 20. The Heritage advocated for a "zero tolerance" policy, whereby an applicant would be found nonconforming if it had received even one single substandard quality of care citation at any of its facilities within North Carolina during the relevant look back period.[8] The ALJ expressly rejected this interpretation of Criterion 20, stating that "[t]he plain language of Criterion 20 does not require any such zero-tolerance standard, and nothing in the text or legislative findings of the CON Act, or any other statute suggests that the General Assembly intended for the Agency's inquiry under Criterion 20 to function in such a manner." The ALJ also relied on Frisone's testimony at the hearing that a statewide zero tolerance policy would not be feasible because it would substantially reduce the pool of approvable applicants, concluding that a statewide zero tolerance policy was "unreasonable, inequitable, inconsistent with Agency practice, and would not effectively achieve the purposes of the CON Act."

Thus, while the ALJ clearly rejected a zero tolerance policy for assessing compliance with Criterion 20, he also specifically "decline[d] to offer specific methods for the Agency" to utilize in determining conformity with Criterion 20, stating that "find[ing] another way or ways of evaluating Criterion 20. . . . is not the role of the Office of Administrative Hearings . . . or the purpose[] of a contested case hearing." The problem with the ALJ's reasoning is that the Final Decision simultaneously (1) stated the ALJ's belief that it was up to the Agency to formulate a standard for assessing compliance with Criterion 20; yet (2) nevertheless proceeded to conclude that Liberty had somehow met this unarticulated standard. In reaching these logically inconsistent conclusions, we believe the ALJ erred. It cannot be determined whether either Liberty or Britthaven conformed with Criterion 20 without a prior understanding of the appropriate standard for assessing such conformity.

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8. Such a policy would have incorporated the Agency's existing approach — whereby applicants were deemed nonconforming if they had a single substandard quality of care citation in the county of the proposed project during the applicable look back period — and expanded its reach so that all facilities statewide would be considered.

The ALJ's Final Decision implicitly recognized that the Agency — as the entity possessing institutional expertise as to CON-related issues and tasked by the General Assembly with administering the CON statutes — is ultimately responsible for developing an appropriate standard for assessing conformity with Criterion 20 (albeit one that is consistent with the CON Laws). *See* N.C. Gen. Stat. § 131E-177(1) (giving Agency authority to "establish standards and criteria or plans . . . and to adopt rules pursuant to Chapter 150B of the General Statutes, to carry out the purposes and provisions of [the CON statutes]").

However, as a result of the General Assembly's 2011 statutory amendments to the APA, the ALJ — rather than the Agency — is entrusted with the duty of making a final decision in any CON matter that becomes the subject of a contested case, and the APA does not provide ALJs with the authority to remand an action back to the Agency for further proceedings. N.C. Gen. Stat. § 150B-34. Accordingly, in cases where, as here, an ALJ has determined that the Agency erred, it is his responsibility to explain why the Agency's decision was erroneous and why the Final Decision he renders is a correct application of the law to the facts of the case. *See id.* ("In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law.").

Therefore, the ALJ, on remand, must make findings of fact and conclusions of law to support his ultimate determination as to whether Liberty and Britthaven adequately demonstrated that they conformed to Criterion 20 by providing quality care in the past.[9]

II. Criterion 13(c)

[7] The last issue presented on appeal concerns the ALJ's finding that (1) The Heritage's application was conforming to Criterion 13(c) but that (2) the denial of a CON to The Heritage did not constitute error because its application was comparatively less effective than the applications of BellaRose, Liberty, and Britthaven (such that The Heritage would not ultimately have been selected even if the Agency had found The Heritage to be conforming with Criterion 13(c)).

The ALJ's determination that The Heritage's application was comparatively less effective than the applications of Liberty and Britthaven

9. In performing this task, he is, of course, free to seek input from the Agency, as well as from the other parties, before rendering a new final decision.

is unchallenged by the parties. However, because we are vacating the ALJ's determination regarding the conformity of Liberty's and Britthaven's applications to Criterion 20 and remanding for new findings and conclusions on that issue, we are required to also review the ALJ's determination that The Heritage conformed with the review criteria and was, in fact, an approvable applicant. This is so because if, on remand, the ALJ determines that neither Liberty nor Britthaven was in conformity with Criterion 20, then The Heritage — if it satisfied Criterion 13(c) — would be entitled to the CON.

Criterion 13(c) provides as follows:

> The applicant shall demonstrate the contribution of the proposed service in meeting the health-related needs of the elderly and of members of medically underserved groups, such as medically indigent or low income persons, Medicaid and Medicare recipients, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to the proposed services, particularly those needs identified in the State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the applicant shall show
>
> . . . .
>
> c. That the elderly and the medically underserved groups identified in this subdivision will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services[.]

N.C. Gen. Stat. § 131E-183(a)(13)(c).

In its decision, the Agency found that The Heritage's projection that 55.4% of its total patient days[10] would be provided to Medicaid recipients was inadequate in meeting the needs of the Medicaid population, thereby rendering it nonconforming with Criterion 13(c). In order to determine whether an applicant satisfies Criterion 13(c), the Agency's practice is to examine the applicant's projections for the services it will provide to medically underserved groups, including Medicaid recipients, and compare those projections with the state and county averages of

10. "Total patient days" is a unit of measurement utilized by health care entities. A facility's total patient days are calculated by assessing the number of patients that use the facility's services each day.

the percentage of total patient days provided to the group in question. Because The Heritage's projection regarding Medicaid recipients was less than the Agency's calculation of the average percentage of total patient days provided to patients receiving Medicaid in nursing facilities within Wake County, the Agency found The Heritage to be nonconforming with Criterion 13(c).

In his Final Decision, the ALJ concluded that the manner in which the Agency computed the Wake County average for services provided to Medicaid recipients was improper. Specifically, the ALJ determined that the Agency "acted erroneously and arbitrarily in *excluding* nursing facility beds in hospital-affiliated nursing facilities to calculate the county average and using that average to find The Heritage nonconforming with [Criterion 13(c)]." (Emphasis added.) The ALJ found that The Heritage's projection, which was based on a calculation of the county average that *included* hospital-affiliated nursing facilities, constituted "sufficient Medicaid access" and demonstrated conformity with Criterion 13(c).

The Agency argues on appeal that the ALJ acted in excess of his statutory authority and erred as a matter of law by affording no deference to the Agency's process for determining conformity with Criterion 13(c) despite the explanation offered by the Agency to support its practice. We agree.

As we previously noted, an agency's interpretation of the statutes it is charged with administering is due deference when its interpretation is reasonable, and the amount of deference given to the agency interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Good Hope*, 189 N.C. App. at 544, 659 S.E.2d at 463 (citation and quotation marks omitted). Indeed, the 2011 legislative amendments to the APA preserve this concept, specifically instructing the ALJ to consider the specialized knowledge of the Agency when deciding a contested case.

> In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law. The administrative law judge shall decide the case based upon the preponderance of the evidence, *giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.*

N.C. Gen. Stat. § 150B-34(a) (emphasis added).

Here, Agency employees testified as to the reasoning behind its exclusion of hospital-affiliated facilities from its calculation of the county average. Frisone testified that hospital-affiliated nursing facility beds typically

> have a different payor mix. They tend to have a much higher Medicare payor mix percentage and a much lower Medicaid. They typically admit the patient and then move them — they're moved to another facility or they go home. It's more likely in a hospital based facility than it is in a community nursing home.

She further explained that the Agency was particularly concerned with achieving access to nursing facilities for Medicaid recipients because "Medicaid patients have greater access problems in 2011" and have "historically had more trouble with access to nursing facility services." McKillip, the Agency employee who analyzed and reviewed each of the applications, likewise testified that the hospital-affiliated facilities were excluded from the calculation "because they have a different payor mix pattern that is not typical or not really comparable to the types of facilities that are being proposed in this review, which were all non-hospital affiliated freestanding facilities."

The ALJ rejected this rationale in his Final Decision. He noted that the Agency did not conduct an analysis of the admission patterns in Wake County or of the percentage of Medicaid recipients served by hospital-affiliated facilities as compared to other facilities before deciding to exclude hospital-affiliated nursing facilities from its calculation.

We believe the ALJ's implication that the Agency was required to specifically analyze the admission patterns of *all* Wake County nursing facilities — both hospital-affiliated and non-hospital-affiliated — disregards the specialized knowledge and expertise of the Agency concerning the typical payor mixes of particular facilities. The evidence presented at the hearing corroborated the Agency's assertion that hospital-affiliated facilities typically have significantly fewer Medicaid patients than other skilled nursing facilities within Wake County with an average 31.6% of the total patient days provided to Medicaid recipients at hospital-affiliated facilities compared to 61.8% at non-hospital-affiliated facilities. As such, we believe that the ALJ erred in failing to give deference to the Agency's reasonable explanation for its decision to exclude hospital-affiliated facilities from its calculation of the county average.

The ALJ further based his conclusion that the Agency's calculation of the county average was arbitrary and capricious on (1) testimony

by Agency employees suggesting that the Agency might have included hospital-affiliated facilities in the county average if a hospital-affiliated nursing facility had applied for the CON; and (2) evidence of two prior Agency decisions from Wake County where the county averages appear to have included hospital-affiliated facilities.

Based on our examination of the record and the testimony of Agency employees, it appears that a number of factors are considered by the Agency when deciding whether hospital-affiliated facilities should be included in the calculation of the county average. For example, in smaller counties with fewer overall facilities, hospital-affiliated facilities are generally included in order to achieve a more balanced analysis while, conversely, in larger, more populated counties — which have many skilled nursing facilities — hospital-affiliated facilities are typically excluded as their different payor mix tends to artificially depress the county average.

The ALJ cited Smith's testimony that if hospital-affiliated nursing facilities apply for a CON, such facilities may be added "to the mix for a more balanced comparison." Frisone noted that this would likely not be the case in Wake County, however, because of its large population and the fact that "there are enough facilities to where you can look at the distribution" without including hospitals and artificially skewing the county average.

Given the Agency's explanation of its methodology and its purpose in assessing the county average in this manner, we reject the ALJ's conclusion that the Agency was unreasonable and arbitrary simply because it might have altered its calculation if the group of applicants included one or more hospital-affiliated nursing facilities. Indeed, we find it logical for the Agency to utilize an approach allowing for some degree of flexibility in striving to capture the most accurate picture of the services provided to Medicaid recipients within a county in accordance with the specialized knowledge and expertise of the Agency.

We also disagree with the ALJ's determination that the Agency acted erroneously and arbitrarily in excluding hospital-affiliated facilities from its calculations in light of evidence pointing to two prior occasions in which the Agency apparently accepted a calculation of the Medicaid average in Wake County that included hospital-affiliated nursing facilities. Based on our review of this evidence, it appears that these two incidents stemmed from non-competitive reviews where an individual applicant was awarded a CON to add or relocate nursing beds from existing facilities after proposing that over 70% of its total patient days

would be provided to Medicaid recipients. The record does not reflect precisely why hospital-affiliated facilities were included in the county average in these two cases. However, we cannot conclude based on the mere existence of these two past cases — without more — that the Agency is no longer entitled to the deference that it would otherwise be due in its interpretation of Criterion 13(c). Indeed, the record also contains evidence of numerous decisions in which the Agency utilized the same method of determining conformity with Criterion 13(c) that it used here.

In sum, we conclude that the Agency's method of assessing conformity with Criterion 13(c) was reasonable, based on facts and inferences within the specialized knowledge of the Agency, and therefore entitled to deference. Accordingly, we reverse the ALJ's determination that The Heritage conformed with Criterion 13(c).

Conclusion

For the reasons stated above, we vacate the ALJ's Final Decision and remand this case for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and McCULLOUGH concur.

IN THE MATTER OF APPEAL OF PARKDALE MILLS AND PARKDALE AMERICA FROM THE DECISIONS OF THE DAVIDSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN REAL PROPERTY FOR THE TAX YEAR 2007

No. COA14-763

Filed 7 April 2015

1. Real Property—Property Tax Commission—remand order—additional hearings—plain language

On remand from the Court of Appeals, the Property Tax Commission did not err by failing to conduct additional hearings. The remand order stated that "the Commission shall conduct additional hearings *as necessary* and make further findings of fact and conclusions of law." By its plain language, the order did not mandate that the Commission conduct additional hearings.

2. Appeal and Error—failure to cite authority

The Court of Appeals declined to address the County's argument that the Property Tax Commission erred on remand by accepting the Taxpayer's argument that the County had already lost its case. The County cited no authority in support of its contention.

3. Real Property—Property Tax Commission—conflicting evidence

The Property Tax Commission did not err by adopting findings contrary to the record. Both the County and the Taxpayer presented substantial evidence, and the Court of Appeals is not permitted to replace the judgment of the Commission with its own.

Judge DILLON concurring in separate opinion.

Appeal by respondent Davidson County from final decision on second remand entered 8 April 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 19 November 2014.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler, for respondent.

Bell, Davis & Pitt, PA, by John A. Cocklereece, Jr., and Justin M. Hardy, for taxpayer.

North Carolina Association of County Commissioners, by Amy Bason and Casandra Skinner, for amicus curiae.

BRYANT, Judge.

Where a directive of this Court instructs a lower tribunal that the lower tribunal "shall conduct hearings *as necessary*," the plain language of such a directive indicates that the lower tribunal may, but is not required to, conduct additional hearings. Where the Property Tax Commission's decision was supported by substantial evidence, the decision will be affirmed upon appeal, despite the presence of contrary evidence in the record.

Parkdale Mills and Parkdale America ("taxpayer") own two textile manufacturing plants in Davidson County ("the County"). In January 2007, the County assessed the value of taxpayer's Lexington plant at $6,776,160.00 and the value of the Thomasville Plant at $3,620,080.00. In contrast, taxpayer's expert appraiser valued the properties at $905,000.00

and $625,000.00, respectively. Upon appeal by taxpayer to the County's Board of Equalization and Review ("the Review Board"), the appraised values were reduced to $5,040,429.00 and $3,287,150.00, respectively. Taxpayer then appealed to the North Carolina Property Tax Commission ("the Commission") which, after a hearing, affirmed the Review Board's assessments of taxpayer's buildings on 3 November 2009.

Taxpayer appealed to this Court, which found that taxpayer had demonstrated that the County's appraisal values were arbitrary, capricious, or illegal, and that the burden of showing that these values were still proper had shifted to the County. This Court then found that the Commission had failed to properly apply the burden-shifting framework as required by not making findings of fact and conclusions of law showing how the County's valuations were still proper despite evidence that these values were arbitrary, capricious, or illegal. We therefore vacated and remanded this case to the Commission with instructions that it "may conduct additional hearings on this matter if it deems them necessary." *In re Appeal of Parkdale Am.*, 212 N.C. App. 192, 198, 710 S.E.2d 449, 453 (2011) ("*Parkdale I*") (emphasis added). The Commission was further instructed that, upon remand, it "*shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence to reach its conclusions using the burden-shifting framework" as articulated in the opinion. *Id.*

Upon remand, no additional hearings were conducted, but a new final decision was entered. By final decision upon remand, entered 23 May 2012, the Commission re-affirmed the appraisal values of taxpayer's plants at $5,040,429.00 and $3,287,150.00, respectively. Taxpayer again appealed the Commission's decision to this Court, which agreed with taxpayer that the Commission had again failed "to alleviate this Court's lack of confidence that the County has, in fact, carried its burden." *In re Parkdale Mills & Parkdale Am.*, ___ N.C. App. ___, ___, 741 S.E.2d 416, 421 (2013) ("*Parkdale II*"). This Court went on to note in Parkdale II that

> [a]lthough we make no finding on appeal here regarding the true value of the property, this Court is troubled by the substantial discrepancy between [taxpayer's] assessed value and the County's assessed value. *On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy.* If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative

> to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the County's valuation, it has not been held to be "arbitrary."

Id. at ___, 741 S.E.2d at 422 (citation omitted) (emphasis added).

On second remand to the Commission, taxpayer filed a motion to limit the scope of the hearing to the record created during the initial hearing and as presented to this Court in *Parkdale I*. By order entered 16 October, the Commission granted taxpayer's motion.

After conducting a hearing on 19 November, the Commission issued its final decision on second remand on 8 April 2014. In its decision, the Commission found that the previous decisions of the Review Board were erroneous and that the true value of taxpayer's plants were $905,000.00 and $625,000.00, respectively. The County appeals.

On appeal, the County raises three issues as to whether the Commission erred in (I) not conducting additional hearings on second remand; (II) in accepting taxpayer's argument that the County had already lost its case; and (III) in adopting findings that are contrary to the record.

I.

[1] The County argues that the Commission erred in not conducting additional hearings on second remand. We disagree.

Pursuant to North Carolina General Statutes, section 105-345.2,

> [w]hen reviewing decisions of the Commission, this Court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or

> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Parkdale II, ___ N.C. App. at ___, 741 S.E.2d at 418—19 (citing N.C. Gen. Stat. § 105-345.2(b) (201[3])).

"An act is arbitrary when it is done without adequate determining principle[.]" *In re Hous. Auth. of City of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952) (citations omitted). "Determination of whether conduct is arbitrary and capricious or an abuse of discretion is a conclusion of law." *Transcon. Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 244, 511 S.E.2d 671, 677 (1999) (citation omitted).

This Court reviews decisions of the Commission under the whole record test to "determine whether an administrative decision has a rational basis in the evidence." *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (citation omitted).

> The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn.

Id. at 87-88, 283 S.E.2d at 127 (citations and quotations omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for that of the Commission's. *In re AMP*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975) (citation omitted). "If the Commission's decision, considered in the light of the foregoing rules, is supported by substantial evidence, it cannot be overturned." *In re Philip Morris U.S.A.*, 130 N.C. App. 529, 533, 503 S.E.2d 679, 682 (1998) (citations omitted).

The County contends the Commission erred in accepting taxpayer's argument that it could not hear evidence because the Commission

was bound by this Court's directive to conduct additional hearings. The County's argument lacks merit though, as this Court clearly stated in *Parkdale II* that "[o]n remand, the Commission shall conduct additional hearings *as necessary* and make further findings of fact and conclusions of law[.]" *Parkdale II*, ___ N.C. App. at ___, 741 S.E.2d at 422 (emphasis added). "A mandate of an appellate court is binding upon [the trial court] and must be strictly followed without variation or departure." *McKinney v. McKinney*, ___ N.C. App. ___, ___, 745 S.E.2d 356, 358 (2013) (citation and quotation omitted), *review denied*, 2014 N.C. LEXIS 46, *review dismissed as moot*, 2014 N.C. LEXIS 50 (Jan. 23, 2014). Moreover, it is well-established that in discerning a mandate's intent, the plain language of the mandate controls. *See, e.g.*, *First Bank v. S & R Grandview, L.L.C.*, ___ N.C. App. ___, ___, 755 S.E.2d 393, 394-95 (2014) (discussing how, in construing the intent of a statute, this Court is guided by the statute's plain language).

Here, this Court indicated that the Commission was to conduct further hearings *as necessary*. We disagree with the County's contention that the language of this directive, that the Commission "shall conduct additional hearings as necessary," meant that the Commission was required to conduct additional hearings because the word "shall" was used. Rather, this directive, taken as a whole, indicates that additional hearings were to be conducted if the Commission found such an action necessary in order to make further findings of fact and conclusions of law regarding the appraisal values of taxpayer's property. At no point did the Court in *Parkdale II* direct the Commission to take new evidence. *See* N.C. Gen. Stat. §105-345.1 (2013) ("No evidence shall be received at the hearing on appeal to the Court of Appeals but if any party shall satisfy the court that evidence has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court *may*, in its discretion, remand the record and proceedings to the Commission with directions to take such subsequently discovered evidence . . . ." (emphasis added)). As such, this Court's directive to the Commission in *Parkdale II* was not a mandate requiring the Commission to conduct additional hearings. *See In re Appeals of S. Ry. Co.*, 313 N.C. 177, 183-84, 328 S.E.2d 235, 240 (1985) (discussing how N.C.G.S. § 105-345.1 does not require the taking of new evidence on remand to the Commission, and noting that where the evidence in the record is sufficient, this Court will not order new proceedings in order to give a party a second opportunity to bolster its case with new evidence); *Bailey v. N.C. Dept. of Mental Health*, 2 N.C. App. 645, 647-48, 163 S.E.2d 652, 654 (1968) (noting that

where the order of a state agency was vacated and remanded for further consideration, the directive did not mandate that a new trial or trial *de novo* be conducted, nor did this directive either require or prohibit the state agency from taking new evidence).

The County further argues that because this Court vacated and remanded in *Parkdale II*, the language of "vacate and remand" was a directive ordering the Commission to conduct additional mandatory hearings. We disagree, for it has been settled by this Court that, for all practical purposes, the term "vacate" is synonymous with "remand," as both terms generally instruct the trial court to set aside and review its prior order. *See In re Appeal of IBM Credit Corp.*, 222 N.C. App. 418, 426-27, 731 S.E.2d 444, 448-49, *review denied*, 366 N.C. 400, 735 S.E.2d 191 (2012). Here, the Commission had discretion to determine whether or not to conduct additional evidentiary hearings. There was no mandate to conduct new hearings; likewise, there was no mandate to enter an order solely on the record. The mandate was to enter proper findings of fact and conclusions of law to reconcile the huge discrepancy in valuation of taxpayer's property. Therefore, in its final decision on second remand, the Commission did not abuse its discretion by not conducting additional hearings while abiding by the mandate.

Additionally, we note that although the County raises this argument concerning the Commission's final decision on second remand, this Court's directive to the Commission in *Parkdale I* was virtually identical to that now contested in *Parkdale II*, yet the County never raised this issue prior to its current appeal. In *Parkdale I*, this Court made it clear that the Commission had discretion to determine whether additional hearings were necessary: "[T]he Commission *may* conduct additional hearings if it deems them necessary . . . [and] *shall* make specific findings of fact and conclusions of law explaining how it weighed the evidence . . . ." *Parkdale I*, 212 N.C. App. at 198, 710 S.E.2d at 453 (emphasis added). However, no additional hearings were conducted, and the County never raised this issue regarding the meaning of the mandate in its appeal following *Parkdale I*. Accordingly, the County's argument is overruled.

II.

[2] Next, the County contends that the Commission erred in accepting taxpayer's argument that the County had already lost its case. However, while a review of the transcript does support the fact that taxpayer did make such an argument, the County cites no case law or other authority in support of its contention that it was error for the Commission to do

so. Therefore, we decline to address this argument. *See* N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

III.

[3] In its final argument, the County contends the Commission erred in adopting findings that are contrary to the record. We disagree.

As stated in *Issue I*, this Court reviews decisions of the Commission under the whole record test to "determine whether an administrative decision has a rational basis in the evidence." *In re McElwee*, 304 N.C. at 87, 283 S.E.2d at 127 (citation omitted). However, this Court cannot reweigh the evidence presented and substitute its evaluation for that of the Commission's. *In re AMP*, 287 N.C. at 562, 215 S.E.2d at 761 (citation omitted). "If the Commission's decision . . . is supported by substantial evidence, it cannot be overturned." *In re Philip Morris U.S.A.*, 130 N.C. App. at 533, 503 S.E.2d at 682 (citations omitted).

The County contends the Commission "erred in adopting a series of argumentative findings that are contrary to the substantial evidence of record." Specifically, the County presents a broad argument, without citing specific findings of fact, that the Commission's final decision on second remand was in error because, in general, the Commission's findings of fact as to the County's application of schedules of values, comparison sales data of properties similar to those of taxpayer's, the operability of taxpayer's properties, and adaptive reuse sales data, can be challenged by contrary evidence within the record.

A review of the record indicates that both the County and taxpayer presented substantial evidence to the Commission, including testimony regarding various methods of appraisal used by each party to determine the actual values of the properties. Although the County is correct that it presented contrary evidence as to the conditions and valuations of taxpayer's properties, the record shows that taxpayer also presented substantial evidence regarding the conditions and valuations of its properties. Further, the Commission, after making numerous findings of fact and conclusions of law, determined that despite the County's evidence, the County had not meet its burden in demonstrating that its method of valuation for taxpayer's properties was proper. While this Court may consider competing or contradictory evidence in reviewing the Commission's decision, this Court is not permitted "to replace the [Commission's] judgment as between two reasonably conflicting views, even though th[is] [C]ourt could justifiably have reached a different

result had the matter been before it *de novo*." *In re McElwee*, 304 N.C. at 87-88, 283 S.E.2d at 127 (citation omitted).

Additionally, we note that the Commission, by making numerous findings of fact and conclusions of law as to the discrepancy between the County's and taxpayer's valuations of the properties, has followed the directive of this Court as stated in *Parkdale II*. *See Parkdale II*, ___ N.C. App. at ___, 741 S.E.2d at 422 ("On remand, the Commission shall conduct additional hearings as necessary and make further findings of fact and conclusions of law in order to reconcile this discrepancy [between taxpayer's and the County's assessed values for the properties].").

As a final point, we note that even had the Commission failed to properly apply the burden-shifting framework, by adopting taxpayer's valuations of the properties the Commission would have met this Court's prerogative warning in *Parkdale II*. *See id.* (warning that "[i]f the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the County's valuation, it has not been held to be 'arbitrary.' "). The County's argument is, therefore, overruled.

AFFIRMED.

Judge DILLON concurring in separate opinion.

DILLON, Judge, concurring.

I concur with the majority in affirming the Final Decision on Second Remand of the Property Tax Commission. I write separately to address the *dicta* from *Parkdale II* quoted in the last paragraph of the majority's opinion:

> If the County cannot carry its assigned burden, or if the Commission again fails to rectify the inadequacies of its Final Decision, this Court may exercise its prerogative to remand for yet a third time with specific instructions for the Commission to adopt [taxpayer's] valuation of the property as, unlike the County's valuation, it has not been held to be 'arbitrary.'

I do not believe that the above *dicta* should be read as a rule which *requires* the Commission to accept the taxpayer's valuation simply

because the County may fail to meet its burden (when applicable) that its valuation does not represent the true value of the property. *Parkdale I* and *Parkdale II* explain the burden-shifting framework the Commission is required to apply, which I believe is as follows:

> The County's valuation is presumed to be correct.
>
> The taxpayer, however, can rebut this presumption by producing competent evidence to show that the County's (1) methodology was either arbitrary or illegal, *and* (2) valuation was substantially higher than the true value of the property.
>
> A rebuttal by the taxpayer does not *conclusively* establish that the County's valuation was in fact arbitrary or illegal or that its valuation was substantially higher than the true value of the property. Rather, the burden shifts back to the County to demonstrate that its valuation was correct.
>
> The County's failure to meet its burden does not necessarily render the taxpayer's valuation to be correct. Rather, where the County fails to meet its burden, it is up to the Commission to weigh the evidence and to make a determination as to the property's true (market) value. It may be that the Commission concludes that *neither* valuation (offered by the County or the taxpayer) accurately reflects the property's true value and determines the true value be some other number. *See, e.g.*, *In re Phillip Morris U.S.A.*, 130 N.C. App. 529, 538, 503 S.E.2d 679, 685 (1998) (after County concedes that it employed an arbitrary methodology, the Commission adopts value that is between value advocated by the County's expert and the value advocated by the taxpayer's expert).

In the present case, the Commission did make a finding that the valuations derived by the taxpayer's appraisal constituted "competent, material, and substantial evidence of the values" of the properties that are the subject matter of this appeal. This finding supports the Commission's ultimate determination of value. There was certainly conflicting evidence regarding the value of the subject properties from which the Commission could have determined that the subject properties' true value was somewhere between the value advocated by the County and the value advocated by the taxpayer. However, it is for the Commission – and not this Court – to weigh the evidence. Accordingly, I concur with the majority in affirming the Commission's order.

IN RE M.B.

[240 N.C. App. 140 (2015)]

IN THE MATTER OF M.B.

No. COA14-897

Filed 7 April 2015

1. Appeal and Error—appealability—writ of certiorari—incorrect date on notice of appeal

A juvenile's petition for a writ of certiorari as to the 22 October 2013 order based on an incorrect date was unnecessary, and thus was dismissed because a notice of appeal is not defective if intent to appeal can be fairly inferred.

2. Appeal and Error—appealability—writ of certiorari—notice of appeal—proper party—extraordinary writs—jurisdiction

A juvenile's petition for certiorari review as to the district court's 23 May 2014 order recognizing the Department of Social Services as a proper party was denied. Instead of filing notice of appeal from this order and moving to consolidate it with the already-pending appeal of the 22 October 2013 order, the juvenile's appellate counsel elected to pursue relief by petitioning for extraordinary writs from this Court. Consequently, the juvenile failed to meet the requirements of N.C.R. App. P. 3 and the Court of Appeals lacked jurisdiction to review the 23 May 2014 order.

3. Appeal and Error-motion to supplement record—denied

The Court of Appeals denied both motions to supplement the record in written orders filed 20 January 2015, reasoning that neither the 31 October 2013 order nor the subsequent abuse, neglect, and dependency orders were available to or relied upon by the district court when it concurred in a juvenile's readmission to a 24-hour psychiatric residential treatment facility after the 10 October 2013 hearing.

4. Juveniles—psychiatric residential treatment facility—ordered into custody in a second county—jurisdiction

The Court of Appeals' already held in *In re Phillips*, 99 N.C. App. 159 (1990), that where a juvenile is ordered into the custody of one county department of social services and then admitted to a psychiatric residential treatment facility in another county, the district court in the second county has jurisdiction over the admission as long as it does not conflict with the order of the prior court.

5. Appeal and Error—appealability—mootness—voluntary admission of minor into treatment facility—capable of repetition

Although juvenile's appeal from a 22 October 2013 order continuing his readmission to a psychiatric residential treatment facility for up to 30 days where the juvenile was subsequently discharged before its expiration would normally be dismissed as moot, it was not moot because orders of voluntary admission of a minor to a 24-hour facility are "capable of repetition, yet evading review" given their short duration. The State has a great interest in preventing unwarranted admission of juveniles into these treatment facilities.

6. Juveniles—readmission to psychiatric treatment facility—sufficiency of evidence—no less restrictive measures available

The district court did not err by concurring in a juvenile's readmission to a psychiatric residential treatment facility (PRTF) based on alleged insufficient findings. There were no sufficient, less restrictive measures available for the juvenile's continued treatment. Further, the district court's order satisfied the requirements of N.C.G.S. § 122C-224.3 by indicating that it incorporated into its factual findings all matters set out in a therapist's court summary, which it in turn relied on for its conclusions that the juvenile was mentally ill, in need of continued treatment at a PRTF, and that less restrictive measures would not be sufficient.

7. Appeal and Error—appealability—de facto party—no prejudice

A juvenile suffered no prejudice as a result of the Department of Social Services' (DSS) participation during the 10 October 2013 hearing. Because the issue of whether the court erred by recognizing DSS as a *de facto* party in its 23 May 2014 order was unnecessary to this determination and was not properly preserved for review.

Appeal by Respondent-juvenile from order entered 22 October 2013 by Judge Donald Cureton, Jr., in Mecklenburg County District Court. Heard in the Court of Appeals 22 January 2015.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Respondent-juvenile.

Deputy County Attorney Cathy L. Moore, for Durham County Department of Social Services.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for petitioner Thompson Child & Family Focus.

STEPHENS, Judge.

Respondent-juvenile appeals from the Mecklenburg County District Court's 22 October 2013 order concurring in and ordering his readmission to a Level IV psychiatric residential treatment facility. Respondent-juvenile also seeks *certiorari* review of the court's subsequent 23 May 2014 order recognizing the Durham County Department of Social Services as a *de facto* party to the matter. After careful consideration, because we conclude that the court did not err in its 22 October 2013 order and that its 23 May 2014 order has not been properly preserved for our review, we affirm.

I. Facts and Procedural History

On 16 August 2012, Michael[1] was voluntarily admitted to Thompson Child and Family Focus ("Thompson"), a 24-hour psychiatric residential treatment facility ("PRTF") by the consent of his legal guardian, the Durham County Department of Social Services ("DSS"). Michael's admission was reviewed one week later by the Mecklenburg County District Court, which concurred in his initial admission and subsequently authorized his readmission to Thompson at six hearings between November 2012 and October 2013.

Michael was admitted to Thompson at the age of eleven following several incidents of inappropriate sexual behavior with other children. He suffered from a history of neglect by his biological parents, and was also sexually abused by several unidentified adult males, before being taken into DSS custody at the age of eight. Michael's treatment plan at Thompson called for reducing his physical and verbal aggression and decreasing his post-traumatic stress disorder symptoms through a combination of medication and individual and group therapy, with the goal of eventually stepping down his treatment to a lower level of care and transferring him to a therapeutic foster home upon discharge.

1. In accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juvenile by a pseudonym throughout this opinion to protect his privacy.

As documented in the court summaries prepared by his therapist, Julia Sotile, Michael initially struggled to adjust to life at Thompson but gradually made progress toward attaining his treatment goals. Sotile's reports also documented her growing concerns with Michael's DSS guardian, Teresa Autry.

A. Michael's pre-October 2013 readmission hearings

In her court summary for Michael's uncontested January 2013 readmission hearing, Sotile noted that Michael had displayed great improvement in his behavior since she began working with him the previous October. Sotile described Michael as calm, compliant, and improving in his interactions with Thompson's staff and his peers there. In his therapy sessions, Michael remained reluctant to take responsibility for his sexual behaviors, displayed a preoccupation with and hyperawareness of sexual issues, and struggled to process his traumatic history. While his mother and siblings made supervised visits, DSS informed Michael's treatment team at Thompson that his permanent plan upon discharge had been changed to adoption with a preferred placement with his previous foster family, whom he visited once during Christmas. Sotile noted she had encouraged Autry to be clear with Michael so as not to set up any false expectations regarding his mother's role in his life.

In her court summary for Michael's uncontested April 2013 readmission hearing, Sotile noted that Michael had struggled since his last review. She explained that Michael was engaging in sexual behaviors with his peers, had difficulty taking ownership of his actions, and was increasingly defiant and disrespectful to Thompson's staff. In therapy, Michael expressed a great deal of anxiety and confusion regarding his sexual behaviors and his family situation and traumatic history. Sotile noted that he seemed deeply worried about whether he would be allowed to return to his mother's care, blamed himself for the majority of his family's problems, and had disclosed to Autry that some inappropriate discipline had taken place at the foster home where he had stayed before his admission to Thompson. Autry's response was to tell Michael that she did not believe his allegations but had told his previous foster parents about them, and that as a result, they had decided that they no longer wanted to be considered as a placement option for him. Sotile noted her dismay to Autry that sharing these opinions with Michael and blaming him for the disruption of his previous foster placement might cause him damage, given his struggles with isolation and loneliness. Autry also requested that Michael's phone contact with his mother, against whom DSS had recently moved for a TPR, be limited to once a week during therapy sessions to monitor for inappropriate

conversations. Michael had previously asked that Autry contact him weekly by phone, but Sotile's report explained that Autry had been inconsistent in her communications with him and expressed concern that Michael's "sexual behaviors and other shows of defiance seem to be increasing in response to an overall sense of instability."

In her court summary for Michael's uncontested July 2013 readmission hearing, Sotile noted that Michael seemed to be benefiting from the opportunity to establish meaningful, healthy relationships with Thompson's staff and his peers, but was struggling with his attitude and behavior. Specifically, Michael was acting increasingly defiant and disrespectful and making inappropriate, hypersexual comments toward female staff members. He also struggled to follow directions at school and became distracted and easily frustrated when he did not understand his assignments. In therapy, Michael presented as hypersexual with his therapist by asking inappropriate questions and violating personal boundaries. He also seemed depressed and expressed feelings of hopelessness and helplessness regarding his family situation. However, Sotile also noted that Michael had recently taken tremendous steps toward acknowledging his past behaviors. Sotile further explained that Michael continued to express a desire for increased outside support and connection, and had repeatedly asked that Autry call him once a week, but that despite assuring him she would call weekly and establishing times to do so, Autry had consistently failed to call, which typically left Michael very upset. Sotile noted that Michael's treatment team at Thompson had repeatedly asked Autry not to commit to making these calls "as she is very clearly unwilling to uphold this [commitment]." By contrast, Michael's guardian *ad litem* offered to call him every weekend and had done so on a regular basis, and Sotile noted that Michael seemed to benefit from this contact. Michael's treatment team at Thompson also asked Autry to give Michael notice if she would not be able to attend certain meetings in person or take him off campus as previously scheduled, given that "[s]he has also not been able to adhere to this and at times will give [Michael] little to no notice" that she will not be coming. Michael's discharge plan continued to call for stepping down to a lower level of care upon completion of his treatment goals at Thompson, with an anticipated date of discharge in late August pending an updated psychological evaluation. Autry had stated that she was looking for a foster placement but that she did not feel it would be feasible to identify a family to begin working with while Michael remained in a PRTF. In the section of her court summary designated "Concerns Noted," Sotile reported that "[] Autry's ongoing inconsistency and lack of communication with [Michael] is of great concern to his [Thompson treatment]

team. [Michael] is a child with very minimal outside support. [] Autry is a vital figure in his life, and her lack of involvement and contact is concerning."

In her court summary for Michael's September 2013 readmission hearing, Sotile reported that although Michael struggled at times with defiant and disrespectful behavior toward Thompson's staff, especially when faced with tasks he did not like, he had not displayed any verbal or physical aggression, or made any threats to harm himself or others, since his last review. However, as Sotile noted, there had been incidents when Michael acted flirtatiously toward his peers, and in therapy, he continued to present as hypersexual by asking her inappropriate questions, and expressed anger over his family situation. Nevertheless, Sotile explained that Michael was making progress toward taking ownership of his past sexual behaviors, improving at acknowledging his struggles with behaving respectfully, and getting better at expressing and tolerating frustration. Sotile also reported that, given Michael's ongoing struggles with emotion regulation and sexual preoccupation, his discharge plan had been amended. After noting Michael had recently undergone a psychosexual evaluation, Sotile recommended that Michael be stepped down to a Level III facility "specific to adolescents with sexual behavior problems," with an identified discharge date of 30 September 2013. However, Sotile continued to express concern over Autry's "ongoing inconsistency and lack of communication with [Michael]."

After a hearing held 12 September 2013, the Mecklenburg County District Court adopted Sotile's summary into its findings of fact; entered conclusions of law that Michael was mentally ill, in need of continued treatment, and that less restrictive measures would not be sufficient; and concurred in Michael's readmission to Thompson for up to 30 days so that adequate plans could be made for his discharge to a Level III facility. The court set Michael's next hearing date for 10 October 2013.

B. Michael's October 2013 readmission hearing

In her court summary for Michael's October 2013 readmission hearing, Sotile reported that although Michael continued to struggle with disrespectful and defiant behavior toward Thompson's staff and required frequent redirection from engaging in attention-seeking behavior during structured activities, he had not displayed any aggressive, self-harming, or overt sexual behavior toward his peers. However, Sotile noted that in therapy, Michael remained sexually preoccupied, struggled with feelings of guilt over his family situation, and expressed frustration with the plan to discharge him to a Level III facility instead of a foster home.

Sotile explained that while both Thompson and Autry had made efforts since the last hearing to secure a Level III placement for Michael, their attempts had proven unsuccessful so far. Moreover, after receiving the results of Michael's psychosexual evaluation by Dr. Keith Hersh, who found that Michael's IQ fell in the Extremely Low range and consequently recommended that he remain in a highly structured and supervised environment, Autry decided that upon discharge, Michael should transition to another Level IV PRTF. Sotile noted that Michael's IQ score was significantly lower than anticipated and theorized that the actions she had previously considered defiant may have in fact been the result of a genuine lack of understanding and comprehension. Further, Sotile reiterated that, despite Dr. Hersh's recommendation, she believed Michael would be best served by treatment in a Level III facility, and that a lateral transfer to another PRTF would be very discouraging for him at this point in his treatment. As Sotile explained,

> [a]lthough [Michael] continues to struggle to take ownership of his past behaviors, he has not engaged in any aggressive or self-harming behaviors during his time at [Thompson]. He has proven that he can remain physically safe, even while angry or agitated. It is clear that [Michael] is in need of ongoing therapeutic services. However, it is recommended that these services reflect his individual needs. Another PRTF that does not target treatment of children with intellectual disabilities would not seem to be an effective change in venue. If [Michael] is placed in a Level III facility, he can be enrolled in therapeutic services more specific to his needs, with a clinician experienced in serving a similar population of client.

Ultimately, Sotile recommended that although she believed Michael

> has earned the opportunity to step down to a lower level of care[, i]t is strongly recommended that [Michael] not discharge until his placement is secure within a facility that will provide adequate supervision and structure. It is not recommended that [Michael] discharge into respite care or emergency placement prior to transitioning to a Level III facility. More time is being requested in an effort to ensure [Michael's] ongoing success and safety.

Sotile again noted her concerns regarding Autry's lack of involvement in Michael's case.

At the ensuing 10 October 2013 readmission hearing in Mecklenburg County District Court, Michael contested his readmission to Thompson. Before the hearing, Michael's appointed counsel had contacted DSS to inquire into Autry's availability to testify, and had been informed by DSS's counsel, Cathy L. Moore, that she would need to obtain a subpoena to secure Autry's participation. Pursuant to that subpoena, Autry appeared at the 10 October hearing via telephone, accompanied by Moore, who identified herself as "deputy attorney for Durham or DSS" and declined to be sworn in as a witness because, as she informed the court, "I don't think I'm—I'm going to be testifying. I'm going to be a lawyer." After indicating this would be allowed, the court called for testimony from Sotile.

Sotile informed the court that Michael had not displayed any aggressive, self-harming, or overtly sexual behavior since the previous hearing and had been working to accept her discharge recommendation to step down to a Level III facility. She also reported that Dr. Hersh had completed an updated psychosexual evaluation of Michael, which she explained is generally standard procedure prior to discharge, and that everyone had agreed Michael needed to have one in this case. However, Sotile further explained that, given the complications in finding a post-discharge placement for Michael, her recommendation "at this time" was for him to "remain with Thompson until we have a clearer understanding of where he will be discharged to." When Michael's counsel asked Sotile whether he met the criteria for a Level IV facility, Sotile responded that while Michael still needed continued structure and supervision, his behavior since the last hearing did not reflect the need for a Level IV facility, and that her discharge recommendation of stepping down to a Level III facility, assuming one was available and would accept Michael, had not changed since September.

The court then allowed DSS's counsel to cross-examine Sotile about Dr. Hersh's psychosexual evaluation and recommendation that Michael be transferred to a Level IV PRTF. Sotile stated that she disagreed with Hersh's recommendation because she believed that transferring Michael to another Level IV PRTF would be "detrimental not only to his motivation in treatment but also just sort of his overall sense of hope and well being," and that it would therefore be much better to transfer him to a Level III facility capable of addressing both his sexual behavior and his low IQ. Although Sotile was unaware of any available placements at Level III facilities suited to Michael's specific needs, she explained this problem could be alleviated by placing him in one and then "identifying

[an] outpatient clinician [who] can provide those targeted services while allowing for the structure and supervision of a [Level III] facility."

After Sotile's testimony, the court noted it had not yet reviewed or been aware of Dr. Hersh's psychosexual evaluation, but expressed concern over the differing recommendations as to what level of facility Michael should be placed in after his discharge from Thompson. The court then called for testimony regarding discharge planning from Michael's case manager, Valisha Vanderpool, who explained that the process is "pretty much driven by the guardian," and that while her job was to look for placement at appropriate facilities based on recommendations by clinicians at Thompson, she could not actually contact any facilities until she had consent from the child's legal guardian. In Michael's case, Vanderpool explained, she had been looking for Level III placements pursuant to Sotile's recommendation, which had proven difficult because many Level III facilities within Thompson's coverage network do not address sexualized behaviors; however, Vanderpool had found at least one opening at a facility that employed an outpatient therapist who could address Michael's issues, and had sent a consent form to Autry for her consent as Michael's guardian, but Autry never followed up with her. As Vanderpool noted, it was Autry's responsibility to look for placements outside Thompson's network in the hopes of setting up an out-of-network placement, but at some point after the September hearing, Autry switched gears and started focusing on Level IV PRTF placements for Michael, which "took away from us pursuing an appropriate [L]evel [III] placement" and "kind of just prolonged [the] process." The court then allowed DSS's counsel to cross-examine Vanderpool about whether her pursuit of a Level III placement for Michael was complicated by his dual diagnosis of sexualized behavior and intellectual disability; Vanderpool acknowledged that it had been, but also explained that Autry had "switched gears" to focusing on placement at another Level IV PRTF even before Dr. Hersh made his psychosexual evaluation and recommendations.

When the court called Autry to testify, she admitted that despite the September recommendation that Michael be discharged to a Level III facility, she had begun looking into Level IV PRTF placements before receiving Dr. Hersh's evaluation because she thought one might be available sooner. Autry also testified that, after receiving Dr. Hersh's evaluation, her focus switched entirely to Level IV placements, in part because the care coordinator from DSS's managed care organization had instructed her that before applying to any Level III facilities, she would first need to apply and get denied by all available Level IV

PRTFs. This led the court to remark that Autry did not appear to be following proper procedures, and when the court inquired whether a Care Review had been conducted to address the conflicting recommendations for Michael's placement upon discharge in light of the new information from Dr. Hersh's evaluation, Autry replied in the negative. However, Autry explained that she had recently found a placement for Michael at a Level IV PRTF in South Carolina, and that the only thing holding up his transfer was Thompson's refusal to sign a certificate of need, based on its recommendation that Michael be transferred only to a Level III facility.

The court then allowed DSS's counsel to examine Autry about an instance when Michael displayed sexualized behavior that Sotile had previously mentioned in her August court summary. Autry further testified that she believed the Level IV PRTF she had located in South Carolina would best fit Michael's needs, and that she was exploring ways to secure his placement there without Thompson's approval, but also opined that he should stay in Thompson until a new discharge plan could be agreed upon because "[i]f [Michael] were to be discharged today, we would have to put him in a rapid response bed. That supervision may not be the level that he needs right now, and it may cause more problems than what he's already facing right now." When DSS's counsel asked Autry whether it would be possible to hold a Care Review to resolve the differing recommendations of Sotile and Dr. Hersh by the end of the month if the court concurred in readmitting Michael to Thompson for an additional thirty days, Michael's counsel objected that DSS was not a party to the matter and consequently had no standing to make recommendations. In overruling this objection, the court explained that it would be appropriate for Autry to make a recommendation given her status as Michael's legal guardian. Autry then testified that "[i]f we had an extra 30 days, yes, we could definitely get a Care Review."

Toward the end of the hearing, the court expressed its concerns over the conflicting recommendations for Michael's treatment and the lack of progress in finding an appropriate post-discharge placement for him, stating:

> THE COURT: I really don't think I have much of a[n] option because I think if I discharge [Michael], that means he goes back into [DSS's] authority.
>
> [DSS's counsel]: That's correct.
>
> THE COURT: And then he just goes wherever. And that can't be good for him right now. I mean, I just don't think

> that's—that's going to help him out. Could it possibly put some pressure on you guys to find a place? Yes. But I could also see that that could result in maybe a rash judgment as well. Or that in haste because you're looking for the first available facility, and that's not what he needs either. He needs the facility that's really going to treat his needs and the services that are really going to treat his needs.

After Michael's counsel subsequently objected to his continued stay at Thompson due to his failure to meet the criteria for remaining in a Level IV PRTF based on Sotile's report, the court noted that even Sotile recognized that simply discharging him "is just not an option right now . . . because we just don't have [the appropriate facility where Michael could obtain a] lower level of care identified yet." In the summation it provided at the close of the hearing, and in the written order it subsequently filed on 22 October 2013, the court concluded—based on findings of fact incorporating Sotile's court summary and additional findings of fact describing the testimony taken during the 10 October hearing—that Michael was mentally ill and in need of continued treatment at Thompson until a lower level of care could be identified, and thus ordered that Michael remain at Thompson for up to another 30 days. The court further noted that it could not ignore the conflict between Sotile's recommendation and Hersh's evaluation, and thus ordered that a Care Review be conducted in order to resolve that conflict, with instructions to look first for an appropriate Level III facility before exploring options for transfer to another Level IV PRTF.

Michael was discharged from Thompson on 7 November 2013 and his counsel filed notice of appeal the following day to challenge the court's order concurring in his readmission, but mistakenly stated that the court's order was filed on 13 October 2013. On 9 December 2013, Michael's counsel filed an amended notice of appeal to correct the filing date of the order appealed from to 22 October 2013. Although Michael's counsel served the first notice of appeal on both Thompson and DSS, the amended notice of appeal was served only on Thompson.

On 30 April 2014, DSS filed a motion to dismiss Michael's appeal for failure to serve a necessary party—namely, DSS. In the alternative, DSS requested that it be served with appellate filings. On 7 May 2014, Michael replied by filing a motion to strike DSS's motion to dismiss, arguing that: (a) DSS lacked standing to bring such a motion because it was not a party to the matter; (b) DSS's motion did not comply with Rule 25 of our Rules of Appellate Procedure and was thus not properly before the court; and (c) DSS's motion to dismiss did not identify any substantial

violations of our Rules of Appellate Procedure. After hearings held on 5 May 2014 and 22 May 2014, the court entered an order on 23 May 2014 denying DSS's motion to dismiss the appeal, but granting the alternative relief requested by ordering Michael to serve DSS with appellate filings because it had treated DSS as a party during the 10 October 2013 readmission hearing when it permitted its counsel to present evidence, cross-examine witnesses, and make arguments. Although Michael's appellate counsel failed to file a notice of appeal from that order, she did file an emergency motion with this Court on 23 May 2014 seeking a temporary stay of the district court's order recognizing DSS as a party and also applied for writs of *supersedeas* and *mandamus* to vacate that order. On 27 May 2014, this Court dismissed Michael's motion for a temporary stay. On 9 June 2014, this Court denied Michael's motion for writs of *supersedeas* and *mandamus*.

On 8 August 2014, the parties filed a stipulation with this Court to settle the record on appeal. In his appellant brief filed 17 October 2014, Michael sought to challenge both the district court's 22 October 2013 order concurring in his readmission and its 23 May 2014 order denying DSS's motion to dismiss but recognizing DSS as a party. In its appellee brief filed 17 November 2014, DSS argued that neither of these two issues was properly preserved for this Court's review in light of the errors contained in Michael's original notice of appeal and the fact that Michael failed to file any notice of appeal regarding the district court's 23 May 2014 order. On 12 December 2014, out of an abundance of caution, Michael filed a petition for writ of *certiorari* asking this Court to permit full appellate review of both orders.

[1] After careful consideration, we conclude first that Michael's petition for a writ of *certiorari* as to the 22 October 2013 order is unnecessary, and thus is dismissed, because the issue was properly preserved for our review. Although Michael's original notice of appeal listed an incorrect filing date for the order appealed from, this Court's prior holdings make clear that a notice of appeal is not defective if "intent to appeal can be fairly inferred." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011). Clearly, Michael's intent to appeal from the order entered in connection with the 10 October 2013 hearing can be fairly inferred. Moreover, any potential defect was cured when Michael filed his amended notice of appeal. DSS argues further that Michael's notice of appeal was defective because he failed to serve DSS with his amended notice. This argument fails because DSS was not formally recognized as a proper party to this matter until the court's 23 May 2014 order, and because DSS already had notice of Michael's intent

to appeal based on the original notice he provided as a courtesy to his legal guardian.

[2] We deny Michael's petition for *certiorari* review as to the district court's 23 May 2014 order recognizing DSS as a proper party. Instead of filing notice of appeal from this order and moving to consolidate it with the already-pending appeal of the 22 October 2013 order, Michael's appellate counsel elected to pursue relief by petitioning for extraordinary writs from this Court. Consequently, Michael has failed to meet the requirements of N.C.R. App. P. 3, which means this Court lacks jurisdiction to review the 23 May 2014 order. *See*, *e.g.*, *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Without proper notice of appeal, this Court acquires no jurisdiction.") (citation omitted). Michael's appellate counsel attempts to invoke our jurisdiction through Rule 21, which provides in relevant part that "[t]he writ of *certiorari* may be issued in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action," and Rule 2, which allows this Court to suspend the requirements of Rule 3 "to prevent manifest injustice." *See* N.C.R. App. P. 2; *see also* N.C.R. App. P. 21. However, "[t]he provisions of Rule 2 are discretionary, and cannot be used to confer jurisdiction upon this Court in the absence of jurisdiction." *Carolinas Med. Cntr. v. Emp'rs & Carriers Listed in Exhibit A*, 172 N.C. App. 549, 554, 616 S.E.2d 588, 592 (2005). Further, while Michael argues that his notice of appeal from the 22 October 2013 order sufficiently conveyed his intent to appeal the district court's *de facto* recognition of DSS as a party during the readmission hearing, which he contends was prejudicial error, we do not believe Michael's notice of appeal of an order from October can be "fairly inferred" to include an order that was not entered until seven months later. *Cf. Von Ramm*, 99 N.C. App. at 156, 392 S.E.2d at 424. Moreover, while this appears to be an issue of first impression, we conclude for the reasons discussed *infra* that denying Michael's petition will not result in manifest injustice because this issue's determination is not relevant to our resolution of Michael's appeal of the district court's 22 October 2013 order, which is the only issue that is properly before us. Accordingly, Michael's petition for a writ of *certiorari* is denied.

[3] In addition, both Michael and DSS subsequently filed motions with this Court seeking to supplement the record on appeal. First, Michael sought to add the district court's 31 October 2013 order discharging him from Thompson. Although Michael never filed a timely notice of appeal from that order, he argued that it would better contextualize both his clinical condition and the unavailability of an alternative placement

in a less restrictive setting as of the 10 October 2013 readmission hearing. For its part, DSS sought to supplement the record with two orders from Michael's abuse, neglect, and dependency proceeding in Durham County entered in April and October 2014. After careful consideration, this Court denied both motions to supplement the record in written orders filed 20 January 2015, reasoning that neither the 31 October 2013 order nor the subsequent A/N/D orders were available to or relied upon by the district court when it concurred in Michael's readmission to Thompson after the 10 October 2013 hearing.

II. Analysis

A. The district court exercised proper subject matter jurisdiction

[4] At the outset, we must address DSS's argument that the Mecklenburg County District Court lacked subject matter jurisdiction to concur in Michael's readmission to Thompson. Specifically, DSS contends that this Court must vacate and dismiss the district court's 22 October 2013 order because Michael's case arose in Durham and Chapter 7B of our General Statutes: (a) confers exclusive original and continuing jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent on the trial court of the county where the case arises until the cause is fully and completely determined; (b) automatically stays the issue of custody in any other civil action involving the juvenile; and (c) provides an extensive statutory scheme to review the custody, placement, and treatment of juveniles, which typically supersedes both our rules of civil procedure and other statutory schemes if they conflict. Although DSS failed to raise this argument during the 10 October 2013 hearing or either of the hearings held in May 2014, "[t]he question of subject matter jurisdiction may be raised at any point in the proceeding." *Sloop v. Friberg*, 70 N.C. App. 690, 692, 320 S.E.2d 921, 923 (1984). Nevertheless, in light of our prior holding in *In re Phillips*, 99 N.C. App. 159, 162, 392 S.E.2d 407, 409 (1990) (holding that where a juvenile is ordered into the custody of one county department of social services and then admitted to a PRTF in another county, the district court in the second county has jurisdiction over the admission as long as it does not conflict with the order of the prior court), we conclude DSS's argument is without merit.

B. This appeal is not moot

[5] Because the district court's 22 October 2013 order only continued Michael's readmission to Thompson for up to 30 days and Michael was subsequently discharged before its expiration, this appeal would normally be dismissed as moot. *See In re A.N.B.*, __ N.C. App. __, __,

754 S.E.2d 442, 445 (2014) ("The general rule is that an appeal presenting a question which has become moot will be dismissed.") (citation and internal quotation marks omitted). However, despite the general rule, this Court "may review cases that are otherwise moot but are capable of repetition, yet evading review" and further "has a duty to address an otherwise moot case when the question involved is a matter of public interest." *Id.* (citations and internal quotation marks omitted). Indeed, this Court has previously recognized that orders of voluntary admission of a minor to a 24-hour facility are "capable of repetition, yet evading review" given their short duration, and that the State has a "great interest in preventing unwarranted admission of juveniles into these treatment facilities." *Id.* We therefore hold that Michael's appeal is properly before us.

C. The district court did not err in concurring in Michael's readmission to Thompson

[6] Michael argues that the district court erred in concurring in his readmission to Thompson, and thus violated his constitutionally protected liberty interest in being free from unlawful restraint, because certain additional findings of fact contained in the court's 22 October 2013 order do not support its ultimate finding that he needed continued treatment at Thompson in its restrictive environment. Citing our prior decisions holding that, in the context of civil commitments, it is reversible error for a district court to make insufficient factual findings in support of its legal conclusions, *see*, *e.g.*, *id.* at __, 754 S.E.2d at 451, Michael argues that this Court must vacate the trial court's 22 October 2013 order. We disagree.

This Court recently indicated that voluntary commitment orders should be reviewed under the same standard used for involuntary commitments. *See In re C.W.F.*, __ N.C. App. __, __, 753 S.E.2d 736, 738 (2014), *disc. review improvidently allowed*, __ N.C. __, 768 S.E.2d 292 (2015). In reviewing commitment orders, we "determine whether there was any competent evidence to support the facts recorded in the commitment order and whether the trial court's ultimate findings . . . were supported by the facts recorded in the order." *In re Allison*, 216 N.C. App. 297, 299, 715 S.E.2d 912, 914 (2011) (citation and internal quotation marks omitted; emphasis in original).

Section 122C-2 of our General Statutes provides that

> [t]he policy of the State is to assist individuals with needs for mental health, developmental disabilities, and substance abuse services in ways consistent with the dignity,

> rights, and responsibilities of all North Carolina citizens. Within available resources, it is the obligation of State and local government to provide mental health, developmental disabilities, and substance abuse services through a delivery system designed to meet the needs of clients in the least restrictive, therapeutically most appropriate setting available and to maximize their quality of life.

N.C. Gen. Stat. § 122C-2 (2013). In the context of voluntary commitments, section 122C-224.3(f) provides in relevant part that, for a minor to be readmitted to a PRTF, the court must find by clear, cogent, and convincing evidence that the minor is "(1) mentally ill or a substance abuser and (2) in need of further treatment at the 24-hour facility to which he has been admitted." *Id.* § 122C-224.3(f). Moreover, the statute provides that "[f]urther treatment at the admitting facility should be undertaken only when lesser measures will be insufficient." *Id.*

Here, Michael contends that the district court's concurrence in his readmission was driven more by DSS's bureaucratic failings than the evidence before the court and was therefore unsupported by the additional findings of fact contained in its 22 October 2013 order that: (1) Sotile believed Michael did not meet the clinical conditions to remain in a PRTF; (2) DSS and Thompson failed to adequately pursue placement at a less restrictive Level III facility; and (3) the search for an appropriate Level III placement should be exhausted before considering transferring Michael to another Level IV PRTF. Based on these findings, Michael argues that he did not meet the statutory requirements for continued admission provided by section 122C-224.3. Specifically, Michael argues that although there was no question that he was mentally ill at the time of the 10 October 2013 hearing, Sotile's recommendation that he be discharged to a Level III facility showed that he no longer needed treatment at Thompson and that "less restrictive measures" for his treatment would have been sufficient. While acknowledging that Sotile also recommended that he remain at Thompson until his next placement at a lower level facility could be secured, Michael emphasizes the plain language of section 122C-224.3, which he contends clearly and unambiguously deals with clinical requirements only and does not permit readmission for purely administrative reasons, such as Autry's failure to timely and adequately pursue a post-discharge placement for him.

Michael's argument fails, however, because it rests upon a literal interpretation of section 122C-224.3(f)'s provision that "[f]urther treatment at the admitting facility should be undertaken only when lesser measures will be insufficient," which ignores the fact that in this case,

there were no sufficient, less restrictive measures available for Michael's continued treatment. In the context of statutory construction, our Supreme Court has long held that "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *See, e.g.*, *Frye Reg'l Med. Cntr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). In the present case, Chapter 122C makes clear our General Assembly's intent to provide "within available resources" mental health services that are "designed to meet the needs of clients in the least restrictive, therapeutically most appropriate setting *available*." N.C. Gen. Stat. § 122C-2 (emphasis added). Here, because there were no other placements available at the time of the 10 October 2013 hearing, the court was essentially faced with the option of either readmitting Michael to Thompson or else allowing a 12-year-old boy with a history of unmanaged sexual deviance problems and a newly discovered intellectual disability to be sent to a non-existent Level III placement or to an emergency placement that neither Sotile nor DSS believed would provide sufficient supervision and support for his needs. Under these circumstances, we conclude that the district court's decision to concur in Michael's readmission to Thompson was more in keeping with the legislative intent behind section 122C-224.3 than either of the aforementioned alternatives.

We also reject Michael's argument that the ultimate finding in the court's 22 October 2013 order was unsupported by adequate factual findings. On the one hand, each of the cases Michael cites in support of this argument addressed situations that are easily distinguishable from the present case. *See In re A.N.B.*, __ N.C. App. at __, 754 S.E.2d at 451 (reversing the trial court's order authorizing readmission of a minor to a PRTF because it failed to make a finding that the minor was "in need of further treatment" at the facility); *In re Allison*, 216 N.C. App. at 300, 715 S.E.2d at 915 (reversing the trial court because it failed to make any of the statutorily required findings); *In re Whatley*, __ N.C. App. __, __, 736 S.E.2d 527, 532 (2012) (reversing the trial court's involuntary commitment order because it failed to make any finding on the required element of dangerousness). Here, by contrast, the district court's order satisfied the requirements of section 122C-224.3 by indicating that it incorporated into its factual findings "all matters set out in [Sotile's court summary]," which it in turn relied on for its conclusions that Michael was mentally ill and in need of continued treatment at Thompson and that less restrictive measures would not be sufficient. On the other hand, Michael's argument that the court's findings of fact do not support its conclusions

relies on selective quotations from the court's additional findings, most notably that Sotile did not believe Michael met the clinical conditions to remain in a PRTF. But this argument conveniently ignores the fact that in both her court summary and her testimony—which the court expressly incorporated into its findings of fact—Sotile strongly recommended that Michael remain at Thompson until an appropriate Level III post-discharge placement could be obtained. In light of the preceding analysis, we conclude that this evidence provided sufficient factual support for the court's conclusion concurring in Michael's readmission.

Finally, we address what appears to be the central thrust of Michael's complaint: namely, that his readmission to Thompson was less the result of his own condition than it was the product of a pattern of consistent failure and neglect by the adults charged with his care and custody to take the steps required to secure his transfer to a less restrictive facility. This Court does not take lightly the violation or deprivation of any juvenile's constitutionally protected liberty interest. We therefore strongly admonish DSS and Michael's legal guardian Autry for their lackluster performance here, and we also specifically caution DSS not to interpret our holding in this case as an excuse for future failures to take timely action in securing post-discharge placements. Nevertheless, this is not an action against DSS, and we are limited in this case to reviewing whether or not the district court erred based on the evidence that was before it during the 10 October 2013 hearing. Accordingly, we hold that the district court did not err in concurring in Michael's readmission to Thompson.

D. Michael was not prejudiced by DSS's participation in the 10 October 2013 hearing

[7] As explained *supra*, the issue of whether the trial court erred in its 23 May 2014 order by recognizing DSS as a *de facto* party to Michael's readmission hearing is not properly before us. But even if it were, we are not persuaded by Michael's argument that DSS's participation as a party during the 10 October 2013 hearing resulted in the admission of incompetent and prejudicial evidence against him.

Specifically, Michael claims that because he received no notice that DSS would offer testimony and evidence against him, he was unable to adequately prepare for the hearing. Michael takes particular exception to the fact that DSS's counsel was allowed to cross-examine Sotile about Dr. Hersh's report, which was never formally introduced into evidence and could not have been properly admitted without giving Michael the opportunity to confront and cross-examine Dr. Hersh. *See* N.C. Gen. Stat. § 122C-224.3(c).

This argument fails for several reasons. First, Michael's assertion that he was essentially ambushed by a lack of notice that DSS would participate during the hearing in an adverse manner is undermined by the fact that Autry only appeared after Michael compelled her to by subpoena. Thus, regardless of Michael's motivation for subpoenaing Autry, his doing so essentially "opened the door" for adverse testimony from her. More importantly, it appears from our careful review of the record that Dr. Hersh's report and the other allegedly prejudicial evidence DSS attempted to introduce during the hearing were already before the court as a direct result of Sotile's court summaries and her testimony during the hearing.

In her court summary, Sotile noted the results of the psychosexual evaluation Dr. Hersh had performed as well as his recommendation that Michael be transferred to another Level IV PRTF and the conflict this created for post-discharge placement planning. Moreover, in her testimony during the 10 October 2013 hearing, Sotile had already answered questions from the court and from Michael's counsel about Dr. Hersh's evaluation before DSS's counsel ever cross-examined her about it. Under these circumstances, regardless of whether or not DSS had participated as a party during the hearing, it was inevitable that the court would consider Dr. Hersh's evaluation, which raised substantial questions concerning Michael's diagnosis and the propriety of his prior discharge plan that had not yet been addressed by the date of the hearing. Even though Sotile's recommendation was sufficient by itself to support the court's concurrence in Michael's readmission to Thompson, certainly this information was also highly relevant. Had Michael wanted to challenge Dr. Hersh's conclusions, he could have compelled Dr. Hersh to appear at the hearing as a witness, by subpoena if necessary, just as he did with Autry. In any event, we are wholly unpersuaded by the argument Michael now makes on appeal, especially given its implication that the district court would have reached a different result if only Michael's counsel had done a better job of concealing this highly relevant information. Therefore, we conclude that Michael suffered no prejudice as a result of DSS's participation during the 10 October 2013 hearing. Because the issue of whether or not the court erred by recognizing DSS as a *de facto* party in its 23 May 2014 order is unnecessary to this determination and was not properly preserved for our review, we decline to reach it.

AFFIRMED.

Judges DILLON and DIETZ concur.

McLAUGHLIN v. BAILEY

[240 N.C. App. 159 (2015)]

IVAN McLAUGHLIN AND TIMOTHY STANLEY, PLAINTIFFS
v.
DANIEL BAILEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA14-446

Filed 7 April 2015

1. Employer and Employee—statutory prohibition on termination for political reasons—not applicable to employees of sheriff

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employees' action for wrongful termination of employment. Plaintiffs' terminations did not violate N.C.G.S. § 153A-99 because plaintiffs, as employees of the sheriff, were not employees of the county.

2. Employer and Employee—deputy sheriff—policymaking position—termination for political reasons—freedom of speech

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons.

3. Employer and Employee—detention officer—objective reasonableness of termination—no specific evidence of improper motivation

The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. The Court of Appeals did not need to determine whether plaintiff's termination was for political reasons because plaintiff failed to offer any evidence that he would not have been fired for violations of the rules and policies of the sheriff's department in carrying out his job duties.

Appeal by plaintiffs from judgment entered 6 January 2014 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 2014.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellants.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellee.

Edmond W. Caldwell, Jr., for amicus curiae North Carolina Sheriffs' Association.

STEELMAN, Judge.

The employees of a county sheriff, including deputies and others hired by the sheriff, are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute. As a sworn deputy sheriff, plaintiff Stanley could be discharged based upon political conduct without violating free speech rights under the North Carolina Constitution. Where defendant produced evidence that plaintiff McLaughlin was discharged for failure to comply with sheriff's department rules and policies, and McLaughlin failed to produce specific evidence that his discharge was politically motivated, the trial court properly dismissed his claim for violation of his rights to free speech under the North Carolina Constitution.

I. Factual and Procedural Background

Ivan McLaughlin and Timothy Stanley (plaintiffs) were employed by former Mecklenburg County Sheriff Daniel Bailey (defendant, with Ohio Casualty Insurance Company, collectively, defendants). Stanley was hired in 1998 as a detention officer at the Mecklenburg County jail, and as a deputy sheriff in 2008. He worked primarily as a courtroom bailiff. McLaughlin was hired as a juvenile counselor at the Gatling Juvenile Detention Center in 1998, and was not a sworn law enforcement officer. When the Mecklenburg County Sheriff's Department assumed responsibility for Gatling, McLaughlin became a detention counselor for youthful offenders housed in Mecklenburg County's Jail North.

In June 2009 defendant, a registered Democrat, sent a letter to approximately 1,350 of his employees, announcing his candidacy for reelection and stating that he would appreciate campaign contributions.

Plaintiffs, who were Republicans, did not contribute to defendant's reelection campaign or attend a fund-raising barbeque sponsored by the campaign. Defendant was reelected in November 2010.

Stanley received favorable performance reviews between 2007 and 2010. However, shortly before the election, Stanley's supervisor reported to defendant that Stanley had been disruptive during the morning briefings by talking in the back of the room and making remarks expressing a preference for defendant's opponent in the election. On 30 November 2011 Stanley was terminated from his employment as a deputy sheriff. Defendant testified in his deposition that Stanley was terminated for being disruptive.

McLaughlin also received favorable performance reviews for several years prior to the election. However, in August 2010 the staff at Jail North, including McLaughlin, received a memo emphasizing the importance of "pod tours" to verify that inmates were present and were not in distress, and warning that failure to conduct pod tours would result in termination. McLaughlin's supervisor testified in his deposition that the "purpose of a pod tour . . . is to make sure that a pod officer can account for every inmate . . . being alive[.]" On 19 November 2010 McLaughlin's supervisors visited Jail North and observed a number of violations of the rules for supervision of the youthful offender population, including failure to conduct pod tours. The supervisors also reviewed a videotape that showed McLaughlin committing additional violations of Sheriff's Department rules. The supervisors documented McLaughlin's violations and submitted a report to the Office of Professional Compliance, which interviewed McLaughlin on 30 November 2010. During the interview, McLaughlin conceded that he had failed to follow Sheriff's Department rules on a number of occasions. On 10 January 2011 McLaughlin received a memorandum setting forth his violations of the Sheriff's Department rules, and the resultant decision to terminate his employment. McLaughlin's termination was confirmed by the Sheriff's Department review board.

On 17 January 2012 plaintiffs filed a complaint, asserting claims against defendants for wrongful termination of employment in violation of public policy, and for violation of their rights under the Constitution of North Carolina, Article 1, § § 14 and 36. Plaintiffs asserted that they were terminated "for failing to make contributions to [Sheriff] Bailey's reelection campaign and for failing to volunteer to work in his campaign," and that McLaughlin was terminated based on "his Republican beliefs." Plaintiffs asserted that their termination was "in violation of [the] public policy" enunciated in N.C. Gen. Stat. § 153A-99. Defendants filed separate

answers denying the material allegations of plaintiffs' complaint. On 13 June 2013 defendants filed a joint motion for summary judgment on all claims. On 6 January 2014 the trial court entered summary judgment in favor of defendants and dismissed plaintiffs' complaint.

Plaintiffs appealed. Although plaintiffs' complaint asserted claims against defendant in both his individual and official capacities, plaintiffs only appeal the entry of summary judgment on their claims against defendant in his official capacity.

II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." " 'In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.' " *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014).

In a trial court's ruling on a motion for summary judgment, " '[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' On the other hand, 'the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.' Plaintiff[s'] complaint in this case was not verified, so it could not be considered in the course of the trial court's deliberations concerning Defendants' summary judgment motion." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011) (quoting *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (2009) (internal quotation omitted), and *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999)).

III. Termination in Violation of Public Policy

[1] In plaintiffs' first argument, they contend that they were wrongfully terminated in violation of the public policy articulated in N.C. Gen. Stat. § 153A-99. Plaintiffs assert that they were "county employees" as defined in § 153A-99, and that their termination from employment violated this statute. We disagree.

A. Legal Principles

"In North Carolina, 'in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason.'" *Elliott v. Enka-Candler Fire & Rescue Dep't, Inc.*, 213 N.C. App. 160, 163, 713 S.E.2d 132, 135 (2011) (quoting *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991)). "However, the employee-at-will rule is subject to certain exceptions. . . . '[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.'" *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446-47 (1989) (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E. 2d 818, 826 (1985), *overruled in part on other grounds as stated in Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 493 S.E.2d 420 (1997)).

Plaintiffs argue that they were terminated in violation of the public policy set forth in N.C. Gen. Stat. § 153A-99:

> (a) The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, [and] to ensure that employees are not restricted from political activities while off duty[.] . . . Employees shall not be restricted from affiliating with civic organizations of a partisan or political nature, nor shall employees, while off duty, be restricted from attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America.
>
> (b) Definitions. For the purposes of this section: (1) "County employee" or "employee" means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.] . . .

"The express purpose of N.C. Gen. Stat. § 153A-99 is 'to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]' N.C. Gen. Stat. § 153A-99 (2002).

In *Vereen v. Holden*, this Court noted that if a county employee was fired due to his political affiliations and activities, 'this would contravene rights guaranteed by our State Constitution. . . . and the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99,' hence violating North Carolina public policy." *Venable v. Vernon*, 162 N.C. App. 702, 705-06, 592 S.E.2d 256, 258 (2004) (quoting *Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (internal citations omitted)).

B. Analysis

The threshold question is whether plaintiffs were county employees. N.C. Gen. Stat. § 153A-99 defines a county employee as an individual who is "employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" It is undisputed that a county sheriff's department is "supported, in whole or in part, by county funds" and that a county's administrators interact in various ways with the sheriff's department. The crucial question, however, is whether or not the persons hired by a sheriff are "employed by" a county department, in this case the "sheriff's department." We conclude that the plaintiffs are employees of the defendant sheriff individually, and are not employed by the county.

Preliminarily, we note that our common law unequivocally establishes that sheriff's deputies are employees of the sheriff, and are not county employees. In *Styers v. Forsyth County*, 212 N.C. 558, 194 S.E. 305, (1937), the widow of a deceased deputy sheriff was denied workers compensation benefits based on the trial court's determination that the deputy was an employee of the sheriff rather than of the county. On appeal, our Supreme Court held that a statute allowing Forsyth County to provide a fixed salary for certain deputies was not applicable to the facts of the case, given that the deceased deputy had been hired directly by the sheriff. The Court also discussed the legal relationship between the sheriff and his deputies:

> "The deputy is not the agent or servant of the sheriff but is his representative, and the sheriff is liable for his acts as if they had been done by himself." . . . . The acts of the deputy are acts of the sheriff. For this reason the sheriff is held liable on his official bond for acts of his deputy. "A sheriff is liable for the acts or omissions of his deputy as he is for his own." In short, a deputy is a lieutenant, the sheriff's right-hand man, whose duties are coequal in importance with those of his chief. One who represents

> the high sheriff of the county in the capacity of deputy occupies no mean place. . . . He holds an appointment as distinguished from an employment.

Styers at 563, 563-64, 194 S.E. at 308-309 (quoting *Michel v. Smith*, 188 Cal. 199, 202, 205 P. 113, 114 (1922), citing *Horne v. Allen*, 27 N.C. 36 (1844), and *Spencer v. Moore*, 19 N.C. 264 (1837), and quoting *Sutton v. Williams*, 199 N.C. 546, 548, 155 S.E. 160, 162 (1930) (other citations omitted).

The holding of *Styers*, that a deputy is an employee of the sheriff and acts as his "alter ego," has been followed in subsequent cases. In *Clark v. Burke County*, 117 N.C. App. 85, 89, 450 S.E.2d 747, 749 (1994), we held that Burke County was not liable for the alleged negligence of a sheriff's deputy:

> A deputy is an employee of the sheriff, not the county. Therefore, any injury resulting from Deputy Smith's actions in this case cannot result in liability for Burke County and summary judgment is therefore affirmed for Burke County.

(citation omitted). Similarly, in *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892 (1988), we rejected the argument by the plaintiff, a dispatcher for the sheriff's department, that she was a county employee:

> Plaintiff argues that even though she was hired by the sheriff, she remained the employee of Watauga County and thus all the protections and privileges provided by the Board of Commissioners to other county employees should have been afforded her[.] . . . We cannot agree. Plaintiff's esoteric analysis of the issue is misplaced. It is clear to this Court that plaintiff was an employee of the sheriff and not Watauga County and its Board of Commissioners. . . . Furthermore, "under state law the sheriff has the exclusive right to fire any deputy [or employee] in his office." . . . [P]laintiff was not an 'employee' of Watauga County or its Board of Commissioners[.]

Peele, 90 N.C. App. at 449-50, 368 S.E.2d at 893-94 (quoting *Joyner v. Lancaster*, 553 F. Supp. 809, 816 (M.D.N.C. 1982)). *See also*, *e.g.*, *Greene v. Barrick*, 198 N.C. App. 647, 653, 680 S.E.2d 727, 731 (2009) ("Our law is well-settled. 'A sheriff is liable for the acts or omissions of his deputy as he is for his own.' ") (quoting *Prior v. Pruett*, 143 N.C. App. 612, 621, 550 S.E.2d 166, 172 (2001) (internal quotation omitted).

The fact that the county is the source of funding to pay deputies does not change their status as employees of the sheriff. In *Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 152, 544 S.E.2d 587, 589-90 (2001), this Court acknowledged that deputies are paid from county funds, but held that:

> Plaintiffs in the instant case are law enforcement officers hired directly by the Sheriff of Cumberland County. The Sheriff is an independent constitutionally mandated officer, elected by the voters. N.C. Const. art. VII, § 2. Because it is the Sheriff, and not the County, who directly hires law enforcement officers, plaintiffs do not enjoy all of the protections of County employees.

(citing *Peele* at 450, 368 S.E.2d at 894, and N.C. Gen. Stat. § 153A-103). Although our common law uniformly holds that the sheriff's employees are not employed by the county, it does not articulate a general definition of a "county employee." Nor do the cases discussed above restrict their holdings by, for example, stating that a deputy is not a county employee "for purposes of *respondeat superior*."

Our common law is undergirded by certain statutory and constitutional provisions. N.C. Const. art. VII, § 2 states that "[i]n each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years[.]" N.C. Gen. Stat. § 153A-103 provides that:

> (1) Each sheriff and register of deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office. . . .
>
> (2) Each sheriff and register of deeds elected by the people is entitled to at least two deputies who shall be reasonably compensated by the county[.] . . . Each deputy so appointed shall serve at the pleasure of the appointing officer. . . .

In sum:

> "Under North Carolina law, sheriffs have substantial independence from county government." Under the North Carolina Constitution, voters directly elect the sheriff. See N.C. Const. art. VII, § 2. County governments do not hire sheriffs. By statute, "the sheriff, not the county

> encompassing his jurisdiction, has final policymaking authority over hiring, supervising, and discharging personnel in the sheriff's office."

Jones v. Sheriff, 2013 U.S. Dist. LEXIS 51032 *5 (E.D.N.C. 2013) (quoting *Parker v. Bladen Cnty.*, 583 F. Supp. 2d 736, 739 (E.D.N.C. 2008), and citing *Little v. Smith*, 114 F. Supp. 2d 437, 446 (W.D.N.C. 2000), and *Clark*, 117 N.C. App. at 89, 450 S.E.2d at 749 (other citation omitted)), *dismissed by Jones v. Harrison*, 2014 U.S. Dist. LEXIS 99537 (E.D.N.C. 2014).

In the instant case, plaintiff's claim for wrongful discharge in violation of public policy is based on their argument that the strictures of N.C. Gen. Stat. § 153A-99 protect them, as "county employees," from being terminated for political reasons. As noted above, this statute states that " 'County employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" We conclude that this statute does not apply to plaintiffs, who are employed by the sheriff and are not county employees.

We first note that the statute's reference to " 'county employee' or 'employee' " does not create two separate classes of employees, but simply clarifies that the statutory definition applies uniformly to all provisions of the statute, regardless of whether or not the word "employee" is modified by "county." There is no indication in the statute that the legislature intended to identify two separate classifications of employees. Secondly, we hold that employees of a county sheriff are not "employed by a county or any department or program thereof." Our common law as well as the relevant statutory and state constitutional provisions clearly establish that plaintiffs, who were hired by the sheriff, are employees of the sheriff, and are not employed by the county in which the sheriff is elected.

In reaching this conclusion, we have considered, but ultimately reject, plaintiffs' arguments for a contrary result. Plaintiffs do not cite any binding authority holding that persons hired by a sheriff are county employees. Instead, plaintiffs contend that the enactment of N.C. Gen. Stat. § 153A-99 effectively abrogated the common law, and that the statute's scope encompasses employees of a sheriff. In support of this argument, plaintiffs primarily rely on a 1998 advisory opinion of the North Carolina Attorney General, which opined that the statute was "applicable to elected officials of counties[.]" "[W]hile opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not

compelling authority." *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998) (quoting *Hannah v. Commissioners*, 176 N.C. 395, 396, 97 S.E. 160, 161 (1918)). In addition, we have considered the sources cited both in the Attorney General's 1998 opinion and by plaintiffs, and are not persuaded that N.C. Gen. Stat. § 153A-99 established a new definition of a county employee in abrogation of the common law.

Plaintiffs, as well as the Attorney General's opinion, cite *Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *reversed and remanded*, 145 F.3d 1323 (4th Cir. N.C. 1998) (unpublished). The *Carter* opinion stated that:

> Plaintiff alleges a cause of action for a violation of N.C. Gen. Stat. § 153A-99 which prohibits counties from restricting county employees in any manner concerning their political affiliation and activities. Defendants seek judgment on the grounds that sheriffs are not county employees. This argument has been previously rejected.

Carter, 951 F. Supp at 1248-49. " 'Although we are not bound by federal case law, we may find their analysis and holdings persuasive.' " *Ellison v. Alexander*, 207 N.C. App. 401, 405, 700 S.E.2d 102, 106 (2010) (quoting *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005)). However, *Carter* did not engage in any analysis of the issue, discuss authority pertaining to this issue, or even cite the basis for its assertion that the argument that the plaintiff was not a county employee under N.C. Gen. Stat. § 153A-99 had "been previously rejected." Moreover, *Carter* was reversed, further limiting its persuasive authority.

Plaintiffs also cite *Elkin Tribune, Inc. v. Yadkin County Bd. of Commissioners*, 331 N.C. 735, 417 S.E.2d 465 (1992), and *Durham Herald Co. v. County of Durham*, 334 N.C. 677, 435 S.E.2d 317 (1993), cases that addressed the applicability of N.C. Gen. Stat. § 153A-98 to applicants for county manager and sheriff respectively. N.C. Gen. Stat. § 153A-98(a) provides in relevant part that "[n]otwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section." The statute thus regulates disclosure of information contained in the "personnel files of employees, former employees, or applicants for employment maintained by a county[.]" In *Durham Herald*, the plaintiff argued

that the applications for the position of sheriff[1] were not protected by the statute because the sheriff is not a county employee. We acknowledged this distinction, but held that:

> While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms "applicants for employment" and makes the personnel files of such applicants subject to its provisions. An "applicant" holds no position with the county whether as an "employee" in the strict sense of the term or as an elected public official such as the sheriff. He, or she, is merely an applicant for such positions. It is as applicants that the statute seeks to afford them and their applications some measure of confidentiality.

Durham Herald, 334 N.C. at 679, 435 S.E.2d at 319. *Durham Herald* did not hold that the sheriff or his deputies are county employees. In essence, the case held that even though the sheriff and the applicants for sheriff were not county employees, the applications for the position were protected from disclosure.

Plaintiffs also argue that a close scrutiny of the word "thereof" in § 153A-99 reveals that the statute classifies them as county employees. However, we are unable to conclude that our legislature would abrogate longstanding and consistent common law by such an indirect method as the use of the modifier "thereof."

"In determining legislative intent, we may 'assume [that] the legislature is aware of any judicial construction of a statute.' " *Blackmon v. N.C. Dep't of Correction*, 343 N.C. 259, 265, 470 S.E.2d 8, 11 (1996) (quoting *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 648, 362 S.E.2d 294, 301 (1987)). Therefore, we assume that when the legislature enacted N.C. Gen. Stat. § 153A-99, it was aware of the common law rule

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1. Although the sheriff is an elected official, N.C. Gen. Stat. § 162-3 provides that a "sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff." In *Durham Herald*, the sheriff had resigned and the county commissioners solicited applications for his replacement.

that sheriff's deputies are not county employees. In this regard, we find it significant that in a similar context our legislature amended a different statute to explicitly abrogate the common law rule. Earlier cases held that, as employees of the sheriff, deputies were not entitled to workers' compensation benefits. In response, in 1939, "the General Assembly amended [N.C. Gen. Stat. § 97-2] . . . so as (1) to include deputies sheriff and all persons acting in capacity of deputy sheriff within the meaning of the term 'employee' as used in the act[.]" *Towe v. Yancey County*, 224 N.C. 579, 580, 31 S.E.2d 754, 755 (1944). The amended statute provided in relevant part that:

> § 97-2(2) . . . The term 'employee' shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis[.] (emphasis added).

We believe that, had the legislature wished to abrogate the common law for purposes of N.C. Gen. Stat. § 153A-99, it would have been similarly direct, rather than requiring our appellate courts to engage in a strained analysis of the word "thereof" in order to ascertain their intent. "To determine whether N.C.G.S. § [153A-99] abrogated the [common law rule] at issue, we must examine its plain language." *Rosero v. Blake*, 357 N.C. 193, 206, 581 S.E.2d 41, 49 (2003) (citing *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996)).

We also find it significant that other statutes addressing issues of county administration employ broader terms that would encompass a county sheriff and his or her employees. For example, N.C. Gen. Stat. § 153A-92(a) authorizes a county board of commissioners to "fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees, whether elected or appointed, and may adopt position classification plans." (emphasis added). And, N.C. Gen. Stat. § 153A-435(a) authorizes a county to "contract to insure itself and any of its officers, agents, or employees against liability . . . caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment." (emphasis added). "It is a tenet of statutory construction that 'a change in phraseology when dealing with a subject raises a presumption of a change in meaning.' If the legislature had wanted to [include a sheriff's employees in N.C. Gen. Stat. § 153A-99] it could have expressly written § [153A-99] to include [persons

employed by an agent or officer of a county.] . . . The fact that the legislature had the option to include this language, but chose not to, is presumptive evidence that it intended that the provision not encompass such options." *Brown v. Brown*, 112 N.C. App. 15, 20, 434 S.E.2d 873, 878 (1993) (quoting *Latham v. Latham*, 178 N.C. 12, 100 S.E. 131 (1919)).

Moreover, the interpretation of N.C. Gen. Stat. § 153A-99 was recently addressed by this Court in *Sims-Campbell v. Welch*, __ N.C. App. __, __, __ S.E.2d __, __ (3 March 2015). In *Sims-Campbell*, the plaintiff, an assistant register of deeds, argued that her firing violated N.C. Gen. Stat. § 153A-99:

> Sims-Campbell also argues that [her firing] . . . violated Section 153A-99 of the General Statutes[.] . . . This argument fails because an assistant register of deeds is not a county employee. . . . We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff's deputies . . . are not county employees, but rather employees of the sheriff. . . . In light of the statute's plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds . . . is not a "county employee" within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __. "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." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

We are not unsympathetic to the plaintiffs' circumstances. However, "this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature, who have the power to rectify any inequities[.] . . . This Court is an error-correcting court, not a law-making court." *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). We hold that the trial court did not err in its adherence to the common law principle that those hired by a sheriff are not county employees, and that N.C. Gen. Stat. § 153A-99 did not articulate a new definition of "county employee." As this statute was the basis of plaintiffs' claim for wrongful termination in violation of public policy, this argument is without merit.

IV. Violation of North Carolina Constitutional Rights

In their second argument, plaintiffs contend that their termination violated their rights to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. We disagree.

A. Legal Principles

"The First Amendment to the Federal Constitution provides: 'Congress shall make no law . . . abridging the freedom of speech, or of the press[.]' . . . Similarly, Article I, § 14 of the North Carolina Constitution states: 'Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.' N.C. Const. art. I, § 14." *State v. Peterslie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993). "[W]e have recognized a cause of action against state officials for [the] violation [of art. I, § 14]. . . . We have also recognized that 'in construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States.' " *Peterslie*, 334 N.C. at 184, 432 S.E.2d at 841 (citing *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (other citations omitted).

"To establish a cause of action for wrongful discharge or demotion in violation of his right to freedom of speech, plaintiff must forecast sufficient evidence 'that the speech complained of qualified as protected speech or activity' and 'that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or demotion.' 'The resolution of these two critical issues is a matter of law and not of fact.' " *Swain v. Elfland*, 145 N.C. App. 383, 386-87, 550 S.E.2d 530, 533 (2001) (quoting *Warren v. New Hanover County Bd. of Education*, 104 N.C. App. 522, 525-26, 410 S.E.2d 232, 234 (1991) (internal quotation omitted), and citing *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (1999)). "[T]he causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Lenzer v. Flaherty*, 106 N.C. App. 496, 510, 418 S.E.2d 276, 284 (1992) (citing *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882 (1989)). In addition, in *Corum*, our Supreme Court "adopt[ed] the reasoning applied in the majority of federal circuit courts of appeal[,]" and held that:

> "[W]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective

> reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated."

Corum, 330 N.C. at 774, 413 S.E.2d at 284-85 (quoting *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) (emphasis in *Corum*).

B. Stanley's State Constitutional Claim

[2] Plaintiffs' complaint alleges that Stanley was terminated "for refusing to make contributions to [defendant's] re-election campaign and for failing to volunteer to work in his campaign[,]" in "violat[ion] of the Constitution of North Carolina, Article I, § § 14 and 36." Assuming, without deciding, that Stanley produced evidence that he was terminated for expressing his political views, we hold that his termination did not violate his rights under the North Carolina Constitution.

"[T]he First Amendment generally bars the firing of public employees 'solely for the reason that they were not affiliated with a particular political party or candidate,' as such firings can impose restraints 'on freedoms of belief and association[.]' " *Bland v. Roberts*, 730 F.3d 368, 374 (4th Cir. 2013) (quoting *Knight v. Vernon*, 214 F.3d 544, 548 (4th Cir. 2000) (internal quotation marks omitted), and *Elrod v. Burns*, 427 U.S. 347, 355, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). However, "the Supreme Court in *Elrod* created a narrow exception 'to give effect to the democratic process' by allowing patronage dismissals of those public employees occupying policymaking positions." *Id.* (quoting *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997) (*en banc*).

> In *Jenkins* we analyzed the First Amendment claims of several North Carolina sheriff's deputies who alleged that the sheriff fired them for failing to support his election bid and for supporting other candidates. In so doing, we considered the political role of a sheriff, the specific duties performed by sheriff's deputies, and the relationship between a sheriff and his deputies as it affects the execution of the sheriff's policies. . . . [We] concluded "that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally[,]" . . . [and] determined "that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations."

Bland, 730 F.3d at 376 (quoting *Jenkins*, 119 F.3d at 1164). "In [*Jenkins*] the majority explained that it was the deputies' role as sworn law enforcement officers that was dispositive[.]" *Bland* at 377.

The reasoning of *Jenkins* and *Bland* was adopted by this Court in *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007), *review denied*, *appeal dismissed*, 362 N.C. 175, 658 S.E.2d 271 (2008). The plaintiffs in *Carter* were former deputy clerks of court who claimed that they had been terminated from their employment for political reasons, in violation of their rights to free speech under the North Carolina Constitution. On appeal, we discussed the holdings of the United States Supreme Court in *Elrod*, and in *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), which held that public employees could be discharged "for not being supporters of the political party in power" if "party affiliation is an appropriate requirement for the position involved." *Carter*, 183 N.C. App. at 453, 645 S.E.2d at 131. The *Carter* opinion also discussed the holding of *Jenkins* that "deputies actually sworn to engage in law enforcement activities on behalf of the sheriff" could be lawfully terminated for political reasons, and noted that *Jenkins* based its holding on the facts that:

> [D]eputy sheriffs (1) implement the sheriff's policies; (2) are likely part of the sheriff's core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy.

Carter at 454, 654 S.E.2d at 131 (citing *Jenkins* at 1162-63). Utilizing the analysis of *Jenkins* and *Knight*, *Carter* held that "political affiliation is an appropriate requirement for deputy clerks of superior court." *Id.* In sum:

> Government employees generally are protected from termination because of their political viewpoints. But this Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss's opponents during an election.

Sims-Campbell, __ N.C. App. at __, __ S.E.2d at __ (citing *Carter*, *Jenkins*, *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and *Terry v. Coo*k, 866 F.2d 373 (11th Cir. 1989)).

In the instant case, it is undisputed that Stanley, as a deputy sheriff, was a sworn law enforcement officer. Plaintiffs argue that, to determine whether Stanley could be terminated for political reasons, we must analyze his customary duties as an individual to assess whether he enjoyed a "policymaking" position. However, the holdings in both *Jenkins* and *Carter* were based on the nature of the plaintiff's position, rather than on an analysis of the degree to which the individual's employer consulted him or her on policy matters. *Carter* is controlling on the issue of whether Stanley could lawfully be fired based on political considerations, and we hold that his termination did not violate his free speech rights under the North Carolina Constitution.

C. McLaughlin's State Constitutional Claim

[3] Plaintiffs' complaint alleges that McLaughlin was terminated "for refusing to make contributions to [defendant's] re-election campaign and for failing to volunteer to work in his campaign[,]" and "because of his Republican beliefs." Unlike Stanley, McLaughlin was not a sworn law enforcement officer. Given that *Carter* held that deputy clerks of court might lawfully be fired based on political considerations, this is not necessarily dispositive. However, defendants' appellee brief takes the position that, "[a]s McLaughlin was a detention officer, his wrongful discharge claim does not fail as a matter of law." In light of defendants' concession on this issue, we assume, without deciding, that McLaughlin could not lawfully be terminated for his exercise of his right to free speech. We conclude, however, that even assuming, *arguendo*, that McLaughlin produced evidence to support his claim that his termination was based on his political preferences, he failed to offer evidence that he would not have been fired for violations of sheriff's department rules, regardless of his political affiliation.

McLaughlin's argument that he was fired in violation of his right to free speech is based on the following circumstances: (1) McLaughlin received favorable performance reviews for several years before he was terminated; (2) over a year before the election, McLaughlin received the letter sent to over 1000 sheriff's department employees, in which defendant announced his candidacy and solicited donations; (3) McLaughlin was a supporter of defendant's opponent and did not contribute to defendant's campaign; and (4) McLaughlin was told by Sergeant Nesbitt prior to the election that he would be fired if defendant won reelection.[2]

2. In response to defendant's challenge to our consideration of the statement by Sergeant Nesbitt as hearsay, McLaughlin argues that "[c]learly [defendant] cannot raise this for the first time on appeal." We agree. *See Gilreath v. N.C. Dept. of Health & Human Servs.*,

On the other hand, defendants note that McLaughlin admitted in his deposition that his belief that defendant knew he was a Republican was "speculation," and that defendant testified that he did not know the identities of the contributors to his campaign and did not know what McLaughlin's political affiliation was. We agree with defendants that McLaughlin produced little evidence that "protected activity was a substantial or motivating factor" in defendant's decision to terminate him. However, we do not need to reach a definitive conclusion on this issue, given McLaughlin's failure to produce evidence to rebut defendant's showing that McLaughlin was fired for failure to comply with Sheriff's Department rules and policies.

" '[W]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated.' Mere conclusory assertions of discriminatory intent embodied in affidavits or deposition testimony are not sufficient to avert summary judgment." *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 501 451 S.E.2d 650, 655-56 (1995) (quoting *Pueblo Neighborhood*, 847 F.2d at 649. We conclude that McLaughlin has failed to produce any evidence to rebut defendants' substantial showing that he was fired for failure to comply with Sheriff's Department rules.

Defendants' Exhibit 2, a memorandum detailing the basis of McLaughlin's termination, states that McLaughlin had been fired for unsatisfactory performance, described as follows:

> [1.] On November 19th and 20th [2009], D/O McLaughlin failed to follow policy and procedures while assigned to the youthful offender pod. Several things were observed by his supervisors and captured on [v]ideo while conducting their wellness checks.
>
> [2.] No crossover roll call conducted during feeding time.
>
> [3.] Youthful offender distributing food trays to the entire pod with no supervision.

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177 N.C. App. 499, 629 S.E.2d 293, (2006) (on appeal from entry of summary judgment, plaintiff could not challenge the trial court's refusal to strike paragraphs from an affidavit where she failed to obtain a ruling on the issue from the trial court).

> [4.] Video clips displayed D/O McLaughlin not conducting his pod tours, falsely entered Pod tours in OMS.
>
> [5.] No shakedowns were conducted.
>
> [6.] Allowed a youthful offender to push his pod tour buttons as he remained at the podium.
>
> [7.] Allowed youthful offenders to come out of their cells to watch TV when they should have been locked down.
>
> [8.] No pre-pod inspection or orientation conducted [and] seen beating on the podium.
>
> [9.] He is seen throwing the Pod Orientation paperwork on the floor, and pushes the youthful offender's white cards off the podium then allows one of them to retrieve them off the floor.
>
> [10.] D/O McLaughlin had a discussion with his Sergeant on October 14th where policy and procedures were discussed.
>
> [11.] On November 30th, during McLaughlin's interview with OPC he admitted to not following policy and procedures, allowing a youthful offender to feed the Pod, push his tour buttons, failing to conduct pod tours, shakedowns, and falsifying his log entries in OMS.
>
> [12.] Detention Officer Ivan McLaughlin's actions were not in keeping with the highest standards of conduct as required by employees of the Mecklenburg County Sheriff's Office.

On appeal, McLaughlin asserts that some of these violations occurred during a 30 minute visit from his supervisors and that they "cornered" him so that he "would have to answer their questions," and then based his termination upon his failure to follow procedures during their visit. However, he does not dispute the factual accuracy of defendants' Exhibit 2, which specifies that violations occurred on both 19 and 20 November, that violations were observed on videotape, and that he admitted in his pre-termination interview that he had violated required rules and policies.[3] In addition, McLaughlin admitted in his sworn

3. Plaintiffs argue on appeal that we should not consider the contents of McLaughlin's interview because it was "not certified" or transcribed by a court reporter, and because McLaughlin was not under oath during the interview. As discussed in regards

deposition that he had violated Sheriff's Department rules, including falsifying a record. McLaughlin also admitted in his deposition that he had no information that Sheriff Bailey knew that he supported Bailey's opponent, and that his opinions on this issue were "speculation." As discussed above, where the "defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the officials' actions were improperly motivated." *Corum* at 774, 413 S.E.2d at 284-85 (citation omitted). We hold that McLaughlin has failed to produce such evidence or to demonstrate that he would not have been fired "but for" his political beliefs.

V. Conclusion

For the reasons discussed above, we conclude that the trial court did not err by granting summary judgment in favor of defendants. Having reached this conclusion, we do not reach the parties' arguments on sovereign immunity. The trial court's order is

AFFIRMED.

Judge STEPHENS concurs.

Judge GEER concurs in part and dissents in part.

GEER Judge, concurring in part and dissenting in part.

I respectfully dissent in part from the majority opinion's conclusion that N.C. Gen. Stat. § 153A-99 (2013) does not cover employees of a county sheriff's office and, therefore, plaintiffs are not entitled to pursue a claim for wrongful discharge in violation of public policy based on that statute. I would hold that since the Mecklenburg County Sheriff's Office is funded by Mecklenburg County, both plaintiffs have properly asserted claims for wrongful discharge in violation of public policy based on N.C. Gen. Stat. § 153A-99. Because a wrongful discharge claim is an adequate alternative remedy, I would not address the state constitutional claim. I do, however, concur in the majority opinion's analysis of both plaintiffs' constitutional claims.

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to Sergeant Nesbitt's statement, plaintiffs failed to challenge the interview at the trial level and cannot raise the issue for the first time on appeal. Moreover, plaintiff does not challenge defendants' Exhibit 2, which states that McLaughlin admitted to rules violations during his interview.

With respect to the issue whether plaintiffs submitted sufficient evidence of wrongful discharge in violation of public policy, I would hold consistent with the majority opinion's analysis of plaintiff McLaughlin's constitutional claim, that McLaughlin has failed to present sufficient evidence to give rise to a genuine issue of material fact with respect to the wrongful discharge claim. The majority was not, however, required to address the sufficiency of plaintiff Stanley's evidence of political discrimination. I would hold that Stanley's evidence is sufficient to warrant reversal of the trial court's order granting summary judgment.

As the majority notes, the pivotal question is whether a sheriff's deputy is considered a "county employee" for purposes of N.C. Gen. Stat. § 153A-99. N.C. Gen. Stat. § 153A-99(b)(1) specifically defines "county employee" and "employee" for purposes of the statute: " 'County employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.]" The majority opinion, in construing the phrase "county employee" in accordance with the common law, overlooks established principles of statutory construction.

As our Supreme Court has explained:

> Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. The courts must construe the statute as if that definition had been used in lieu of the word in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction . . . .

In re Clayton-Marcus Co., 286 N.C. 215, 219-20, 210 S.E.2d 199, 203 (1974) (internal citation omitted). *See also Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 135-36, 221 S.E.2d 297, 305 (1976) (accord).

In accordance with statutory construction principles, this Court has previously refused to incorporate common law definitions when the statute itself contains a definition. *See, e.g.*, *Campos-Brizuela v. Rocha Masonry, L.L.C.*, 216 N.C. App. 208, 219-20, 716 S.E.2d 427, 436 (2011) ("[W]e conclude that the broad statutory definition of 'employee' contained in N.C. Gen. Stat. § 97-2(2) renders it unnecessary for us to finely parse the common law distinctions between disclosed, unidentified, and undisclosed principals as applied to this case."); *Baker v. Rushing*, 104 N.C. App. 240, 248, 409 S.E.2d 108, 113 (1991) ("This broad, statutory

definition of landlord makes irrelevant in determining the liability of an agent the common law distinction between disclosed and undisclosed principals.").

Here, N.C. Gen. Stat. § 153A-99(b)(1) contains a specific definition of "county employee" and "employee." Under controlling Supreme Court authority, the role of this Court is to apply the General Assembly's actual definition. In the event that definition is deemed ambiguous, this Court is required to apply statutory construction principles in determining the General Assembly's intent in adopting that definition. I have found no authority supporting the majority's approach of essentially assuming that the General Assembly, although including a specific definition, actually intended simply to adopt the common law definition.

Indeed, the majority's incorporation of the common law definition overlooks an obvious question: Why would the General Assembly need to include a definition of "county employee" if it intended that phrase to refer only to county employees as defined by the common law or employees undisputedly employed by the county under current law? In construing statutes, "we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). Consequently, in the absence of a specific statutory definition of "county employee," we would have construed that phrase in accordance with prior opinions of our courts. Yet, here, because there is a statutory definition, the question before this Court is not whether sheriff's department employees are "county employees" under prior case law, but rather what did the General Assembly intend when it enacted N.C. Gen. Stat. § 153A-99(b)(1)?

N.C. Gen. Stat. § 153A-99(b)(1) defines a "county employee" as an individual either (1) "employed by a county" or (2) employed by "any department or program thereof that is supported, in whole or in part, by county funds." The majority opinion does not seriously address what the General Assembly intended when it referred to employees of "any department or program thereof that is supported, in whole or in part, by county funds." *Id.*

As North Carolina's constitution establishes, a sheriff's department is a county sheriff's department. *See* N.C. Const. art. VII, § 2 ("In each county a Sheriff shall be elected by the qualified voters thereof . . . ."). Because a county sheriff's department is also funded in whole or in part by county funds, it arguably is a department of the county supported by county funds. *See* N.C. Gen. Stat. § 153A-149(c)(18) (2013)

(authorizing property taxes levied by counties to be used to "provide for the operation of the office of the sheriff of the county"); N.C. Gen. Stat. § 153A-103(2) (2013) (providing that "at least two deputies . . . shall be reasonably compensated by the county"). Thus, N.C. Gen. Stat. § 153A-99(b)(1) can reasonably be construed as encompassing employees of a sheriff's department.

"Statutory language is ambiguous if it is fairly susceptible of two or more meanings." *Purcell v. Friday Staffing*, ___ N.C. App. ___, ___, 761 S.E.2d 694, 698 (2014) (internal quotation marks omitted). When, as here, " 'a statute is ambiguous, judicial construction *must* be used to ascertain the legislative will.' " *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (emphasis added) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)). Therefore, in deciding what the General Assembly in fact intended when it included within the definition of "county employee" employees of "any department or program thereof that is supported, in whole or in part, by county funds," N.C. Gen. Stat. § 153A-99(b)(1), the majority should have applied statutory construction principles rather than just invoking the common law and holding that the statutory definition is synonymous with the common law at least with respect to sheriff's department employees.

In my view, the majority opinion fails to give any separate meaning to the clause "any department or program thereof that is supported, in whole or in part, by county funds." *Id.* Yet, it is a basic principle of statutory construction that

> "[i]f possible, a statute must be interpreted so as to give meaning to all its provisions." *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (citing *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998)). " '[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word.' " *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)).

Brown v. N.C. Dep't of Env't & Natural Res., 212 N.C. App. 337, 346-47, 714 S.E.2d 154, 161 (2011). *See also In re K.L.*, 196 N.C. App. 272, 280, 674 S.E.2d 789, 794 (2009) ("It is, however, well established that [w]hen interpreting a statutory provision, [t]he legislature is presumed to have intended a purpose for each sentence and word in a particular statute, and a statute is not to be construed in a way which makes any portion of it ineffective or redundant." (internal quotation marks omitted)).

In other words, because N.C. Gen. Stat. § 153A-99(b)(1) refers to both individuals "employed by a county" and individuals employed by "any department or program thereof that is supported, in whole or in part, by county funds," the General Assembly must have intended that the second clause cover people who do not otherwise fall within the clause "employed by a county." If the statute is construed, as the majority opinion does, to cover only individuals actually "employed by a county," *id.*, then the second clause is rendered meaningless -- a construction that is impermissible.

The question becomes: what departments or programs exist that are in some fashion part of the county and are supported at least partially by county funds, but whose employees are not otherwise considered as being employed by the county? I believe that Chapter 153A itself answers that question. Article 5 of Chapter 153A covers the "Administration" of Counties. N.C. Gen. Stat. § 153A-99 appears in Part 4 (entitled "Personnel") of Article 5. Part 5 of Article 5 addresses "Board of Commissioners and *Other Officers*, *Boards*, *Departments*, *and Agencies of the County*." (Emphasis added.) The titles of Part 4 and Part 5 were included in the original session law enacting Chapter 153A. *See* 1973 N.C. Sess. Laws ch. 822, pp. 1246, 1248. These titles, therefore, are evidence of the General Assembly's intent. *See State v. Fowler*, 197 N.C. App. 1, 6, 676 S.E.2d 523, 532 (2009) ("[W]hile 'the caption [of a statute] will not be permitted to control when the meaning of the text is clear,' '[w]here the meaning of a statute is doubtful, its title may be called in aid of construction.' " (quoting *Dunn v. Dunn*, 199 N.C. 535, 536, 155 S.E. 165, 166 (1930))).

Within Part 5 appears N.C. Gen. Stat. § 153A-103, which was also included in the 1973 Session Law and is titled: "Number of employees in offices of sheriff and register of deeds." The statute specifies that the Board of County Commissioners may fix the number of salaried employees in the offices of the sheriff and the register of deeds subject to certain limitations. *Id.* Since Part 5 addresses not only the Board of County Commissioners, but also "Other Officers, Boards, Departments, and Agencies of the County," I believe that § 153A-103 indicates the General Assembly's intent that sheriff's departments be considered, for purposes of Chapter 153A, as "Other . . . Departments[] and Agencies of the County."

Moreover, while N.C. Gen. Stat. § 153A-103(1) specifies that the sheriff has "the exclusive right to hire, discharge, and supervise the employees in his office," the statute also specifies that the county fixes the number of sheriff's department salaried employees and pays

their compensation. Given that the General Assembly has, in N.C. Gen. Stat. § 153A-99(b)(1), chosen to define a "county employee" in terms of who pays for the employee's department or program -- rather than who hires, fires, or supervises the employee -- I believe, contrary to the majority opinion, that N.C. Gen. Stat. § 153A-103 in fact supports the conclusion that the General Assembly intended that sheriff's departments fall within the scope of N.C. Gen. Stat. § 153A-99(b)(1). For that reason, I also find cases relied upon by the majority -- deciding whether a sheriff's department employee is a county employee for purposes of respondeat superior -- unhelpful in addressing the General Assembly's intent in N.C. Gen. Stat. § 153A-99. Those cases focus entirely on identifying who has the authority to control the actions of the deputy sheriffs -- a different test than the one specified in N.C. Gen. Stat. § 153A-99(b)(1).

Moreover, the view that a sheriff's department is an office or department of the county is, contrary to the majority opinion's assumption, consistent with well-established and controlling law of the Supreme Court. In *Southern Ry. Co. v. Mecklenburg Cnty.*, 231 N.C. 148, 151, 56 S.E.2d 438, 440 (1949), the Supreme Court explained:

> *One of the primary duties of the county, acting through its public officers*, is to secure the public safety by enforcing the law, maintaining order, preventing crime, apprehending criminals, and protecting its citizens in their person and property. This is an indispensable function of county government which the county officials have no right to disregard and no authority to abandon.
>
> *The sheriff is the chief law enforcement officer of the county.*

(Emphasis added.) This portion of *Southern Railway* has more recently been relied upon by the Supreme Court in emphasizing the importance of county lines for redistricting purposes. *Stephenson v. Bartlett*, 355 N.C. 354, 365, 562 S.E.2d 377, 386 (2002). This Court has also held that this holding of *Southern Railway* is controlling authority. *See Boyd v. Robeson Cnty.*, 169 N.C. App. 460, 477, 621 S.E.2d 1, 12 (2005) (holding that "[w]e are bound by *Southern Railway*" when concluding that office of North Carolina sheriff is a "person" under § 1983).

When N.C. Gen. Stat. § 153A-99(b)(1) (emphasis added) refers to a "department or program *thereof* that is supported, in whole or in part, by county funds," I can conceive of no other interpretation of "thereof" than "of the county." Further, our legislature has chosen in Chapter 153A

to require that the county fully fund the county sheriff's department, which is the county's means, consistent with its duties under *Southern Railway*, to provide for the public safety of its citizens. Under Chapter 153A and controlling Supreme Court authority, a sheriff is an officer *of the county*, his department is a department *of the county*, and, I would hold, it is encompassed within N.C. Gen. Stat. § 153A-99(b)(1).

A review of other statutes addressing the office of the sheriff further indicates that, as a matter of legislation, the General Assembly has chosen to given counties significant control over the office of the sheriff even though the sheriff remains a constitutionally-established, separate local government officer. The Fourth Circuit Court of Appeals has succinctly explained:

> [The defendant sheriff] ignores, however, a series of indicia suggesting substantial county control of sheriffs. Residents of a county elect their sheriff. N.C. Const. art. VII, § 2; N.C. Gen. Stat. § 162-1. The Board of County Commissioners determines the number of salaried employees in the sheriff's office. § 153A-103. The county sets and pays the salaries of a sheriff and his deputies and the county determines and pays the overall budget. §§ 153A-103, 153A-149. If a vacancy arises in the position of sheriff, either by resignation or removal, the Board of County Commissioners appoints a new sheriff for the remainder of the sheriff's term. § 162-5. A petition for removal of a sheriff is prosecuted by the county attorney, § 128-17, before a judge of the Superior Court in the county where the sheriff resides. § 128-16. If a sheriff resigns, he forwards his resignation to the county commissioners. § 162-3. Sheriffs must also furnish a bond to the county commissioners, with the amount of the bond set by the commissioners. § 162-8.
>
> Therefore, county government controls many significant aspects of North Carolina sheriffs' employment. County residents hire the sheriff (through election), the county government sets their pay, the county provides for the number of deputies, and the county attorney is the official with the power to move to dismiss the sheriff.

Harter v. Vernon, 101 F.3d 334, 340-41 (4th Cir. 1996) (internal footnote omitted). *See also id.* at 341 ("Sheriffs have been considered county officers from the creation of that office in England.").

Moreover, the majority opinion's analysis cannot be reconciled with the " 'fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n v. Sec. Nat'l Bank*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). "Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) (internal citation and quotation marks omitted). Further, " '[i]nterpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.' " *Barnes v. Erie Ins. Exch.*, 156 N.C. App. 270, 278, 576 S.E.2d 681, 686 (2003) (quoting *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (2001)).

The majority opinion's holding means that no portion of N.C. Gen. Stat. § 153A-99 applies to employees of sheriff's departments. However, N.C. Gen. Stat. § 153A-99(e) provides that "[n]o employee may use county funds, supplies, or equipment for partisan purposes, or for political purposes except where such political uses are otherwise permitted by law." Consequently, the majority opinion leads to the result that this provision does not apply to sheriffs and their employees even though the sheriff's department's funding, supplies, and equipment come from the county.

Perhaps even more significantly, the majority's holding also places N.C. Gen. Stat. § 153A-99 in conflict with other provisions of Chapter 153A in which "county employee" and "employee" have been determined to include employees of the sheriff's department. N.C. Gen. Stat. § 153A-92(a) (2013) specifies that "the board of commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of *all county officers and employees, whether elected or appointed*, and may adopt position classification plans." (Emphasis added.) N.C. Gen. Stat. § 153A-92(d) authorizes a county to "purchase life insurance or health insurance or both for the benefit of all or any class of county officers and employees as a part of their compensation. A county may provide other fringe benefits for county officers and employees." These provisions -- although addressing "county officers and employees"

-- cover employees of the sheriff's department. *See Hubbard v. Cnty. of Cumberland*, 143 N.C. App. 149, 154, 544 S.E.2d 587, 591 (2001) (upholding denial of county's motion for summary judgment). Indeed, in *Hubbard*, this Court upheld the trial court's dismissal of the plaintiff's compensation-based claims against the sheriff on the grounds that it is not the sheriff's responsibility to fund the sheriff's department but that of the county, and "[n]or does the Sheriff administer the funds." *Id.*

Further, N.C. Gen. Stat. § 153A-97 (2013) provides that "[a] county may, pursuant to G.S. 160A-167, provide for the defense of: (1) Any county officer or employee, including the county board of elections or any county election official." N.C. Gen. Stat. § 160A-167(a) (2013) provides that the defense may be provided "by purchasing insurance which requires that the insurer provide the defense."

N.C. Gen. Stat. § 153A-435(a) (2013) also specifies:

> *A county may contract to insure itself and any of its officers, agents, or employees* against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county *or of any of its officers, agents, or employees* when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> *Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function. . . .* By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

(Emphasis added.)

It is well established that sheriffs and their employees fall within these provisions:

> Our Legislature has prescribed two ways for a sheriff to be sued in his official capacity, thus waiving sovereign immunity. First, under section 58-76-5, a plaintiff may sue

> a sheriff and the surety on his official bond for acts of negligence in the performance of official duties. . . .
>
> Second, a sheriff may be sued in his official capacity under section 153A-435. Section 153A-435 permits a county to purchase liability insurance, which includes participating in a local government risk pool, for negligence caused by an act or omission of the county or any of its officers, agents, or employees when performing government functions. The [p]urchase of insurance under this subsection waives the county's sovereign immunity, to the extent of insurance coverage . . . .

Myers v. Bryant, 188 N.C. App. 585, 588, 655 S.E.2d 882, 885 (2008) (internal citations and quotation marks omitted).

In *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424 (2005), this Court further recognized that when the county "purchased insurance covering the acts of the employees of the Mecklenburg County Sheriff's Department[,]" then "[a] suit against a sheriff's deputy in his official capacity constituted a suit against the county, thus triggering this insurance coverage." Moreover, while "[t]he doctrine of sovereign immunity generally bars recovery in actions against deputy sheriffs sued in their official capacity[,]" "[a] county may waive sovereign immunity by purchasing liability insurance, but only to the extent of coverage provided." *Id.* (citing N.C. Gen. Stat. § 153A-435(a) (2004)).

Finally, N.C. Gen. Stat. § 153A-98 (2013), which addresses the application of the Public Records Act to personnel files of county employees and applicants for county employment has also been held to apply to sheriffs and their employees. Our Supreme Court has held: "While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms 'applicants for employment' and makes the personnel files of such applicants subject to its provisions." *Durham Herald Co. v. Cnty. of Durham*, 334 N.C. 677, 679, 435 S.E.2d 317, 319 (1993).

In short, without a specific definition such as that contained in N.C. Gen. Stat. § 153A-99(b)(1) -- a definition that by its terms encompasses a sheriff's department -- other provisions of Chapter 153A, including

provisions within the same Article and Part as N.C. Gen. Stat. § 153A-99, have been deemed to cover employees of a sheriff's department even though referencing only "county officers" or "county employees." The majority opinion provides no rationale for concluding that the General Assembly intended in these provisions to include sheriffs as county officers and to bring sheriff's department employees within the scope of those provisions, but had a different intent in N.C. Gen. Stat. § 153A-99.

I can conceive of no basis for reaching that conclusion given the definition actually contained in N.C. Gen. Stat. § 153A-99(b)(1) and its focus on funding of departments as opposed to control over personnel decisions when defining "county employee." I would, therefore, hold under longstanding principles of statutory construction that employees of sheriff's departments fall within the definition of "county employee" and "employee" set out in N.C. Gen. Stat. § 153A-99(b)(1).

Based on this conclusion, I would further hold that plaintiff Stanley may assert a wrongful discharge claim in violation of the public policy set out in N.C. Gen. Stat. § 153A-99. *See Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (holding that N.C. Gen. Stat. § 153A-99 supported claim for wrongful discharge in violation of public policy when county employee alleged defendants fired him due to his political affiliation and activities).

Because the majority opinion does not address the sufficiency of plaintiff Stanley's evidence to support this claim, I do so briefly. When the evidence is viewed in the light most favorable to Stanley, as required on a motion for summary judgment, the evidence shows that Stanley had, prior to being terminated, an exemplary employment record. Stanley, a Republican, has also presented evidence from which a jury could find that Sheriff Bailey, a Democrat, and Stanley's superior officers knew of Stanley's opposition to Sheriff Bailey's reelection. According to Stanley's evidence, Sheriff Bailey sent a letter to employees of the sheriff's department, including Stanley, soliciting contributions for his campaign. Stanley was also approached by superior officers and asked to purchase tickets to fundraisers. When Stanley refused, one of the officers commented: "You know who signs your checks."

Stanley presented further evidence that on 30 November 2010, shortly after Sheriff Bailey won reelection, Stanley was handed a letter of termination by Captain/Major Pummell. When Stanley asked him what the reason was for the termination, Pummell simply turned around and walked away. Subsequent to Stanley's termination, two incident reports were submitted accusing Stanley of having been responsible for

a roll call disruption by loudly making a comment complaining about the lack of raises and talking about Sheriff Bailey's opponent being elected. One report stated that the incident occurred between 25 and 29 October 2010 while the other report did not indicate the date of the incident. The first report was signed off on by a sergeant on the day of Stanley's termination, while the second report was not signed off on until 6 December 2010. Stanley asserted in an affidavit that both reports were false.

Sheriff Bailey submitted evidence indicating that he fired Stanley for being disruptive -- he claimed that Stanley had disrupted the workplace by campaigning for Sheriff Bailey's opponent. The Sheriff submitted testimony from another employee about Stanley being disruptive one morning during roll call and that other employees had indicated that Stanley talked about how much better the Sheriff's Office would be once Sheriff Bailey's opponent got elected.

Stanley presented evidence that he had heard from two sergeants that someone else had, shortly before the election, made a comment about things changing when Sheriff Bailey's opponent was elected. One of the sergeants asked Stanley whether he had made the comment. When Stanley explained that he was out sick the day the comment was made, the other sergeant confirmed that Stanley had in fact been out on the day of the comment.

Given Stanley's evidence of his employment record, the sheriff's soliciting contributions from sheriff's department employees, the sheriff's having knowledge of Stanley's political support for the sheriff's opponent, and the sheriff's claim that Stanley was fired for a politically-motivated disruptive comment, together with Stanley's evidence that he did not make the disruptive comment, I would hold that Stanley has presented sufficient evidence to give rise to a genuine issue of material fact regarding whether Stanley's employment was terminated for a reason in violation of public policy. *See*, *e.g.*, *Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000) (holding that plaintiff submitted sufficient evidence that her firing was politically motivated when sheriff asked plaintiff for political loyalty, sheriff's top officers solicited employees for campaign contributions, sheriff accused plaintiff of supporting his opponent, and reason given for termination could be found by jury to be pretext); *Jenks v. City of Greensboro*, 495 F. Supp. 2d 524, 529 (M.D.N.C. 2007) (explaining that plaintiff may establish pretext by showing employer's reliance on false or biased report caused adverse employment action); *Jones v. Cargill, Inc.*, 490 F. Supp. 2d 994, 1006 (N.D. Iowa 2007) ("When the facts are viewed in the light most favorable to Plaintiff, a jury could

find that this prior 'record' was a sham, insofar as Plaintiff was falsely accused of staging the incident because he had repeatedly complained about racial discrimination and harassment.")

I would, therefore, reverse the trial court's grant of summary judgment as to Stanley's wrongful discharge claim. I agree, however, that we should affirm the entry of judgment on plaintiff McLaughlin's claims.

TONYA M. PRICE, PLAINTIFF
v.
ROBERT CALDER, JR., DEFENDANT

No. COA14-832

Filed 7 April 2015

Immunity—judicial immunity—appointment of attorney as commissioner overseeing partition of property—quasi-judicial official

The trial court did not err by dismissing plaintiff's complaint on the grounds that defendant real estate attorney had judicial immunity when he was carrying out a partition by sale ordered by the trial court. Defendant, appointed as a commissioner by a clerk of superior court to oversee the partition of property held by co-tenants, was acting within the scope of his duties as a quasi-judicial official. Thus, his actions were covered by the rule of judicial immunity.

Appeal by plaintiff from order entered 12 June 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 3 December 2014.

Randolph M. James for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Patrick M. Mincey and Kara O. Gansmann, for defendant-appellee.

BRYANT, Judge.

Because defendant—appointed as a commissioner by a Clerk of Superior Court to oversee the partition of property held by co-tenants—was acting within the scope of his duties as a quasi-judicial official, his

actions were covered by the rule of judicial immunity. Accordingly, we affirm the dismissal of the complaint.

On 29 April 2014, plaintiff Tonya M. Price filed a complaint against defendant Robert Calder, Jr., a real estate attorney, for his conduct while serving as a commissioner over a partition by sale of property jointly owned by plaintiff and her co-tenant, Robert M. Hesch.

Prior to the partition by sale ordered in *Hesch v. Price*, 09-SP-0401, plaintiff had retained defendant as a real estate attorney in at least one real estate transaction. In her complaint, plaintiff alleged that in 2007, she and co-tenant Hesch—with whom she was romantically involved—sold real property in New Hanover County for $533,000.00. In that transaction, defendant acted on behalf of plaintiff and Hesch.

Plaintiff and Hesch also held other properties as joint tenants with right of survivorship, including property located at 314, 316, and 414 Loder Avenue, Wilmington (the Loder Avenue properties). Plaintiff alleged that Hesch rented the property located at 414 Loder Avenue to a realtor, Jeffery Terry, without accounting to plaintiff for the rent paid by Terry. In addition to being a realtor who had previously listed the property at 414 Loder Avenue for sale, Terry was also Hesch's personal friend.

In a letter to the Wilmington Regional Association of Realtors dated 10 September 2009, plaintiff stated that Terry was residing at the property plaintiff owned jointly with Hesch, that Terry removed a jet-ski lift (a procedure subjecting the property owners to a fine of up to $10,000.00 if performed without a permit), removed plaintiff's personal belongings from the residence, blocked a boat slip plaintiff had rented out in a commercial venture, had "run up" maintenance fees to be split between the property owners, and was living rent free.

To represent him in proceedings before the Association of Realtors, Terry retained defendant. In her complaint, plaintiff alleged that during the course of his representation of Terry, defendant acted adversely to plaintiff's interests. Plaintiff also alleged that in the course of the proceedings before the Association of Realtors, defendant expressed the opinion that the Loder Avenue properties jointly owned by plaintiff and Hesch should be partitioned. Shortly, thereafter, defendant accepted an appointment by the New Hanover County Clerk of Superior Court as commissioner over the partition of all the Loder Avenue properties.

Plaintiff alleged that she sought an in-kind partition of the Loder Avenue properties as opposed to a partition by sale, but defendant "endorsed" Hesch's desire to partition the property by sale. Plaintiff

alleged that because of prior dealings, defendant was aware that Hesch had sufficient resources to acquire plaintiff's interest in the Loder Avenue properties. Plaintiff alleged that due to defendant's knowledge of the inequitable financial footing between plaintiff and Hesch, defendant should have known that "the Clerk's Order denying a partition in-kind and instead ordering a sale of plaintiff and Robert Hesch's property was improper . . . ."

Plaintiff asserted that as a commissioner appointed by the New Hanover Clerk of Superior Court, defendant owed a fiduciary duty to herself and Hesch, including, an obligation to divide rents collected from Terry between them and maximize the recovery from the sale of the Loder Avenue properties. Plaintiff alleged that as a result of defendant's breach of fiduciary duty during the partition by sale, Hesch and his mother[1] were able to acquire all properties previously held jointly by plaintiff and Hesch, while plaintiff received no money for her interest in the Loder Avenue properties.

Plaintiff sought compensatory and punitive damages against defendant for amounts in excess of $10,000.00. Defendant answered plaintiff's complaint listing seventeen defenses including judicial immunity.

Following a hearing on the matter in New Hanover County Superior Court before the Honorable Phyllis M. Gorham, Judge presiding, the trial court issued a 12 June 2014 order dismissing plaintiff's complaint pursuant to Rule 12(b)(6) on the basis that "[d]efendant was acting as a judicial official and, thus, had judicial immunity." Plaintiff appeals.

Plaintiff argues that the trial court erred in dismissing her complaint on the grounds that defendant had judicial immunity. Plaintiff contends that defendant was not acting as a judicial official and, thus, had no judicial immunity. We disagree.

"It is well established that 'a judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties.' " *Sharp v. Gulley*, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995) (quoting *Fuquay Springs v. Rowland*, 239 N.C. 299, 300, 79 S.E.2d 774, 776 (1954)) (affirming the dismissal of the plaintiff's action against a court-appointed referee in an underlying equitable distribution

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1. In her complaint against defendant, plaintiff makes allegations of collusion between Hesch and his mother, and between Hesch, his mother, and Terry, asserting that they all attempted to interfere with plaintiff's rights regarding the Loder Avenue properties.

proceeding on the basis that such was implicitly an action against the trial judge and barred by judicial immunity). "Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. In effect, the rule of judicial immunity extends to those performing quasi-judicial functions." *Vest v. Easley*, 145 N.C. App. 70, 73-74, 549 S.E.2d 568, 572 (2001) (citations omitted).

Chapter 1, Article 29A of our General Statutes governs the execution of judicial sales. Pursuant to General Statutes, section 1-338.1, codified within Article 29A, "[a] judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court . . . ." N.C. Gen. Stat. § 1-339.1(a) (2013). A commissioner may be specially appointed to hold the sale. *See id.* § 1-339.4(1).

> When an order of sale of such real or personal property . . . makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous.

Id. § 1-339.9(c) (2013) (per subsection (a), the judge or clerk having jurisdiction may direct that the property be sold as a whole, in parts, or offered by each method then sold by the method which produces the highest price).

> A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz., to sell the land and distribute the proceeds to the parties entitled thereto. He has no authority and can exercise no powers except such as may be necessary to execute the decree of the court. Immediately upon his appointment he ceases to be an attorney or agent for either party, but becomes in a certain sense an officer of the court for the specific purposes designated in the judgment.

Peal v. Martin, 207 N.C. 106, 108, 176 S.E. 282, 284 (1934).

The New Hanover County Clerk of Superior Court ordered that the property jointly owned by plaintiff and Hesch was to be partitioned by sale. The trial court order for partition by sale was acknowledged by plaintiff in her complaint. Defendant was appointed by the Clerk of Court as the commissioner for the partition proceeding referenced in *Hesch v. Price*, 09 SP-0401, New Hanover County. Therefore, in carrying out the partition by sale, defendant was acting "in a certain sense [as]

an officer of the court." *See id.* at 108, 176 S.E. at 284. We find no merit in plaintiff's assertion that defendant was not acting in accordance with his duty as commissioner appointed to carry out a partition by sale of property jointly held by plaintiff and Hesch. Therefore, defendant was immune from suit while engaging in this function. *See Vest*, 145 N.C. App. at 73-74, 549 S.E.2d at 572 ("Quasi-judicial immunity is an absolute bar, available for individuals in actions taken while exercising their judicial function. In effect, the rule of judicial immunity extends to those performing quasi-judicial functions." (citation omitted)). Accordingly, we affirm the trial court's dismissal of plaintiff's complaint.

AFFIRMED.

Judges DILLON and DIETZ concur.

R & L CONSTRUCTION OF MT. AIRY, LLC, PLAINTIFF
v.
JAVIER DIAZ, DEFENDANT AND F. EUGENE REES, JR., THIRD-PARTY DEFENDANT

No. COA14-1127

Filed 7 April 2015

Attorney Fees—statutory lien—scant record on appeal

The Court of Appeals held that the trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 44A-35 to the prevailing party in a contract dispute, but the prevailing party was not entitled to attorney fees incurred on appeal. Neither party included transcripts or other evidence from the hearing on the underlying action or attorney fees.

Appeal by plaintiff from order entered 4 August 2014 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 18 February 2015.

Royster & Royster, by Mark S. Royster, for plaintiff-appellant.

Smith Law Group, PLLC, by Steven D. Smith and Matthew L. Spencer, for defendant-appellee.

TYSON, Judge.

R & L Construction of Mt. Airy, LLC ("Plaintiff") appeals from order awarding attorneys' fees to Javier Diaz ("Defendant"). We affirm.

I. Factual Background

In June 2012, Plaintiff entered into a contract with Defendant to provide labor and materials for the renovation of a residence located in Surry County, North Carolina. Plaintiff performed its contractual obligations between 9 July 2012 and 24 August 2012.

Defendant failed to pay the balance due. Plaintiff filed a claim of lien on Defendant's real property in the amount of $11,175.49 on 7 December 2012. Plaintiff subsequently filed a complaint to perfect the lien against Defendant on 20 February 2013.

Plaintiff asserted claims against Defendant for breach of contract and for satisfaction of its lien on real property. Plaintiff alleged it furnished labor and materials in accordance with the contractual specifications for a total value of $16,175.49. Defendant made one payment of $5,000.00. Plaintiff repeatedly demanded Defendant pay the remaining balance due pursuant to the parties' contract. Defendant refused to pay the balance of the outstanding debt. Defendant filed an answer and third party counterclaim against F. Eugene Rees, Jr., a manager of Plaintiff.

On 27 November 2013, the parties entered into court-ordered mediation. During mediation, Plaintiff reduced its demand from $11,175.49 to $9,000.000. Defendant rejected Plaintiff's final settlement offer. Nothing before us shows any further settlement discussions took place after that date.

On 12 March 2014, Defendant filed a motion for summary judgment. On 9 June 2014, the trial court granted Defendant's motion for summary judgment, dismissed Plaintiff's claims against Defendant, and cancelled Plaintiff's claim of lien on the real property.

On 25 June 2014, Defendant filed a motion for an award of attorneys' fees pursuant to N.C. Gen. Stat. § 44A-35. Defendant alleged he "made multiple good faith attempts to fully resolve the matter, including but not limited to a settlement offer at mediation, which the Plaintiff has unreasonably refused."

After hearing Defendant's motion for attorneys' fees, on 4 August 2014 the trial court entered an order awarding attorneys' fees to Defendant in the amount of $8,823.00. In its order, the trial court made the following findings of fact:

> 1. The Plaintiff filed a claim of lien in the amount of $11,175.49 . . . pursuant to Chapter 44A of the North Carolina General Statutes and filed a lawsuit to collect same.
>
> 2. Plaintiff made a final settlement demand of $9,000.00 at the mediation of this matter *which was thereby rejected by the Defendant*, constituting an unreasonable refusal to fully resolve the matter and in light of Defendant being granted summary judgment on Plaintiff's claims against the Defendant and the Plaintiff receiving no recovery. Therefore, Defendant was and is the prevailing party of this case pursuant to N.C. Gen. Stat. §44A-35 due to the amount of the claim of lien filed by the Plaintiff.
>
> 3. Defendant incurred $8,823.00 of attorney time, up and until November 30, 2014, defending and prosecuting his claims [based on the affidavit submitted by counsel for Defendant].

(emphasis supplied).

Plaintiff timely appealed to this Court. Defendant filed a motion with this Court seeking an award of attorneys' fees incurred on appeal.

II. Issues

Plaintiff argues the trial court made an improper finding that Plaintiff unreasonably refused to resolve the matter at mediation and erred by granting Defendant's motion for attorneys' fees.

III. Standard of Review

This Court reviews a trial court's award of attorneys' fees under N.C. Gen. Stat. § 44A-35 for abuse of discretion. *Martin Architectural Prods. Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 182, 574 S.E.2d 189, 193 (2002). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006) (citations omitted).

IV. Analysis

Pursuant to N.C. Gen. Stat. § 44A-35,

> [i]n any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding

> judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party . . . 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 or the basis of the defense. For purpose of this section, "prevailing party" is a party . . . who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party . . . against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended.

N.C. Gen. Stat. § 44A-35 (2013).

N.C. Gen. Stat. § 44A-35 permits a trial judge to award attorneys' fees provided two elements are satisfied: (1) the party awarded attorneys' fees is the prevailing party; and (2) the party required to pay the attorneys' fees unreasonably refused to resolve the matter. *S. Seeding Serv., Inc. v. W.C. English, Inc.*, __ N.C. App. __, __, 735 S.E.2d 829, 835 (2012).

In this case, the trial court made the following finding of fact in its order, which awarded attorneys' fees to Defendant:

> 2. Plaintiff made a final settlement demand of $9,000.00 at the mediation of this matter *which was thereby rejected by the Defendant*, constituting an unreasonable refusal to fully resolve the matter and in light of Defendant being granted summary judgment on Plaintiff's claims against the Defendant and the Plaintiff receiving no recovery. Therefore, Defendant was and is the prevailing party of this case pursuant to N.C. Gen. Stat. §44A-35 due to the amount of the claim of lien filed by the Plaintiff.

(emphasis supplied).

Plaintiff does not dispute Defendant was the prevailing party. Plaintiff contends no competent evidence exists to support the trial court's finding of fact that Defendant's rejection of Plaintiff's final settlement offer at mediation constituted an unreasonable refusal to settle.

Plaintiff has failed to meet its burden of showing "the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Bourlon*, 172 N.C. App. at 601, 617 S.E.2d at 45. Plaintiff failed to appeal the trial court's order granting Defendant's motion for summary judgment of the underlying action. Plaintiff also

failed to include in the record on appeal any transcript from either the hearing on Defendant's motion for summary judgment or the hearing on Defendant's motion for attorneys' fees. Without a review of the transcripts, this Court cannot determine what arguments were made at the hearings on either of these two motions.

The evidence in the record before this Court, including the order awarding attorneys' fees to Defendant, shows the trial court found and concluded Plaintiff's refusal to settle was unreasonable. Because no transcript of the hearing was filed with the record on appeal, this Court is also unable to ascertain how statutorily confidential information under N.C. Gen. Stat. § 70A-38.1, such as an offer to settle in a court-ordered mediation procedure, was entered into evidence and considered by the trial judge.

The trial court made the requisite findings of fact, based upon the stated actions at mediation *and* "the affidavits, including affidavit of fees and other evidence submitted by the parties and the arguments and authorities presented by counsel and a full review of the file," to support its conclusions of law and its order awarding attorneys' fees to Defendant. Plaintiff failed to show the trial court's award of attorneys' fees was manifestly unsupported by reason. This argument is overruled.

V. Defendant's Motion for Attorneys' Fees Incurred on Appeal

Defendant moves for the imposition of attorneys' fees incurred on appeal, pursuant to Rule 35 and Rule 37 of the North Carolina Rules of Appellate Procedure. Rule 35(a) allows costs to be taxed against the appellant if a judgment is affirmed, "unless otherwise ordered by the court." N.C.R. App. P. 35(a). "Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal." N.C.R. App. P. 35(c). Assessable costs include "counsel fees, as provided by law." N.C. Gen. Stat. § 7A-305(d)(3) (2013).

The trial court determined Defendant was entitled to an award of attorneys' fees under N.C. Gen. Stat. § 44A-35 and entered an order thereon. In his motion submitted to this Court, Defendant contends he is likewise entitled to an award of attorneys' fees incurred in defending the trial court's order on appeal.

As stated previously, neither party filed any transcripts or presented any evidence, other than the order appealed, to allow us to decipher how statutorily confidential information was admitted into evidence, or what other evidence the trial court considered.

In the absence of a transcript, or other evidence in the record to review, we reject an additional award to Defendant of attorneys' fees incurred on appeal.

VI. Conclusion

The trial court's order granting Defendant's motion for attorneys' fees is affirmed. Neither party included transcripts or other evidence of the hearing on the underlying action or the hearing on Defendant's motion for attorneys' fees. Defendant's motion for attorneys' fees incurred on appeal is denied.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, PLAINTIFF
v.
TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP, D/B/A TIME WARNER CABLE, AND TIME WARNER CABLE SOUTHEAST, LLC, DEFENDANTS

No. COA14-905

Filed 7 April 2015

1. Utilities—telephone pole attachment—cable provider—rates not just and reasonable

The Business Court did not err in its findings of fact and conclusion of law that the rates Rutherford Electric Membership Corporation (Rutherford) charged TWEAN (a cable service provider) between 2010 and 2013 for use of utility poles were not just and reasonable under N.C.G.S. § 62-350. Rutherford did not specifically challenge any of the order and opinion's factual findings, but instead contended that the Business Court misapprehended the General Assembly's intent in enacting N.C.G.S. § 62-350, leading to an absurd result. Rutherford offered several arguments in support of its position, none of which had merit. These involved use of the FCC Cable Rate, the effect of Rutherford's uniform class-based rates, the state law presumptions to which Rutherford referred, and Rutherford's failure to present any competent evidence that its rates were just and reasonable.

2. Utilities—telephone pole attachment—negotiation of rates

The Business Court did not err by concluding that Rutherford Electric Membership Corporation violated N.C.G.S. § 62-350 when it unilaterally raised the pole attachment rates of TWEAN (a cable service provider) without negotiation. The plain language of N.C.G.S. § 62-350 requires a utility pole owner to allow CSPs to attach to their poles at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements.

Appeal by Plaintiff from order and opinion entered 22 May 2014 by Judge Calvin E. Murphy in the North Carolina Business Court. Heard in the Court of Appeals 4 December 2014.

Nelson Mullins Riley & Scarborough LLP, by Joseph W. Eason and Christopher J. Blake, for Plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Reid L. Phillips; and Sheppard Mullin Richter & Hampton LLP, by Gardner F. Gillespie, Paul Werner, and J. Aaron George, for Defendant.

Womble Carlyle Sandridge & Rice, LLP, by Pressly M. Millen and Raymond M. Bennett, for amicus curiae North Carolina Association of Electric Cooperatives, Inc.

The Bussian Law Firm, PLLC, by John A. Bussian, for amicus curiae North Carolina Cable Telecommunications Association.

STEPHENS, Judge.

Rutherford Electric Membership Corporation ("Rutherford") argues that the North Carolina Business Court erred in holding that the utility pole attachment rates it charged Time Warner Cable Entertainment-Advance/Newhouse Partnership ("TWEAN")[1] between 2010 and 2013 were neither just nor reasonable under section 62-350 of our General Statutes. Rutherford also argues that the Business Court erred in concluding that it violated section 62-350 by unilaterally raising TWEAN's rates without negotiation during the years in dispute. After careful

1. This dispute arose in 2010 between Rutherford and TWEAN. In 2012, TWEAN's corporate subsidiary Time Warner Southeast, LLC, assumed all of its parent company's rights, obligations, and liabilities relating to cable operations in North Carolina, and was subsequently joined as a necessary party to this litigation.

consideration, we hold that the Business Court did not err and we consequently affirm its order and opinion.

I. Background and Procedural History

A. Regulatory Background

For approximately 35 years, the Federal Communications Commission ("FCC") has regulated the pole attachment rates that certain utility companies may charge cable service providers within North Carolina and around the nation. Section 224 of the federal Pole Attachment Act of 1978 amended the Communications Act of 1934 to provide that investor-owned utilities ("IOUs") may only charge utility pole attachment rates that are just and reasonable, based on the utility's incremental costs incurred in providing a pole attachment service and an appropriate share of its fully allocated costs, which would exist even in the absence of any pole attachments. *See* 47 U.S.C. § 224 (2014). Developed pursuant to section 224's enactment, the FCC Cable Rate provides a formula for charging an attaching party a percentage of the actual, documented costs of owning and maintaining a utility pole based on the proportion of the usable space[2] on the pole occupied by the attacher. *See id.* § 224(d). In 1996, Congress amended section 224 to include an alternative formula called the FCC Telecom Rate, which followed a similar approach for calculating the cost of a pole but utilized a different method for allocating those costs to attachers by including both usable and unusable pole space into its calculations for the amount of space each attacher occupies. *See id.* § 224(e). However, in 2011, the FCC adjusted the Telecom Rate formula to produce maximum rates more closely aligned with those provided by the FCC Cable Rate.

Unlike IOUs, municipally owned utilities and non-profit electric membership corporations ("EMCs") are exempt from federal regulation by the FCC. Thus, given the absence of any comparable state legislation here in North Carolina prior to 2009, pole attachment rates

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2. Utility poles come in standard sizes, typically in five-foot increments, and utilities usually use 35- and 40-foot poles for distribution of electricity and communications services. Of that space, utilities bury approximately six feet of the pole underground. Then, to meet "minimum grade" and achieve ground clearance, the utility typically leaves at least 18 feet of pole space unused between the ground and any installation. As such, every utility pole has roughly 24 feet of unusable space either buried underground or required to achieve minimum ground clearance. Thus, each 35- and 40-foot pole has 11 feet and 16 feet, respectively, of usable space to accommodate overhead facilities, and the FCC Cable Rate therefore uses a presumptive average of 13.5 feet of usable space per pole, although the formula allows a utility to substitute its actual data where available.

went effectively unregulated for such utilities providers. Indeed, when TWEAN attempted to challenge the pole attachment rates set by a North Carolina EMC in federal court in 2007 under common law principles, the United States Court of Appeals for the Fourth Circuit flatly rejected its argument and held that, "if any regulation or compulsion is to be applied to pole-attachment agreements, it should be done by the North Carolina legislature, the North Carolina Utilities Commission, [or] the North Carolina state courts." *Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 315 (4th Cir. 2007). In so holding, the Fourth Circuit set the stage for our General Assembly's enactment of N.C. Gen. Stat. § 62-350.

As enacted in 2009, section 62-350 requires that municipalities and EMCs organized under Chapter 117 of our General Statutes "shall allow any communications service provider to utilize [their] poles, ducts, and conduits at just, reasonable, and nondiscriminatory rates, terms, and conditions adopted pursuant to negotiated or adjudicated agreements." N.C. Gen. Stat. § 62-350(a) (2013). Included in the definition of "communications service provider" ("CSP") are those that provide "cable service over a cable system as those terms are defined in Article 42 of Chapter 66 of the General Statutes." *Id.* § 62-350(e). The statute further provides that:

> Following receipt of a request from a communications service provider, a municipality or membership corporation shall negotiate concerning the rates, terms, and conditions for the use of or attachment to the poles, ducts, or conduits that it owns or controls. . . . Upon request, a party shall state in writing its objections to any proposed rate, terms, and conditions of the other party.

Id. § 62-350(b). However, if the parties are unable to reach an agreement "within 90 days of a request to negotiate . . . , or if either party believes in good faith that an impasse has been reached . . . , either party may bring an action in [the North Carolina Business Court] . . . , and the Business Court shall have exclusive jurisdiction over such actions." *Id.* § 62-350(c). In such cases, the statute provides that the Business Court shall

> resolve any dispute identified in the pleadings consistent with the public interest and necessity so as to derive just and reasonable rates, terms, and conditions, taking into consideration and applying such other factors or evidence that may be presented by a party, including without

> limitation the rules and regulations applicable to attachments by each type of communications service provider under section 224 of the Communications Act of 1934, as amended, and [] apply any new rate adopted as a result of the action retroactively to the date immediately following the expiration of the 90-day negotiating period or initiation of the lawsuit, whichever is earlier.

Id. In the only case heretofore brought under this statute, this Court interpreted section 62-350 to "endorse[] regulatory intervention to promote just and reasonable rates" by "establish[ing] several judicially enforceable statutory rights" including "a statutory right for both [CSPs] and municipalities to establish just, reasonable, and nondiscriminatory pole attachment rates within 90 days of a request to negotiate" and "a private cause of action to enforce these rights." *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, __ N.C. App. __, __, 747 S.E.2d 610, 615-16 (2013) (citations and internal quotation marks omitted).

B. Facts and Procedural History

Rutherford is an EMC organized under Chapter 117 of our General Statutes that owns and operates an electric distribution system consisting of overhead and underground lines used to provide electric service to its members in its service territory, which covers all or portions of 10 North Carolina counties. As part of its system, Rutherford owns utility poles to which it attaches its overhead distribution lines. Rutherford also maintains "joint-use" arrangements with incumbent local telephone companies and electric utilities under which Rutherford typically does not pay for its use of space on the other party's poles, nor does it charge the other party for using space on its poles; instead, the joint-user pays the pole owner for any expenses associated with accommodating its facilities. In addition, Rutherford licenses the use of surplus space on its poles to CSPs and other third-party attachers.

On 5 March 1998, Rutherford and TWEAN entered into a pole attachment agreement, the terms of which largely followed Rutherford's standard third-party CSP attachment agreement and obligated TWEAN to pay an annual, per-pole rental rate of $5.25 in exchange for the right to attach to surplus space on Rutherford's poles. The agreement provided that where there was no surplus space on a pole, including sufficient safety space and ground clearance, TWEAN would create space by purchasing a new, larger pole, entirely at its own expense. Moreover, if Rutherford reclaimed space on the pole for its own attachments, TWEAN either had to move its attachment to create new safety space

or, if there was insufficient space to maintain minimum requirements for ground clearance or safety space, pay to install a taller pole. In both cases, the agreement provided that Rutherford would take ownership of the new pole and TWEAN would continue paying the same rate to attach to it.

In 1999, Rutherford increased the rate it charged TWEAN to $5.50 per pole. In 2004, Rutherford exercised its option to terminate the 1998 pole attachment agreement and the parties spent the next eight years unsuccessfully attempting to reach a new agreement, while Rutherford continued to invoice TWEAN for its attachments at gradually increased rates. In 2005, the rate was $7.50 per pole; in 2006, $9.50 per pole; in 2007, $11.50 per pole; in 2008, $12.50 per pole; in 2009, $14.50 per pole; in 2010, $15.50 per pole; in 2011, $18.50 per pole; in 2012, $19.19 per pole; and in 2013, $19.65 per pole.

Prior to section 62-350's enactment, TWEAN lacked any means to challenge Rutherford's rates and thus continued to pay the amounts invoiced until 2009. Then, on 18 December 2009, TWEAN objected to Rutherford's invoiced rates and requested negotiations for the rate, terms, and conditions of a new license agreement pursuant to section 62-350. Over the next 39 months, the parties negotiated in good faith but were unable to reach an agreement. In the meantime, TWEAN refused to pay Rutherford's 2010 rate of $15.50 per pole and instead paid the 2009 rate of $14.50 per pole, subject to a true-up based on a negotiated or adjudicated rate and without prejudice to either party. In response, Rutherford threatened to demand removal of 481 TWEAN attachments, which was the number of poles equal to the amount of the outstanding balance, unless TWEAN paid the full invoiced amount for 2010. TWEAN responded by letter that Rutherford did not have the authority to unilaterally raise its rates or remove its attachments, and continued to pay $14.50 per pole, subject to true-up and without prejudice, through 2011 and 2012 while Rutherford continued to demand payment of the unpaid invoices and refused to provide TWEAN with financial data and documents that it requested in conjunction with the ongoing negotiations. In 2013, TWEAN offered to pay Rutherford's invoices at a rate of $7.50 per pole, but Rutherford objected and refused to accept any such payment. By February 2013, after more than three years of unsuccessful negotiations, the parties reached an impasse as to the maximum permissible rates under section 62-350 for the years 2010 through 2013. During these years, Rutherford invoiced TWEAN for attachments on the following number of poles: 7,269 poles in 2010; 7,336 poles in 2011; 7,336 poles in 2012; and 7,384 poles in 2013. All of TWEAN's attachments were

concentrated in two of the 10 counties in Rutherford's service area, near Gastonia in Gaston County and Shelby in Cleveland County.

On 1 March 2013, Rutherford filed a complaint against TWEAN seeking adjudication under section 62-350 of the lawfulness of its rates for 2010 through 2013, as well as a money judgment for amounts invoiced to but unpaid by TWEAN and a declaratory judgment that its rates would be considered just and reasonable going forward. The case was designated a mandatory complex business case on 7 March 2013 and subsequently assigned to the North Carolina Business Court on 12 March 2013. In its answer filed 4 April 2013, TWEAN asserted affirmative defenses and counterclaimed that: (1) Rutherford's pole attachment rate was neither just nor reasonable under section 62-350; (2) Rutherford violated section 62-350 by continuing to increase its rates without negotiation; and (3) several of Rutherford's non-rate terms also violated section 62-350. On 1 August 2013, the Business Court joined TWEAN's corporate subsidiary TWC Southeast, LLC, as a necessary party to the litigation. The parties resolved their disputes over Rutherford's non-rate terms before trial.

On 3 September 2013, with Judge Calvin E. Murphy presiding, the Business Court began a four-day bench trial to determine whether Rutherford's pole attachment rates for 2010 through 2013 were just and reasonable under section 62-350. Given the statute's explicit reference to "section 224 of the Communications Act of 1934," TWEAN argued that the court should base its determination on the FCC Cable Rate, which calculates the maximum rate an IOU can charge by: (1) determining the net cost of an average utility pole; (2) multiplying that cost by carrying charge factors to determine the utility's annual cost of owning and maintaining an average pole; and then (3) allocating a portion of that annual cost to the third-party attacher proportionate to the amount of usable space on the pole it occupies. *See* 47 U.S.C. § 224(d). For its part, Rutherford generally agreed that the cost of a pole should be calculated based on the first two elements of the FCC Cable Rate, but strenuously objected to allocating those costs based on the formula's third element, which Rutherford contended would result in a subsidy to TWEAN at the expense of its member-owners. Instead, Rutherford argued for a rate based on the allocation of both usable and unusable pole space to third-party attachers like TWEAN.

During the trial, Rutherford presented testimony from three witnesses in support of its rates. First, Rutherford's system engineer Thomas Haire, whose duties included overseeing the development and negotiation of rates, terms, and conditions for pole attachment agreements, testified that he relied on a combination of formulaic rate methodologies

from the "Pole Attachment Toolkit" published by the National Rural Electric Cooperatives' Association ("NRECA") in order to gradually increase attachment rates for TWEAN and nearly all of Rutherford's other third-party attachers to make them closer to the rates charged under its agreement with Bell South.[3] Specifically, Haire testified that Rutherford was willing to follow the FCC Cable Rate as a guide as long as it produced a sufficient maximum rate to justify the desired annual rate increase. When that failed, Haire turned to NRECA's Telecom Plus formula, which uses calculations identical to the FCC Cable Rate to derive the annual net cost of owning and maintaining a pole, but differs in its allocation of costs. Unlike the FCC Cable Rate, which allocates the costs of the entire pole in the proportion that the attaching party uses the usable space, the Telecom Plus formula allocates the pole's usable space in the same manner but then further allocates its unusable space equally among all of the attaching parties. Here, Haire testified that he allocated the unusable space by dividing the costs by Rutherford's system-wide average of attaching parties per pole. Thus, Haire testified that his calculations—which presumed a standard 40-foot pole[4] with 13.5 feet of usable space of which Rutherford utilized 6.5 feet and every CSP attachment occupied 4.33 feet—produced a range of potential attachment rates that were higher than the rates Rutherford actually charged TWEAN, thus rendering the latter just and reasonable under section 62-350. Furthermore, echoing the testimony of several other Rutherford witnesses, Haire testified that by 2012, Rutherford had licensing agreements with ten third-party attachers including TWEAN; that although several other attachers had complained about Rutherford's pole attachment rate, TWEAN was the only attacher that refused to pay it; and that

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3. Under the terms of its joint-use agreement with Bell South (now AT&T), Rutherford agrees to install, at its own expense, poles large enough to insure sufficient space for Bell South to make an attachment, which means that if a jointly used pole is insufficient in size or strength to accommodate existing attachments and Bell South's proposed attachments, Rutherford will pay the cost to promptly replace the pole with a taller, stronger one. Bell South and Rutherford also agreed to use a 40-foot pole as the standard joint-use pole with a standard space allocation of two feet for Bell South's attachments and 8.5 feet for Rutherford's attachments. Further, the agreement gives Bell South priority by specifying that any attachments by third parties would "not be located within [two feet of Bell South's] space allocation." The agreement requires each party to pay an annual per-pole rental fee for its attachments on the other's poles. In 2012, Bell South paid $18.12 per pole for 18,335 attachments to Rutherford's poles, and Rutherford paid $24.98 for each of its 1,026 attachments to Bell South's poles.

4. Haire testified that Rutherford had previously used 35-foot poles throughout its system, but that over the last 25 years, it transitioned to using 40-foot poles, at least in part to accommodate its joint-use agreements with other utilities.

Rutherford generally refused to lower or even negotiate its pole attachment rate with individual attachers because it was required to charge nondiscriminatory and uniform class-based rates.

On cross-examination, Haire explained that even though an average CSP attachment occupies only one foot of space, Rutherford attributed 4.33 feet to TWEAN's attachments based on the National Electric Safety Code's ("NESC") requirement that poles with communications facilities maintain sufficient "safety space"—typically 40 inches—between those communications facilities and electrical conductors. However, Haire acknowledged that the NESC allows electric utilities like Rutherford to use this safety space for certain types of attachments provided they maintain minimum separations, and further admitted that on at least some of its poles, Rutherford generated revenue by using the safety space to install streetlights. Haire also admitted that although NRECA's Telecom Plus formula calls for dividing the cost of unusable space equally among all attachers, his calculations based on Rutherford's system-wide averages divided the cost of unusable space by only 1.45 attaching parties, which resulted in a higher rate. Haire explained this was necessary because Rutherford lacked data on how many of its poles with TWEAN attachments included other attachers besides Rutherford itself. He further acknowledged that in determining the annual average costs of Rutherford's poles, he miscalculated the carrying charge component by failing to divide Rutherford's maintenance expenses by its net investment in overhead conductors and service lines, and he also erroneously used a "default" rate of return rather than Rutherford's actual rate of return, even though he had no basis to use the default and the default was higher than the rate of return used by Rutherford's other experts. Haire also admitted that the NRECA toolkit he relied on described the FCC's rate methodologies as "unimpeachable" and cautioned that although the Telecom Plus formula generated higher pole attachment rates by allocating more costs to attachers, "it has not been sanctioned by the FCC and may not be readily embraced by state or federal regulators."

Rutherford next presented expert testimony from Judy Beacham, an outside consultant who acknowledged that she had never previously performed a pole attachment rate analysis and that in formulating her rate methodology she relied primarily on a position paper prepared by a lawyer for the National Association of Regulatory Utility Commissioners ("NARUC") on behalf of a number of IOUs for presentation to the FCC in 1996. After testifying about the history of EMCs, their importance in bringing electrical power to sparsely populated rural areas, and the

impact of their tax-exempt non-profit status on their costs and finances, Beacham offered calculations that followed the basic outlines of the Telecom Plus rate methodology. However, Beacham acknowledged that her calculations departed from NRECA's formula in several notable ways. First, Beacham increased the cost of a bare utility pole in Rutherford's system by adding in the costs of ancillary supporting equipment, such as anchors, guys, grounds, and lightning arresters, which would be on any pole to support the utility's core services regardless of whether there were any attachments. Second, Beacham added to the expenses included in the carrying charge, including a category called "operations related expenses" that is not found in the FCC Cable Rate or NRECA's Telecom Plus formula. Third, while Beacham purported to follow the Telecom Plus method for allocating unusable space, she acknowledged that her calculations were missing critical data inputs because although her approach required information on the number of entities attached to an average joint-use pole, Rutherford kept no such statistics. Indeed, Beacham admitted that if the average pole to which TWEAN attached had more than 2.4 attaching entities, or that if a third entity such as Bell South was attached to 40 percent or more of Rutherford's poles to which TWEAN was also attached, her methodology would not justify Rutherford's rates. On cross-examination, Beacham admitted she was unaware of the fact that in 2001, NARUC's board resolved that states should regulate all pole attachment rates, including those for municipalities and EMCs, according to the FCC Cable Rate "because it is simple, it is fair and reasonable, it uses readily identifiable information and it avoids disputes."

Finally, Rutherford offered expert testimony from Gregory Booth, an engineer who performed a rate analysis as well as a Times Interest Earned Ratio ("TIER") analysis on Rutherford's rates. Booth's rate analysis combined several formulas to calculate a range of maximum just and reasonable rates based on an equal allocation of the usable and unusable space occupied by the attacher. However, despite his testimony that the costs of unusable pole space should be paid for evenly by each party that occupies the pole, Booth employed the same unusable space allocation methodology as Haire, dividing the unusable space by 1.45 rather than recognizing that, by definition, each of Rutherford's poles to which TWEAN attaches must have a minimum of two attachers—i.e., TWEAN and Rutherford. Booth defended his space allocation methodology by claiming that the average pole TWEAN attaches to is more expensive for Rutherford, but Rutherford presented no evidence to support this assertion, nor did it present any data about how many (or which) poles in its system have one or more third-party attachments. Also like Haire, Booth allocated 100% of the NESC-required safety space

to TWEAN in his calculations, thereby increasing the one-foot of usable space TWEAN's attachments occupy by an additional 40 inches, which he justified by reasoning that were it not for TWEAN's attachments, the safety space would not be required and Rutherford would be able to make fuller use of the usable space on its poles. Unlike Haire, Booth's calculations for determining Rutherford's costs and the amount of space to allocate per attacher utilized an average of only 10.83 feet of usable space per pole.

Based on his TIER analysis, Booth claimed that even at its current pole attachment rates, financially speaking, Rutherford's bottom line would be better off without any third-party communication attachments like TWEAN's, although his analysis relied on the assumption that the only reason Rutherford uses 40-foot poles, instead of cheaper 35-foot poles, is to provide pole attachment space for TWEAN and other communications licensees. Moreover, Booth testified that while Rutherford might eventually recoup its investment in those more expensive poles at its present attachment rates, applying the FCC Cable Rate would amount to an improper subsidy for TWEAN at the expense of Rutherford's member-owners.

To support its argument that Rutherford's rates for the disputed years were neither just nor reasonable under section 62-350, TWEAN relied on expert testimony from economist Patricia Kravtin. She testified that by applying the FCC Cable Rate to Rutherford's financial data, the maximum just and reasonable pole attachment rates for each year in question were $2.68 in 2010, $2.56 in 2011, $2.57 in 2012, and $2.64 in 2013. She also offered alternative calculations based on the higher inputs Rutherford's experts used to determine the net bare costs of a pole, which resulted in a slight increase in the maximum just and reasonable pole attachment rates for the disputed years to $3.63 for 2010, $3.51 for 2011, $3.51 for 2012, and $3.55 for 2013. As Kravtin explained, the differences between her rate calculations and those proposed by Rutherford's experts were driven primarily by Rutherford's method of allocating unusable pole space to TWEAN and other third-party attachers. Kravtin testified that in her view, by charging attachers in proportion to the usable space they occupy on the pole, the FCC Cable Rate provides a more just and reasonable allocation of costs, in the same way that it makes more sense to charge a tenant who occupies only one floor of a ten-story apartment building 10 percent of the costs of the building's common space. Kravtin also took issue with Booth's allocation of 100 percent of the NESC-required safety space to the attacher, given the evidence that Rutherford still made use of the space itself, and with Booth's argument that applying the FCC Cable Rate would result in a

subsidy for TWEAN, arguing instead that if anything, attachments leave utilities like Rutherford in a better position economically because they can generate additional revenue by utilizing surplus space on their poles while attachers pay the resulting incremental cost increases. Moreover, Kravtin testified that although it was initially intended to apply only to IOUs, the FCC Cable Rate is more widely applicable and more straightforward to calculate than the formulas Rutherford's experts relied on because it utilizes clear, readily accessible data inputs and presumptive averages rather than detailed statistics that EMCs including Rutherford simply do not maintain.

On 22 May 2014, the Business Court issued an order and opinion holding that the pole attachment rates Rutherford charged TWEAN between 2010 and 2013 are unjust and unreasonable under section 62-350, and that Rutherford violated section 62-350 by unilaterally increasing its rates during those years without first negotiating with TWEAN. In its findings of fact, the Business Court noted that although section 62-350 allows it to consider and "apply other evidence presented by the parties to determine whether [Rutherford's] rates are just and reasonable, the Court looks first to the FCC's methods for setting maximum just and reasonable pole attachment rates, given the express instruction for the Court to consider the FCC approach outlined in Section 224." The Court further found that the FCC Cable Rate "provides an economically justified means of reasonably allocating costs" and "promotes uniformity in pole attachment rates across the state" because its formula is "applicable to all manner of utilities regardless of differences in costs, the number of attaching entities, or other variables." Indeed, as the Court noted, even NRECA, which promulgated the Telecom Plus formula on which Rutherford's experts partially relied, has stated that rates established according to the FCC's rules are "unimpeachable" because "the FCC rate formulas are sanctioned by the U.S. Congress, have been adopted by most of the states that regulate pole attachments and are the most widely accepted methodologies for calculating pole attachment rates." Thus, the Business Court found that

> it is appropriate to consider the rates yielded by the FCC Cable Rate formula in determining whether [Rutherford's] rates are just and reasonable. Not only is the Court directed to do so by § 62-350, but, by applying the facts presented in this case to an analytical structure that is well-understood, widely used, and judicially sanctioned, the Court is assured that it is not exceeding its judicial function. Moreover, the Court expects that reliance on

> established FCC precedent will, as the General Assembly intended, provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions.

However, the Court also emphasized that "this finding is based on the facts presented at trial in this case, and does not limit the Court from considering other methods of proving just and reasonable rates in future cases that may be brought under § 62-350."

The Business Court found that TWEAN's expert Kravtin was the only witness to provide credible evidence of what Rutherford's maximum just and reasonable rate would be under the FCC Cable Rate formula. Despite Rutherford's objections, it further found that Kravtin's use of the FCC Cable Rate's presumptive average of 13.5 feet of usable space per pole when deriving the space allocation factor "was reasonable given the lack of complete data from [Rutherford] on the average usable space on an average pole in its system."

By contrast, the Business Court found that the different rate methodologies that Rutherford's experts offered as proof that its rates were just and reasonable conflicted with each other and were not supported by credible evidence. As the Court noted, Rutherford's experts relied on NRECA's Telecom Plus formula and other methodologies which have "not been adopted by any court or administrative agency as a means of establishing a maximum just and reasonable rate." Moreover, the Court found that the evidence before it did not justify Rutherford's use of the Telecom Plus formula's equal allocation of unusable space in light of the unequal rights and benefits accruing to the parties under its standard third-party CSP attachment agreement. Nevertheless, the Court noted that it "might have been swayed by [Rutherford's] arguments regarding the equal allocation of the unusable space, if the attachers shared equal rights to the pole and the cost was indeed equally allocated." However, even assuming *arguendo* that Rutherford's decision to allocate unusable space to attachers was a defensible method for calculating a reasonable rate, the Court noted that Rutherford's experts all made critical errors in applying it. For example, the Court found that Haire's rate calculations were flawed because they were based on: (1) a miscalculation of the Telecom Plus formula's carrying charge element; (2) a failure to divide maintenance expenses; (3) an erroneous use of a default rate of return instead of Rutherford's actual rate of return; and (4) Haire's failure to divide the cost of unusable space equally among all attachers. The Court found that when combined, these errors resulted in a 2012 rate that was nearly $8.00 higher than the Telecom Plus rate would yield if properly

applied and $3.00 higher than what Rutherford actually charged TWEAN for that year. The Court also found Rutherford's expert Beacham's rate calculations similarly unpersuasive, given that her approach to space allocation required data on the number of entities on an average pole that Rutherford did not maintain.

The Business Court likewise found that Rutherford's expert Booth's rate analysis was flawed because his calculation that Rutherford's poles averaged only 10.83 feet of usable space was based not on actual data but instead on a series of flawed assumptions regarding the average height of Rutherford's poles, the average amount of space Rutherford uses on its poles, and the average number of third-party attachers per pole. The Court also rejected Booth's proposed allocation of 100 percent of the NESC-required safety space to TWEAN, which neither the FCC nor NRECA support and which the Court found would be unjust and unreasonable because Rutherford itself uses the safety space to generate revenue by installing streetlights. The Court further found that Booth's decision to allocate unusable space by dividing Rutherford's costs by only 1.45 attachers per pole after assigning the entire 40-inch safety space to TWEAN substantially increased TWEAN's rates but also contradicted his purported goal of equally allocating unusable space to each attacher, and was both unjust and unreasonable because "despite [Rutherford's] (and Bell South's) greater use of the pole and more valuable rights, Booth's rate methodology assigns a significantly greater portion of the pole costs (over 60 percent) to [TWEAN] than to any other party on the pole, including the pole owner."

The Business Court also rejected both Booth's TIER analysis, which it found was too faulty to be relied upon because it ignored Rutherford's actual practices and the terms of its attachment agreement with TWEAN, and Booth's argument that application of the FCC Cable Rate would result in a subsidy to TWEAN at the expense of Rutherford's members. In its findings, the Court noted that Booth's underlying assumption—that Rutherford only installs 40-foot poles to support attachments by TWEAN and other third-party attachers—was contradicted by: (1) testimony from Rutherford's other witnesses that it has used 40-foot poles as its standard pole size for the past 25 years, regardless of whether CSPs were present, to accommodate other electric utilities who as joint-users do not pay for their attachments; and (2) the terms of Rutherford's agreement with TWEAN, which explicitly require TWEAN to pay to install and make ready new, larger poles—which Rutherford takes ownership of while TWEAN continues to pay to attach—when additional space is needed for its attachments. Thus, contrary to Booth's claims,

the Court found that the FCC Cable Rate "actually leaves the utility and its customers better off than they would be if no attachments were made to their poles" because the cable attacher "pays most of the incremental 'but for' costs of attachment up front, as well as its share of the fully allocated costs of pole ownership that necessarily would exist even absent its attachment." In terms of subsidies, the Court found that if anything, in light of the agreement's terms, they flowed the opposite direction because "[w]hen [TWEAN] pay[s] to create surplus space where it does not already exist, [Rutherford] benefits from receiving a taller, stronger pole that enhances [Rutherford's] network, and TWEAN remain[s] obligated to pay annual rent to maintain an attachment to that pole."

The Business Court also rejected Rutherford's argument that its rates from 2010 to 2013 should be considered just, reasonable, and binding on TWEAN simply because other CSPs such as Charter Communications continued to pay them, especially in light of the evidence in the record that Charter only continued to pay due to its reluctance or inability to litigate the issue. As for Rutherford's argument that applying the FCC Cable Rate would lead to an absurd result, given that Kravtin's calculations for a just and reasonable rate yielded sums less than half of what TWEAN had voluntarily agreed to pay in 1998, the Court acknowledged "the disparity between the FCC Cable rates calculated by Kravtin and the IOU rates, on the one hand, and the rates charged by [Rutherford], on the other hand," but nevertheless found that disparity "does not undercut the reasonableness of the former or justify the latter."

Ultimately, the Business Court concluded that Rutherford's pole attachment rates from 2010 through 2013 were not just and reasonable because they "greatly exceed the maximum just and reasonable pole attachment rates calculated under the FCC Cable Rate formula, and are not otherwise supported by the evidence and methodologies put forth by [Rutherford] and its experts." While acknowledging that section 62-350 "does not limit the Court's consideration [of whether a rate is just and reasonable] to only the [FCC] rules and regulations applicable under Section 224," it nevertheless concluded that "on the record before the Court in this case, the FCC Cable Rate formula offered the most credible basis for measuring the reasonableness of [Rutherford's] rates." The Court further concluded that contrary to Rutherford's interpretation of section 62-350's use of the term "nondiscriminatory" to mean that its rates should be deemed reasonable because other third-party CSP attachers in the same class as TWEAN accepted them, the statute's detailed provisions requiring EMCs to negotiate when requested "would be meaningless if [Rutherford] could dictate the rates and terms of

attachment for every communications service provider once it reached an agreement with a single one." After noting that our General Assembly could have expressly insulated class-based rates from review in individual cases but did not, the Court concluded that "other third-party attachers' acceptance of [Rutherford's] rates may be weighed as evidence . . . [but] will not foreclose [judicial] review under § 62-350." Consequently, the Court also held that Rutherford violated section 62-350 by unilaterally increasing TWEAN's rates without negotiation. Given the statute's plain language and its detailed procedures for negotiating disputes between EMCs and CSPs, the Court concluded that

> [t]he meaning of the statute is clear. [Rutherford] cannot subject a communications service provider to a rate without first negotiating and subsequently adopting a rate or litigating disputes. Although § 62-350 in no way bars the parties from reaching an agreement through negotiation that may contemplate annual rate increases, . . . the statute cannot be construed to allow [Rutherford] to do so without first negotiating with [TWEAN].

Finally, having found Rutherford's rates for the years 2010 through 2013 unjust and unreasonable, the Business Court concluded pursuant to section 62-350 that "the parties must negotiate and adopt new rates" for those years, which "shall be applied retroactively to the date immediately following the expiration of the 90-day negotiating period for each year or the initiation of this lawsuit, whichever is earlier." The Court specifically declined to assess any damages for TWEAN because doing so "would be, in effect, setting a new rate" which it declined to do out of concern for exceeding its judicial role. Instead, the Court ordered the parties to adopt new rates for 2010 through 2013 in accordance with the reasoning outlined in its order and opinion, and further ordered that, based on those new rates, Rutherford reimburse TWEAN for any amounts it overpaid between 2010 and 2012, and that TWC Southeast pay Rutherford the amount it owed based on the new rate adopted for 2013.

On 11 June 2014, Rutherford gave timely written notice of appeal to this Court.

II. Analysis

A. Rutherford's rates from 2010-13 were not just or reasonable under section 62-350

[1] Rutherford first argues that the Business Court erred in its findings of fact and conclusion of law that the rates it charged TWEAN between

2010 and 2013 were not just and reasonable under section 62-350. We disagree.

The standard of review on appeal from a judgment entered after a non-jury trial like the one the Business Court conducted in this matter is "whether there is competent evidence to support the [] court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007) (citations and internal quotation marks omitted), *affirmed per curiam*, 362 N.C. 343, 661 S.E.2d 732 (2008). When the court's factual findings are supported by competent evidence, they are considered conclusive, *see id.*, while "unchallenged findings of fact are presumed to be supported by competent evidence" and thus likewise binding on appeal. *Peltzer v. Peltzer*, __ N.C. App. __, __, 732 S.E.2d 357, 360, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). However, "it is well established that facts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light." *42 East, LLC v. D.R. Horton, Inc.*, 218 N.C. App. 503, 518, 722 S.E.2d 1, 11 (2012) (citation and internal quotation marks omitted). Further, conclusions of law which are mischaracterized as findings of fact will be treated on review as conclusions of law. *See, e.g., Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007); *see also In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) ("As a general rule . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law."). A trial court's conclusions of law are reviewed *de novo*, as are any questions of statutory interpretation. *See, e.g., Dare Cnty Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997).

In the present case, Rutherford does not specifically challenge any of the order and opinion's factual findings, but instead contends that the order and opinion must be vacated in its entirety and the case remanded for a new trial because the Business Court misapprehended our General Assembly's intent in enacting section 62-350 and therefore misinterpreted and misapplied its provisions, leading to an absurd result. Rutherford offers several arguments in support of its position that the Business Court erred in its interpretation of the statute, but none of them are meritorious.

(1) The FCC Cable Rate was the only provision of Section 224 relied on at trial

First, Rutherford argues that because the statute refers to "section 224 of the Communications Act of 1934," which at the time of section

62-350's enactment in 2009 included both the FCC Cable Rate and the FCC Telecom Rate, the Business Court erred by only considering the FCC Cable Rate to determine whether Rutherford's rates were just and reasonable. However, in light of the fact that none of Rutherford's experts relied on the FCC Telecom Rate for their calculations at trial, we consider this argument to be the judicial equivalent of a red herring. While Rutherford contends that its experts utilized formulas that share the FCC Telecom Rate's approach for allocating unusable pole space, the record before us indicates that the only evidence introduced at trial regarding the specific formulas found in section 224 of the Communications Act of 1934 was TWEAN's expert Kravtin's testimony based on the FCC Cable Rate. As such, this argument is without merit.

(2) The Business Court did not presumptively adopt the FCC Cable Rate

Rutherford next argues that the Business Court erred by presumptively applying the FCC Cable Rate to determine whether its pole attachment rates were just and reasonable because the express language and legislative history of section 62-350 illustrate that our General Assembly did not intend to enact a federal standard of decision. In terms of legislative history, Rutherford emphasizes the fact that in deliberating how best to regulate pole attachment rates, our General Assembly considered statutory language that would have mandated the use of FCC rules and regulations for determining whether a rate is just and reasonable, but ultimately rejected that version of section 62-350 in favor of its current format. Rutherford further contends that, as enacted, section 62-350's reference to "section 224 of the Communications Act of 1934" was only intended to address the admissibility of otherwise irrelevant evidence regarding federal rate-setting methods while still preserving a state law standard of decision. Indeed, Rutherford points to the use of the phrase "including without limitation" to modify the statute's reference to section 224 as proof that the General Assembly never intended for the FCC Cable Rate to presumptively apply as the standard of decision for determining whether an EMC's rates are just and reasonable.

Instead, Rutherford argues that because section 62-350 includes the terms "just," "reasonable," and "nondiscriminatory"—which are all commonly used in North Carolina statutes and case law relating to activities legislatively determined to affect a public use—and because section 62-350 falls under our State's Public Utilities Act, our General Assembly clearly intended for the Business Court to utilize state law standards in assessing pole attachment rates. Rutherford contends this is significant because unlike the FCC Cable Rate, which offers a strictly cost-based

approach, the state law standard the General Assembly intended requires additional consideration of other factors, including Rutherford's organizational structure and revenue requirements as an EMC and the costs it incurs by allowing attachments to its poles, as well as distinct evidentiary standards and presumptions. *See*, *e.g.*, *State ex rel Utils. Comm'n v. Carolina Util. Customers Ass'n*, *Inc.*, 348 N.C. 452, 467, 500 S.E.2d 693, 704 (1998); *State ex rel Utils. Comm'n v. Carolina Util. Customers Ass'n*, *Inc.*, 351 N.C. 223, 245, 524 S.E.2d 10, 24 (2000). Specifically, Rutherford argues that under a state law standard: (1) the rates adopted by a legislatively designated rate-setting body are presumed to be just and reasonable; and (2) the inclusion of the term "nondiscriminatory" in section 62-350 obligates it to charge uniform class-based rates, which are judged based on their fairness to the class as a whole, rather than any specific individual member. *See*, *e.g.*, *Carolina Water Serv.*, *Inc. v. Pine Knoll Shores*, 145 N.C. App. 686, 689, 551 S.E.2d 558, 560, *disc. review denied*, 354 N.C. 360, 556 S.E.2d 298 (2001); *State ex rel Utils. Comm'n v. Boren Clay Products Co.*, 48 N.C. App. 263, 270-71, 269 S.E.2d 234, 239-41, *disc. review denied*, 301 N.C. 531, 273 S.E.2d 461 (1980); *State ex rel Corp. Comm'n v. Cannon Mfg. Co.*, 185 N.C. 17, 35, 116 S.E. 178, 189 (1923).

Proceeding from these premises, Rutherford contends that because other third-party attachers continued to pay its pole attachment rates during the years TWEAN refused, the rates should be presumed just and reasonable, and that the Business Court therefore erred in applying the FCC Cable Rate and rejecting the rate calculations proposed by Rutherford's experts based on its findings of fact, which Rutherford contends are mislabeled conclusions of law, that: (1) section 62-350's reference to section 224 indicates a "policy decision" by the General Assembly to require the use of federal standards and distinct cost apportionment methods associated with them; (2) the Court should "look[] first to the FCC's methods . . . given [section 62-350's] express instruction for the Court to consider the FCC approach outlined in Section 224;" and (3) the General Assembly "intended" that "reliance on established FCC precedent will . . . provide helpful guidance to parties involved in future negotiations over just and reasonable pole attachment rates, terms, and conditions."

We agree with Rutherford that section 62-350's legislative history and its use of the phrase "including without limitation" suggests that our General Assembly did not intend for the Business Court to rely solely on the FCC Cable Rate as its standard of decision for evaluating whether a pole attachment rate is just and reasonable. Indeed, we construe the

plain language of section 62-350 to indicate a broadly inclusive approach to the types of evidence the Business Court should consider in analyzing pole attachment rates. However, Rutherford's argument that the Business Court presumptively adopted the FCC Cable Rate as its standard of decision fails because it relies on selective quotations from the order and opinion that distort and ignore the context of its holding. While certain findings of fact do suggest that the Business Court viewed the FCC Cable Rate's formula for allocating costs to attachers based on the proportion of usable pole space they occupy to be a more just and reasonable method of apportionment than those provided in the formulas Rutherford's experts relied on, the order and opinion makes clear that the Court's ultimate holding was based not on its preference for one formula over another but instead on the fact that—due to the significant errors Rutherford's experts made in calculating their proposed rates—the only competent evidence before the Court showed that the rates Rutherford charged TWEAN for the disputed years were neither just nor reasonable under the FCC Cable Rate. Stated slightly more succinctly: the problem for Rutherford was not that the Business Court refused to consider its evidence, but that it did not consider its evidence competent because the errors by Rutherford's witnesses Haire, Beacham, and Booth artificially inflated the pole attachment rates they testified would be just and reasonable. In short, the Business Court did not decide that Rutherford's witnesses were applying the wrong formulas; it concluded that they were applying them incorrectly. In the absence of any other competent evidence, it is unsurprising that the Business Court would rely on the FCC's methodology, which the express terms of section 62-350 indicate is admissible as at least some evidence of whether a pole attachment rate is just and reasonable. But that does not mean that in doing so the Business Court presumptively adopted the FCC Cable Rate as its standard of decision. Indeed, our review of the order and opinion demonstrates that, contrary to Rutherford's claims, the Business Court explicitly and repeatedly explained that its findings and conclusions were "based on the facts presented at trial in this case, and do[] not limit the Court from considering other methods of proving just and reasonable rates in future cases that may be brought under § 62-350." As such, we conclude that the Business Court did not adopt the FCC Cable Rate as a presumptive standard of decision, nor did it err in applying it here, absent any other competent evidence, to determine Rutherford's rates for the disputed years were not just and reasonable.

As noted *supra*, Rutherford also argues that the Business Court erred by disregarding the state law standard of decision it claims our

General Assembly intended, including the presumption that its rates are just and reasonable as a legislatively designated rate-making body that is obligated to charge uniform rates based on the statute's inclusion of the term "nondiscriminatory." Rutherford further contends that, in light of case law indicating the fairness of a class-based rate should be measured on a class-wide basis, *see, e.g.*, *Boren Clay Products Co.*, 48 N.C. App. at 270-71, 269 S.E.2d at 239-41, the Business Court should have presumed its rates were just and reasonable because other third-party attachers paid them. There are several reasons why these arguments fail.

On the one hand, we agree with the Business Court's conclusion that while another attacher's acceptance of Rutherford's uniform class-based rates may serve as some evidence those rates are just and reasonable, nothing in section 62-350 suggests that a rate should be presumed just and reasonable simply because it is uniform, or that the acceptance of such a rate by one attacher makes it just and reasonable as applied to all others, especially when, as here, the record demonstrates that although TWEAN was the only attacher to stop paying, others were clearly dissatisfied with Rutherford's rates but could not afford to litigate. Like the Business Court, we read the plain language and structure of the statute to indicate that Rutherford must negotiate with each CSP that so requests, and we likewise conclude that the detailed timelines for negotiations and procedures for judicial review provided under section 62-350 would be meaningless if Rutherford "could dictate the rates and terms of attachment for every [CSP] once it reached an agreement with a single one." We are similarly unpersuaded by Rutherford's argument that the Business Court erred because TWEAN failed to prove that the uniform class-based rates Rutherford charged were unreasonable on a class-wide basis, given that Rutherford failed to prove its rates were reasonable on any basis and nothing in the record indicates that either party's rate calculations depended on any information that was uniquely specific to TWEAN. Both parties relied on Rutherford's information to calculate the costs of its poles, and Rutherford's experts based their allocation of those costs to TWEAN on Rutherford's system-wide averages, while TWEAN applied the FCC Cable Rate's allocation formula based on the one foot of usable pole space its attachments occupy. Even assuming *arguendo* that Rutherford's other third-party CSP attachers might occupy slightly more or less space on its poles than TWEAN's attachments, we conclude that because those variations would be immaterial in light of the vast disparity between the maximum just and reasonable rate under the FCC Cable Rate and the rates Rutherford actually charged, this argument lacks merit.

On the other hand, it is difficult to discern how any of the state law presumptions Rutherford refers to could apply in this case, given that Rutherford failed to present any competent evidence that its rates were just and reasonable. The Business Court's order and opinion provides detailed findings of fact explaining how the errors Rutherford's experts made in their calculations artificially inflated its rates and why the Court did not consider them. Those findings do not require the application of legal principles and are well supported in the record by competent evidence including each witness's testimony at trial. Moreover, Rutherford does not challenge any of them or offer any argument as to how or why the state law standards it insists the Business Court should have applied would excuse self-serving mathematical errors. Therefore, these factual findings are binding on appeal. *See Peltzer*, __ N.C. App. at __, 732 S.E.2d at 360; *Everette*, 133 N.C. App. at 85, 514 S.E.2d at 525. Again, the only competent evidence before the Business Court showed that Rutherford's rates were not just or reasonable under the FCC Cable Rate, and we conclude this was sufficient to rebut the state law standards and presumptions of reasonableness Rutherford claims should have applied, as there was simply nothing to which they could attach. We therefore further conclude that Rutherford's argument that the Business Court erred by failing to apply state law standards and presumptions lacks merit.

(3) This result is not absurd

Finally, Rutherford argues that the Business Court erred because its application of the FCC Cable Rate produced absurd results that could not have been intended by the General Assembly. While it is well established that our primary objective in construing a statute is to give effect to its legislative intent based on its plain meaning, when a literal reading of a statute "will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Freeland v. Orange Cnty.*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968).

Here, Rutherford contends the Business Court's application of the FCC Cable Rate produced absurd results with regard to both its rate levels and its aggregate pole attachment revenues. First, Rutherford complains that the Business Court's determination of its maximum just and reasonable per attachment rates of $2.68 for 2010, $2.56 for 2011, $2.57 for 2012, and $2.64 for 2013 are less than half of the per attachment rate of $5.50 that TWEAN voluntarily paid in 1999. Rutherford further asserts, without citation to any evidence in the record, that our General Assembly surely could not have intended for section 62-350 to statutorily mandate a rollback of pole attachment rates. But Rutherford's bald

assertion ignores this Court's prior holding that section 62-350 "endorses regulatory intervention to promote just and reasonable rates," *Town of Landis*, __ N.C. App. at __, 747 S.E.2d at 615, as well as the fact that before the statute's enactment in 2009, Rutherford and other EMCs were operating in what essentially amounted to an unregulated monopoly environment in which they were allowed to charge whatever exorbitant rate they wanted. We also note that Rutherford's argument mischaracterizes what the Business Court actually held. As its order and opinion makes clear, the Business Court explicitly declined to *set* a maximum just and reasonable pole attachment rate out of concern that doing so would exceed its judicial function. Instead, it held that Rutherford's rates for the years in dispute were not just or reasonable based on the only competent evidence in the record before it—TWEAN's expert Kravtin's testimony applying the FCC Cable Rate—and ordered the parties to "negotiate and adopt new rates" for the years in dispute. Thus, we conclude this argument is without merit.

Rutherford also complains that under the FCC Cable Rate, the maximum just and reasonable pole attachment rate it can charge as an EMC is far lower than the maximum rate the same formula could potentially generate for an IOU, which will result in a drastic reduction to its total revenues from pole attachments. By Rutherford's logic, this is an absurd result in part because Congress never intended for the FCC Cable Rate to apply to EMCs, which it exempted from federal regulation when it first enacted legislation to protect the then-fledgling cable industry from monopoly pole attachment rates charged by for-profit IOUs. Nevertheless, the Business Court provided detailed factual findings explaining that the FCC Cable Rate is widely lauded for its straightforward applicability to all types of utilities. Rutherford's related argument that our General Assembly never intended for the Business Court to presumptively adopt the FCC Cable Rate as its standard of decision fails for the same reasons already discussed *supra*. Moreover, as Rutherford concedes, the disparity in the maximum rates EMCs and IOUs can charge under the FCC Cable Rate is driven entirely by the disparities in their relative costs. As an EMC organized under Chapter 117 of our General Statutes, Rutherford's costs are far lower than a typical IOU's because it is exempt from paying income taxes and receives many other special advantages in order to better serve its core mission of helping to spread electricity to rural parts of our State.

Rutherford further protests that under the FCC Cable Rate its rates will be even lower relative to IOU rates because its rural service areas have a lower average number of attaching parties per pole than IOUs

that serve more densely populated areas. Essentially then, Rutherford's argument amounts to a plea for more special advantages to make up for all the special advantages that it already gets, implying that otherwise its core mission could be jeopardized by the decline in its pole attachment revenues. Rutherford made similar arguments at trial, but the Business Court rejected them in detailed factual findings explaining that, rather than subsidizing TWEAN at Rutherford's members' expense, applying the FCC Cable Rate would still benefit Rutherford financially because the incidental costs of attachments are paid by the attachers who generate additional revenue for Rutherford by renting surplus pole space that would otherwise go unoccupied. Moreover, nothing in our review of the record indicates that Rutherford's continued financial stability is in any way dependent on its pole attachment rates or supports its insinuation that application of the FCC Cable Rate will endanger its core mission. Rutherford also argues that as an EMC, Chapter 117 of our General Statutes conveys vast discretion to its board of directors to act in the best interests of its member-owners. That may well be true, but section 62-350 demonstrates our General Assembly's intent to limit that discretion when it comes to charging pole attachment rates. While Rutherford's board of directors may no doubt be unhappy that it can no longer charge the same pole attachment rates it previously could in an unregulated monopoly environment, that alone does not mean the Business Court's narrow, detailed, and accurate application of section 62-350 produced an absurd result. We therefore conclude that this argument is without merit.

Accordingly, we hold that the Business Court did not err in concluding that Rutherford's rates for the disputed years were neither just nor reasonable under section 62-350.

B. Rutherford violated § 62-350 by unilaterally raising its rates without negotiation

[2] Rutherford also argues that the Business Court erred by concluding that it violated TWEAN's rights under section 62-350 when it unilaterally raised TWEAN's pole attachment rates without negotiation. Specifically, Rutherford contends that given the statute's inclusion of the term "nondiscriminatory," it is obligated to charge a uniform rate to all similarly situated third-party attachers, which means it was required to invoice TWEAN at the same rate it charged other CSPs, which continued to increase during the years in dispute. Therefore, Rutherford insists that it did not violate section 62-350 when it continued to unilaterally raise TWEAN's rates without negotiation and also complains that the

Business Court's interpretation of the statute renders compliance virtually impossible. We disagree.

The plain language of section 62-350 requires a utility pole owner to allow CSPs to attach to its poles at "just, reasonable, and nondiscriminatory rates, terms, and conditions *adopted pursuant to negotiated or adjudicated agreements*," N.C. Gen. Stat. § 62-350(a) (emphasis added), and further provides procedures for negotiations upon a CSP's request and mechanisms for resolving disputes arising therefrom. *Id.* § 62-350(b)-(c). Thus, as the Business Court concluded in its order and opinion, "[t]he meaning of the statute is clear. [Rutherford] cannot subject a [CSP] to a rate without first negotiating and subsequently adopting a rate or litigating disputes."

Rutherford's protests to the contrary are wholly unpersuasive. On the one hand, Rutherford insists that as an EMC organized under Chapter 117 of our General Statutes, it is authorized to adopt uniform rates for similarly situated attachers, and that section 62-350 does not purport to extinguish that authority or transfer it to either the Business Court or an objecting attacher. But this argument conveniently ignores the statute's plain language, which requires Rutherford to negotiate when requested before charging rates that are not merely uniform but also just and reasonable. On the other hand, Rutherford worries that if an EMC with multiple CSPs attached to its poles must first negotiate with every attacher that so requests before adopting a rate, compliance with section 62-350's nondiscrimination requirement will be virtually impossible. We see no reason that would prevent a pole owner from adopting temporary rates subject to true-up while negotiating rates with multiple attachers at the same time and then subsequently adopting a uniform rate that is just and reasonable as to all of them.

Finally then, absent any credible argument why we should ignore the statute's plain language, we have no trouble concluding from the procedural history of this litigation that Rutherford violated section 62-350. The record before us clearly indicates that after the parties began negotiating pursuant to section 62-350, Rutherford unilaterally raised TWEAN's pole attachment rates each year and threatened to remove TWEAN's attachments from its poles if it refused to pay the increased rates. Rutherford attempts to argue that its actions did not violate section 62-350 because it only subjected TWEAN to invoices, but given Rutherford's failure to show that the rates reflected in these invoices were "adopted pursuant to negotiated or adjudicated agreements" as the statute's express terms require, id. § 62-350(a), this

argument fails. Accordingly, we hold that the Business Court did not err in concluding that Rutherford violated section 62-350 when it unilaterally raised TWEAN's pole attachment rates without negotiation. Therefore, the Business Court's order and opinion is

AFFIRMED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
GARY ANDERSON BARKER, JR., DEFENDANT

No. COA14-744

Filed 7 April 2015

1. False Pretense—indictment—misrepresentation—roof repairs

The Court of Appeals rejected defendant's argument that his indictments for obtaining property by false pretenses were facially invalid because they failed to "intelligibly articulate" defendant's misrepresentations. The indictments clearly stated that defendant told his elderly victims their roofs needed repairs when the roofs in fact did not need repairs.

2. False Pretense—sufficiency of the evidence—misrepresentation—roof repairs—incomplete or substandard work

In defendant's appeal of his convictions for obtaining property by false pretenses, the Court of Appeals rejected his argument that the trial court erred by denying his motion to dismiss. In the light most favorable to the State, the evidence showed that defendant falsely told his elderly victims that their roofs needed repairs and then took their money only to perform incomplete or substandard work.

3. False Pretense—jury instructions—specific misrepresentation and property—not required

In defendant's trial for obtaining property by false pretenses, the trial court did not err by failing to instruct the jury on the specific alleged misrepresentation made or the property received by defendant. The trial court properly gave the pattern jury instruction and was not required to specify the misrepresentation or property received. Even assuming error, there would be no plain error

because the Court of Appeals has consistently found no error where a trial court has given the pattern jury instruction on obtaining property by false pretenses.

4. False Pretense—bad character evidence—post-arrest interview video

In defendant's trial for obtaining property by false pretenses, the trial court did not commit plain error by admitting a video recording of defendant's post-arrest interview with a police detective, which contained evidence of defendant's bad character. Defendant knew the contents of the video yet chose not to object—perhaps as part of his trial strategy—and he failed to meet his burden of showing that the trial court erred. Even assuming the trial court erred, in light of abundant other testimony that defendant actively sought to defraud elderly homeowners, defendant did not demonstrate prejudice.

5. False Pretense—bad character testimony—showed plan to defraud

In defendant's trial for obtaining property by false pretenses, the trial court did not err by admitting Rule 404(b) testimony from multiple witnesses tending to show that defendant actively sought to defraud elderly homeowners by falsely telling them their roofs needed repairs. This evidence was relevant for showing defendant's common plan, knowledge, intent, and lack of mistake, and the probative value outweighed the prejudicial effect. Furthermore, the trial court gave a limiting instruction to the jury.

Appeal by defendant from judgment entered 1 November 2013 by Judge W. Douglas Parsons in Orange County Superior Court. Heard in the Court of Appeals 6 January 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David N. Kirkman, for the State.

Michele Goldman for defendant-appellant.

BRYANT, Judge.

Where an indictment for the offense of obtaining property by false pretenses alleges the ultimate facts of the offense, including the acts of misrepresentation, the indictment is not facially defective. The trial court did not commit error, plain or otherwise, in the admission of evidence, including evidence admitted under Rule 404(b).

On 22 April 2013, defendant Gary Anderson Barker, Jr., was indicted on two counts of obtaining property by false pretenses and for being an habitual felon. The charges came on for trial during the 28 October session of Orange County Superior Court, the Honorable W. Douglas Parsons, Judge presiding. At trial, the evidence tended to show the following.

In May of 2010, defendant approached Nellie Harward at her home and told her that her roof needed repainting. Ms. Harward, who was eighty-five years old, was persuaded by defendant and paid him $2,200.00 to repaint the metal roof of her home with black paint. Defendant also told Ms. Harward he would repair a shed in her backyard which housed her laundry equipment. Ms. Harward signed agreements with defendant for the work on her home and shed. Defendant worked on the roofing and siding of the shed, and rewired the shed. Ms. Harward paid defendant in two checks in the amount of $3,400.00 and $3,900.00, for a total of $7,300.00, for the shed repairs.

Ms. Harward stated that as soon as it began to rain, the roof of her newly repaired shed began to leak and continued to do so each time it rained, damaging her new clothes dryer. Ms. Harward also stated that the black paint defendant had used on her roof quickly began to flake and peel off, causing leaks in the ceiling of her home. When Ms. Harward asked defendant to repair the roofs on her home and shed to stop the leaks, defendant claimed his repairs did not cause the leaks. After defendant refused to repair the leaking house and shed roofs, Dennis LaRue, a neighbor of Ms. Harward's, fixed the roof of her home and replaced her backyard shed. LaRue noted the shoddy work and substandard materials used by defendant and testified regarding them at trial. Ms. Harward ultimately paid $8,000.00 to have her shed replaced in order to correct the "work" defendant performed on it.

Also, in May of 2010, Ms. Geraldine Hoenig was approached by defendant who claimed Ms. Hoenig's roof needed repair. After inspecting her roof, defendant told Ms. Hoenig she also needed to repair the roof decking on her home because the wood was rotten. Defendant told Ms. Hoenig that he could repair her roof for $6,800.00 and her chimney for $900.00. Ms. Hoenig borrowed $4,000.00 from the bank to pay defendant. Then, defendant demanded she pay him an additional $2,800.00 so he could special-order white shingles for her roof; Ms. Hoenig returned to her bank and borrowed these additional funds which she paid to defendant.

Defendant and his work crew began to work on Ms. Hoenig's roof, but after removing the shingles surrounding the roof's perimeter,

defendant covered the exposed areas with roofing felt and did not return to complete the job. The roofing felt soon blew off of the roof, causing the roof to leak. When Ms. Hoenig called defendant, defendant claimed he could not finish her roof until the white shingles had arrived. Defendant then told Ms. Hoenig he would need another payment to complete the work, and when she told defendant she could only give him an additional $200.00, defendant accepted the money. Defendant never returned to finish the roofing repairs for Ms. Hoenig.

A subsequent investigation revealed no sign of rotten wood on Ms. Hoenig's roof; rather, the damage observed appeared to have been recently caused by a hammer. It was also determined that defendant had not placed an order for white shingles, despite telling Ms. Hoenig that he had. Ms. Hoenig's roof was later repaired by another roofing company at no cost to her.

The State presented additional testimony by Bill Grice, Zona Norwood, and Helen Stinson. Mr. Grice testified that defendant had contracted with his late father, eighty-six-year-old William F. Grice, to repair his father's roof in May 2010. Mr. Grice stated that he had observed his father arguing with defendant because defendant wanted additional monies paid before he would finish the roof repairs. Mr. Grice further stated that his father's roof had to be replaced about three years later due to leaks caused by defendant's poor workmanship.

Ms. Norwood testified that she was approached by defendant in May of 2010 about needing repairs to the flashing on the chimney of her home where she had resided for forty-four years. Defendant offered to repair the flashing for $40.00. After defendant went onto her roof to repair the chimney flashing, defendant told Ms. Norwood that her roof had significant damage all over it due to hail. Defendant urged Ms. Norwood to call her insurance company and that he would fix her roof for whatever price the insurance company would agree to. However, Ms. Norwood's insurance adjuster found no sign of hail damage to the roof. Another roofer whom Ms. Norwood called for a second opinion also found no evidence of hail damage, although he did notice that the repairs to the chimney flashing were not done properly. The second roofer also found what he determined to be evidence of intentional damage to Ms. Norwood's roof: a new nail had been partially driven into the roof just below the chimney, and the placement of the nail was such that it would cause the roof to leak. The second roofer repaired the damage to Ms. Norwood's roof for $100.00.

Ms. Stinson testified that she was approached by defendant in September of 2009 about needing repairs to her roof. Ms. Stinson, who

was seventy-eight years old, stated that after going onto her roof, defendant claimed that she needed her entire roof replaced. Ms. Stinson eventually paid defendant in three checks in the amount of $425.00, $1,600.00, and $2,000.00, totaling $4025.00, to have her roof repaired. However, after opening a large hole in her roof, defendant failed to fix the hole or finish repairing her roof. Defendant did not respond to Ms. Stinson's phone calls when she tried to reach him. Ms. Stinson had to pay another roofer $3,000.00 to repair the hole in her roof.

The State presented during the trial a video-recording of defendant's post-arrest interview. During the interview defendant, when questioned about the repairs he performed for Ms. Harward and Ms. Hoenig, defended his workmanship and denied any wrongdoing.

On 1 November, a jury convicted defendant on two counts of obtaining property by false pretenses. Defendant plead guilty to the habitual felon charge. The trial court sentenced defendant to 96 to 125 months in prison, and ordered defendant to make restitution to Ms. Harward in the amount of $7,300.00 and to Ms. Hoenig in the amount of $7,000.00. Defendant appeals.

On appeal, defendant argues that (I) his indictments for obtaining property by false pretenses were facially invalid. Defendant further contends the trial court (II) committed plain error in admitting an exhibit, and (III) erred in admitting Rule 404(b) witness testimony.

I.

In his first argument, defendant sets forth three major contentions which we review separately based on the standard of review applicable to each.

Validity of Indictments

[1] Defendant contends his indictments alleging obtaining property by false pretenses were facially invalid because they failed to "intelligibly articulate" defendant's misrepresentations. We disagree.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (citations omitted). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

"An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. It is also generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense." *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) (citing *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977)).

> Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person [pursuant to N.C. Gen. Stat. §] 14-100(a). A key element of the offense is that the representation be intentionally false and deceptive.

State v. Compton, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988) (citations omitted).

The indictments challenged by defendant are as follows. Indictment 10 CRS 51390A, concerning Ms. Hoenig, alleged that

> [t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud obtain U.S. currency in the amount of $7,000.00 from Geraldine Hoenig by means of a false pretense which was calculated to deceive and did deceive. This property was obtained by means of approaching the victim and claiming that her roof needed repair, and then overcharging the victim for either work that did not need to be done, or damage that was caused by the defendant, with no intention of providing professional services to the victim in return for the U.S. currency that he fraudulently acquired.

Indictment 10 CRS 51931A, concerning Ms. Harward, alleged that

> [t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain or attempt to obtain U.S. currency in the amount of $7,300.00 from Nellie Harward by

> means of a false pretense which was calculated to deceive and did deceive. This property was obtained by means of approaching the victim and claiming that her shed roof needed repair, and at the time the defendant intended to use substandard materials and construction to overcharge the victim.

Defendant's argument that the indictments fail to articulate the misrepresentations committed by defendant lacks merit. The indictments clearly state that defendant, on separate occasions, obtained property (money) from Ms. Hoenig and Ms. Harward by convincing each victim to believe that their roofs needed extensive repairs when in fact their roofs were not in need of repair at all. In each indictment, the State gave the name of the victim, the monetary sum defendant took from each victim, and the false representation used by defendant to obtain the money: by defendant "approaching [Ms. Hoenig] and claiming that her roof needed repair, and then overcharging [Ms. Hoenig] for either work that did not need to be done, or damage that was caused by the defendant[.]" As to Ms. Harward, the false representation used by defendant to obtain the money was "by . . . claiming that her shed roof needed repair, [with defendant knowing] at the time [that he] intended to use substandard materials and construction to overcharge [Ms. Harward]." Each indictment charging defendant with obtaining property by false pretenses was facially valid, as each properly gave notice to defendant of all of the elements comprising the charge, including the element defendant primarily challenges: the alleged misrepresentation (i.e., that defendant sought to defraud his victims of money by claiming their roofs needed repair when in fact no repairs were needed, and that defendant initiated these repairs but either failed to complete them or used substandard materials in performing whatever work was done). *See State v. Cronin*, 299 N.C. 229, 238, 262 S.E.2d 277, 283 (1980) (holding that an indictment alleging the defendant had deceived a bank through false representations was facially sufficient, because "[i]f the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense."). Defendant's challenge to the indictments as facially invalid is, therefore, overruled.

Sufficiency of the Evidence

[2] Defendant further argues that even if the indictments were facially valid, the State did not meet its evidentiary burden of proof. Specifically, defendant contends the State's evidence only showed that defendant

"charged a lot for poor quality work," rather than demonstrating that defendant "obtained the property alleged by means of a misrepresentation," and that as a result, the trial court erred in denying defendant's motion to dismiss.

> In order to justify the denial of a motion to dismiss for insufficient evidence, the State must present substantial evidence of (1) each essential element of the [charged offense] and (2) defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. On appeal, we view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. We review a trial court's decision to deny a motion to dismiss for insufficient evidence *de novo*.

State v. Privette, 218 N.C. App. 459, 470-71, 721 S.E.2d 299, 308-09 (2012) (citations and quotations omitted).

> The gist of obtaining property by false pretense is the false representation of a . . . fact intended to and which does deceive one from whom property is obtained. The [S]tate must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the [S]tate's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the [S]tate's proof varies fatally from the indictments.

State v. Linker, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983) (citations omitted).

The State presented evidence through the testimony of Ms. Harward and Ms. Hoenig. Each testified that defendant approached them at their respective homes by claiming he had noticed roof damage on their homes while driving through their neighborhood. Each of them gave defendant money, $7,300.00 and $7,000.00, respectively, based on his representation that repairs were needed. Ms. Hoenig discussed how defendant initially claimed only a small repair to her roof was needed, before inspecting the roof and claiming that significant repairs were needed. Ms. Hoenig stated that although defendant began to repair her roof by removing several rows of shingles, defendant then abandoned the job; Ms. Hoenig was forced to call another roofer to repair the damage after her partially unshingled roof began to leak.

Ms. Harward testified that after she asked defendant to simply "nail down" part of her shed's roofing, defendant claimed the shed's entire roof needed to be replaced. After the shed's roof was replaced, Ms. Harward stated that the roof began to leak immediately, damaging her clothes dryer; defendant's substandard repairs required Ms. Harward to purchase a new shed.

We disagree with defendant that such evidence was insufficient to support the charges of obtaining property by false pretenses. Rather, this evidence demonstrates that defendant deliberately targeted Ms. Harward and Ms. Hoenig, two elderly women, for the purpose of defrauding each of them by claiming their roofs needed significant repairs when, as the State's evidence showed, neither woman's roof needed repair at all. The State presented additional evidence which tended to show that within the same general timeframe, defendant had targeted other elderly individuals as well, each time approaching the individual at his or her home and claiming that their roof needed a small repair. Upon inspecting the roof, defendant would then claim the roof needed more significant (and costly) repairs. In each instance, defendant would either begin but never complete the roof repair, or would do a substandard job on the repair. Such evidence was more than sufficient to sustain the charges of obtaining property by false pretense against defendant, as the evidence demonstrated that defendant deliberately targeted elderly individuals for the purpose of defrauding those persons based on false roof repair claims.

Defendant also attempts to support his argument by contending that even if the State presented evidence of a false representation by defendant, such evidence would constitute a fatal variance because the $7,000.00 obtained from Ms. Hoenig and the $7,300.00 obtained from Ms. Harward "was not the subject of any purported misrepresentation." Rather, defendant asserts he "legitimately earned at least some portion" of each amount and, as such, the indictments were defective. Defendant's argument lacks merit for, as already discussed, the indictments were facially sufficient as to what property defendant obtained from his victims by means of false representations. Moreover, although defendant claims he "legitimately earned at least some portion" of the $7,300.00 Ms. Harward paid him for other home repair services, a review of the trial transcript indicates that Ms. Harward paid this sum to defendant solely for defendant's "work" on her shed, a shed which had to be replaced with an entirely new structure due to the damage caused by defendant. Likewise, Ms. Hoenig's payment of $7,000.00 to defendant was solely for her roof to be repaired, and these "repairs" consisted of defendant removing three rows of shingles from the edge of her roof

and then abandoning the job, causing the roof to leak and forcing Ms. Hoenig to contact another roofer to fix the damage. Defendant's contention that the indictments were defective because he "legitimately earned at least some portion" of these monies is without any merit, as the evidence indicated that for each victim, defendant engaged in work which caused significant damage to each victim's property, causing each victim to expend resources of time and/or money to complete work that was never finished or repair damage based on the shoddy work performed by defendant. Viewed in the light most favorable to the State, the evidence was sufficient for a jury to find defendant made a false representation to each of his victims and committed the crime of obtaining property by false pretenses. Defendant's challenge to the trial court's denial of his motion to dismiss is overruled.

Jury Instructions

[3] Defendant next argues that even if the indictments were sufficient, the trial court erred in its jury instructions because the trial court failed to specify the misrepresentation made by defendant or the property defendant received. First, and perhaps most importantly, defendant failed to object to the trial court's jury instructions. Therefore, this issue must be reviewed for plain error. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 516-17, 723 S.E.2d at 334 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). However, "even when the 'plain error' rule is applied, [i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 517, 723 S.E.2d at 333-34 (citations and quotation omitted).

During the charge conference, defendant did not object to the trial court's proposed instructions, nor did defendant object during or after the trial court gave the following pertinent instructions to the jury:

> The defendant has been charged with two counts of obtaining property by false pretenses. For you to find the defendant guilty of each of these offenses, the State must prove five things beyond a reasonable doubt in each count: First, that the defendant made a representation to another about a past or subsisting fact or of a future fulfillment or event; second, that this representation was false; third, that this representation was calculated and intended to deceive; fourth, that the victim was in fact deceived by this representation; and fifth, that the defendant obtained or attempted to obtain property from the victim.
>
> In 10 CRS 5193A, if you find from the evidence beyond a reasonable doubt that on or about May 1, 2010, to June 1, 2010, the defendant made a representation to Geraldine Hoenig about a past or subsisting fact or of a future fulfillment or event and that this representation was false, that this reputation was calculated and intended to deceive, that Geraldine Hoenig was in fact deceived by it, and that the defendant thereby obtained property from Geraldine Hoenig, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.
>
> In 10 CRS 51931A, if you find from the evidence beyond a reasonable doubt that on or about May 1, 2010, to June 1, 2010, the defendant made a representation to Nellie Harward about a past or subsisting fact or of a future fulfillment or event and that this representation was false, that this representation was calculated and intended to deceive, that Nellie Harward was in fact deceived by it, and that the defendant thereby obtained or attempted to obtain property from Nellie Harward, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant's contention that the trial court erred in its jury instructions is without merit, as the trial court properly instructed the jury using the pattern jury instruction for the offense of obtaining property by false pretenses. *See* N.C. Gen. Stat. § 14-100 (2013); N.C.P.I–Crim. 219.10 (2013). Defendant cites cases indicating the specificity required of an *indictment* alleging obtaining property by false pretenses, and the proof the State is required to put forth, including the representation alleged in the indictment. However, defendant also acknowledges, albeit while trying to distinguish it, a case where this Court noted that the trial court was not required to instruct the jury on a specific misrepresentation in the indictment alleging obtaining property by false pretenses. *See State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) ("A jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds 'no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury.' " (quoting *State v. Clemmons*, 111 N.C. App. 569, 578, 433 S.E.2d 748, 753 (1993)). Therefore, we can find no error in the trial court's instructions in the instant case.

However, even assuming *arguendo* the trial court's instructions were erroneous, we would still find no plain error as this Court has consistently found no plain error where a trial court has given the pattern jury instruction for the offense of obtaining property by false pretenses. *See State v. Grier*, 35 N.C. App. 119, 121, 239 S.E.2d 870, 871 (1978) (no plain error where the trial court charged the jury according to the pattern jury instruction for obtaining property by false pretenses). As such, the trial court did not commit error, much less plain error, in its jury instructions for the offense of obtaining property by false pretenses. Defendant's argument is, therefore, overruled.

II.

[4] Defendant next contends the trial court committed plain error in admitting an exhibit, a videotaped interview of defendant after his arrest. We disagree.

As defendant lodged no objection to the videotape when it was introduced into evidence and played for the jury, defendant's challenge on appeal can only be based on plain error. And, as we noted in *Issue I*, plain error is to be applied cautiously, and only in exceptional cases. Defendant bears the burden of establishing that the error he alleges is a fundamental error, prejudicial to him, that had a probable impact on the jury's verdict. *See Lawrence*, 365 N.C. at 516-17, 723 S.E.2d at 333-34. On the facts of this case, defendant is unable to meet his burden.

Defendant argues that the trial court committed plain error when it admitted into evidence, without objection by defendant, a videotaped recording of his post-arrest interview with Detective Atack. Nevertheless, defendant now contends the admission of the video recording was highly prejudicial because the recording contained evidence regarding defendant's prior criminal history, drug use, and "habit of frequenting strip clubs[,]" and that this evidence of defendant's bad character violated Rule 404(b). Defendant's argument is unavailing though, because defendant knew the contents of the video, including those parts he now challenges, yet he chose not to object to the video, either in its entirety or any portion of it, at trial. Under our adversarial system, parties must present their evidence and arguments at trial, and "have an obligation to raise objections to errors at the trial level. Any other approach would place an undue if not impossible burden on the trial judge." *Id.* at 512, 723 S.E.2d at 330 (citations and quotation omitted). Perhaps as a trial strategy, since he did not testify, defendant chose not to object and was able to use the video to assert an alibi defense, to describe events and interactions with the victims, including specific denials of wrongdoing, and to point to someone else as being responsible for the shoddy work alleged. Notwithstanding defendant's reasons for not objecting at trial, here, on appeal, he is unable to show that the trial court erred in admitting the videotape and its contents as evidence.

Further, even if we were to assume (which we refuse to do) that the admission of the video recording was error, defendant has not demonstrated prejudice from its admission. The State put forth witness testimony of Ms. Harward and Ms. Hoenig, the two victims alleged in the indictments, as well as Rule 404(b) witness testimony by four other individuals who had been subjected to defendant's fraudulent roof repair scheme. The videotape of defendant's interview was admitted into evidence only after six witnesses and Detective Atack had testified. As the testimony was both consistent and compelling in demonstrating that defendant actively sought to defraud elderly homeowners by claiming their homes needed roof repairs when, in fact, no such repairs were needed, it is not probable that the jury could have reached a different verdict had the trial court not admitted the videotaped interview. Accordingly, defendant's argument is overruled.

III.

[5] Finally, defendant argues that the trial court erred in admitting Rule 404(b) witness testimony. We disagree.

"[W]e . . . review the admission of . . . 404(b) testimony de novo." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

While "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion," such evidence may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(a), (b) (2013). We use a three-part test to determine whether evidence was properly admitted under Rule 404(b):

> First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice pursuant to Rule 403?

State v. Foust, 220 N.C. App. 63, 69, 724 S.E.2d 154, 159 (2012).

The State put on three Rule 404(b) witnesses: Mr. Grice, Jr., Ms. Norwood, and Ms. Stinson. Mr. Grice testified about his elderly father's experience with defendant, while Ms. Norwood and Ms. Stinson testified about their personal experiences with defendant. Each witness offered evidence which tended to show that defendant had deliberately targeted elderly individuals by approaching them at their homes and claiming their roofs needed repair. More specifically, the Rule 404(b) evidence was offered to show, and indeed demonstrated, that defendant acted according to a common plan or scheme, as well as showing knowledge, intent, and lack of mistake. The trial court in fact analyzed the Rule 404(b) evidence and found it to be relevant for a purpose other than propensity, and that it was admissible and relevant to plan, knowledge, and lack of mistake. The trial court then conducted a balancing test, finding that the probative value of the evidence outweighed the prejudicial effect. From our review, it appears the evidence was properly admitted under Rule 404(b).

The evidence defendant challenges shows that defendant would stop and approach an elderly victim at his or her house and claim that the victim needed minor roof repairs (defendant often claimed a few shingles were loose, and that this problem could be immediately fixed for about $40.00). After defendant or defendant's assistant would go onto the roof to "inspect" it, defendant would then claim that the roof needed extensive repairs and request immediate payment before those repairs could begin. After receiving payment, defendant would do some

work on the roof (which consisted of defendant removing roofing materials, such as shingles), before demanding additional money to complete the repair. In some instances, defendant would "complete" the repair, only to tell the victim the repair was fine when, in fact, the victim's roof was seriously leaking; in other instances, defendant would abandon the repair job entirely.

This evidence was properly admitted under Rule 404(b) because it demonstrated that defendant specifically targeted his victims pursuant to his plan and intent to deceive, and with knowledge and absence of mistake as to his actions. Further, the trial court gave limiting instructions to the jury as to the proper use of this evidence when the evidence was initially received, and again during the final jury charge. Accordingly, defendant's argument is overruled.

We find no error in the judgment of the trial court.

NO ERROR.

Judges STROUD and HUNTER, Jr., concur.

STATE OF NORTH CAROLINA
v.
CHARLES GILBERT GILLESPIE

No. COA14-953

Filed 7 April 2015

1. Constitutional Law—effective assistance of counsel—failure to object

A defendant in an assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense case did not receive ineffective assistance of counsel because his trial counsel's failure to object to the officer's testimony and failure to object to the striking of the defense witness's testimony did not prejudice him.

2. Criminal Law—clerical error—remanded for correction

A clerical error on the Additional File No.(s) and Offense(s) form attached to the judgment, which did not affect defendant's sentences for the charges of assault inflicting serious injury by

strangulation; second degree kidnapping; and second degree sexual offense, was remanded for correction of the clerical error in the judgment.

Appeal by defendant from judgment entered 31 October 2013 by Judge Hugh B. Lewis in Rowan County Superior Court. Heard in the Court of Appeals 4 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

Kevin P. Bradley for defendant-appellant.

DIETZ, Judge.

Defendant Charles Gilbert Gillespie appeals from convictions stemming from a brutal attack and sexual assault on a female victim. Gillespie repeatedly punched the victim in the face, threatened her with a kitchen knife, forced her to submit to anal sex, and choked her when she attempted to fight him off. A jury convicted Gillespie of assault inflicting serious injury by strangulation, second degree kidnapping, and second degree sexual offense. The trial court sentenced him to 146-185 months in prison.

On appeal, Gillespie argues that it was either plain error or ineffective assistance of counsel for the trial court to admit without objection the testimony of a law enforcement officer who described the victim's demeanor. He also argues that it was either plain error or ineffective assistance of counsel for the trial court to strike without objection the testimony of a defense witness who stated that the alleged crimes "just don't fit [Gillespie's] M.O." Finally, Gillespie argues that his sentence should be vacated and remanded because the judgment form mistakenly lists a conviction for assault with a deadly weapon, a charge of which he was acquitted.

For the reasons set forth below, we hold that Gillespie did not receive ineffective assistance of counsel because his trial counsel's failure to object to the officer's testimony and failure to object to the striking of the defense witness's testimony did not prejudice him. We likewise hold that the trial court's admission and striking of that testimony did not constitute plain error. Because there is a clerical error on the "Additional File No.(s) and Offense(s)" form attached to the judgment—which did not affect Gillespie's sentence—we remand for correction of the clerical error in the judgment.

Facts and Procedural History

Gillespie and Jane Doe[1] had known each other since around 1994 or 1995 and previously had a consensual sexual relationship. On 16 May 2011, Ms. Doe's neighbor gave Ms. Doe and Gillespie a ride to the grocery store to buy food and beer. Gillespie and Ms. Doe then returned to her apartment where they drank the beer. Ms. Doe testified that Gillespie became angry when he realized that there was no more beer in the refrigerator. He told her that he was going to "f--- [her] in [her] a--" and began "punching" and "smacking" her in the face. Ms. Doe attempted to get away from Gillespie by running into the bathroom. She got in the shower to clean the blood off of her face. Gillespie followed her into the bathroom, pulled the shower curtain back, and made her take a shower while he watched.

When Ms. Doe finished showering and left the bathroom wearing only a towel, she saw Gillespie "come walking towards [her] with three knives, like a butcher knife and two small steak knives." He said, "Don't think I won't do it to you." Ms. Doe ran back into the bathroom and locked the door, but Gillespie broke through the door. Once inside the bathroom, Gillespie again hit Ms. Doe.

Gillespie then put the knives away and took Ms. Doe into the bedroom. Gillespie told her to take her towel off and get on the bed. She complied because she was "scared for [her] life." Gillespie got cocoa butter and baby oil from the bathroom and rubbed them on his penis. He then started having anal sex with Ms. Doe against her will. She "told him to stop," that "he was hurting [her]," but he told her to "shut up." Ms. Doe kicked him in the chest to get him off of her, but he pulled her onto the floor and started choking and hitting her. When Gillespie was choking her, Ms. Doe was unable to breathe and felt "[l]ike [she] was going to die."

Gillespie eventually left the bedroom and Ms. Doe quickly put some clothes on and ran next door to her neighbor's apartment. Ms. Doe had blood on her face and arms, a swollen eye, and a hurt ankle. The neighbor called 911. The neighbor testified that Ms. Doe was "really upset" and "shaking," and said Ms. Doe told her that Gillespie had sexually assaulted her, trapped her in the bathroom, and "beat on her." Throughout the evening, the neighbor had heard "a lot of banging" coming from Ms. Doe's apartment.

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1. We use a pseudonym to protect the victim's privacy.

Rowan County Sheriff's Deputy Timothy Cook responded to the 911 call. He discovered Ms. Doe sitting in front of her neighbor's apartment and complaining that she thought she had a broken ankle. Deputy Cook observed that Ms. Doe had bruises on her body and was very upset. Ms. Doe told Deputy Cook that her boyfriend had beaten her up. Deputy Cook searched Ms. Doe's apartment, but did not find Gillespie. Ms. Doe did not tell Deputy Cook that Gillespie had sexually assaulted her. Ms. Doe testified that she did not tell Deputy Cook about the sexual assault because she "didn't like that cop" and "[h]e was real rude, like I was faking or something." Deputy Cook called EMS and Ms. Doe was taken to the hospital by ambulance. Ms. Doe was treated for her injuries at the hospital, but testified that she did not tell hospital personnel about the sexual assault because she was embarrassed and ashamed.

When Ms. Doe's mother picked her up from the hospital, she told her mother what had happened, including that Gillespie had forced her to have anal sex with him against her will. Ms. Doe and her mother went to the Rowan County Sheriff's Office and met with Deputy J.R. Wietbrock. Ms. Doe told Deputy Wietbrock what had happened, including the sexual assault, and then made a written statement.

Gillespie was charged as a habitual felon with first degree sexual offense, first degree kidnapping, assault by strangulation, and assault with a deadly weapon. The case went to trial on 29 October 2013. At trial, the State asked Deputy Wietbrock to compare Ms. Doe's demeanor during her initial police statement and during her trial testimony. Deputy Wietbrock testified:

> That day she was – I would say that she was more scared and, you know, wanted to let me know everything that had happened. Today she's, in my opinion, trying to remember things that have happened, and she's not scared or anything today or upset like she was.

Gillespie's counsel did not object to this testimony.

Wilbert Horton, Jr., an acquaintance of Gillespie, testified on Gillespie's behalf. Horton testified that he did not believe his friend Gillespie had committed the acts charged. When the State asked Horton why he believed "this is something that I don't think [Gillespie] could do," Horton testified that the charged offenses "just don't fit [Gillespie's] M.O." The State then requested a *voir dire* examination with Horton outside the presence of the jury. During this *voir dire*, the State questioned Horton about his knowledge of Gillespie's prior convictions, including multiple prior assault convictions. Gillespie's counsel objected to the

cross-examination of Horton regarding Gillespie's prior convictions. In response, the trial court sustained the objection to cross-examination, but also struck some of Horton's testimony, instructing the jury that

> [T]here were statements made by this witness that "this is something I don't think he could do," referring to the defendant, "this is not part of his M.O.," and other statements such as that. . . . Any statements by this individual as to his opinion of whether or not the defendant could or could not have done these acts that are at issue in this trial are not to be considered by you in any form or fashion during your deliberation.

Gillespie's counsel did not object to the striking of Horton's opinion.

The jury convicted Gillespie of second degree sexual offense, second degree kidnapping, and assault by strangulation, but acquitted him of assault with a deadly weapon. He then entered a plea agreement, acknowledged by the trial court at sentencing, that provided that his three convictions would be consolidated into one sentence for second degree sexual offense, a Class C felony. However, the "Additional File No.(s) and Offense(s)" form attached to the judgment erroneously indicated that "Assault with a Deadly Weapon" was a charge for which Gillespie had been convicted. Gillespie did not seek to correct this error in the trial court. He then appealed his conviction and sentence to this Court.

Analysis

I. Admission and Striking of Witness Testimony

[1] Gillespie first argues that it was either plain error or ineffective assistance of counsel for the trial court to admit, and for defense counsel to fail to object to, testimony from Rowan County Sheriff's Deputy J.R. Wietbrock regarding the victim's demeanor during her initial police statement and during her trial testimony. We reject this argument because Gillespie cannot show a reasonable probability that absent the alleged error, the jury would have reached a different result—the strict prejudice standard applicable to these claims.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (internal quotation marks omitted).

Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

Similarly, to show ineffective assistance of counsel, a defendant must show both that "counsel's performance was deficient" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). "[I]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [this Court] need not determine whether counsel's performance was deficient." *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011) (internal quotation marks omitted).

Gillespie contends that it was error for the court to allow, and for his counsel not to object to, testimony given by Deputy Wietbrock comparing the victim's demeanor during her police statement and during her trial testimony. The State asked Wietbrock to describe how Ms. Doe's demeanor during her initial police statement was different from her demeanor during her trial testimony. Wietbrock responded:

> That day she was – I would say that she was more scared and, you know, wanted to let me know everything that had happened. Today she's, in my opinion, trying to remember things that have happened, and she's not scared or anything today or upset like she was.

Gillespie asserts that these statements are inadmissible opinion testimony because Wietbrock "vouched for the veracity of [Ms. Doe's] claims." *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2013); *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007). He argues that, because "this case turned on the credibility of the victim," Wietbrock's statements "must have had an impact on the jury's determination whether [Ms. Doe] was remembering or fabricating her accounts of Gillespie sexually assaulting, restraining, and strangling her."

We disagree. Ms. Doe's testimony was supported by the testimony of her neighbor and Ms. Doe's mother. The testimony of those witnesses was not refuted at trial. Thus, Gillespie has not met his burden of showing that, absent Deputy Wietbrock's purportedly inadmissible testimony, the jury probably would have reached a different result.

Gillespie contends that this case is analogous to *State v. Towe*, where an expert witness made a "conclusory assertion that the victim

had been sexually abused," based only on the victim's statements. 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Our Supreme Court found that the admission of this expert testimony constituted plain error because it "impermissibly bolstered the victim's credibility" where the "case turned on the credibility of the victim, who provided the only direct evidence against defendant." *Id.* at 62-63, 732 S.E.2d at 568. But *Towe* is readily distinguishable. There, the only testimony supporting the alleged abuse came from the victim herself. Here, by contrast, there were multiple other sources of evidence that corroborated the victim's testimony, including the testimony of her neighbor and her mother. Accordingly, we reject this argument.

Gillespie next argues that it was either plain error or ineffective assistance of counsel for the trial court to strike, and for defense counsel to fail to object to the striking of, testimony from defense witness Wilbert Horton, Jr., regarding Gillespie's character. Again, we must reject this argument under the applicable standard of review.

After Horton testified that he did not believe Gillespie could have committed the crimes charged and that "it just – that just don't fit his M.O.," the State sought to introduce evidence of Gillespie's prior convictions for assault. The trial court denied that request but instructed "the jury that they are to disregard the opinion of whether or not this individual could have done this or it's in his M.O."

Gillespie has not shown that, had the trial court not instructed the jury to disregard these portions of Horton's testimony, the jury probably would have reached a different result. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; *Strickland*, 466 U.S. at 694. Gillespie does not offer any reason why the opinion of a friend of Gillespie would have made it likely that the jury would discredit the compelling testimony of the victim, the victim's mother, and the victim's neighbor. Accordingly, we reject Gillespie's argument and find no plain error or ineffective assistance of counsel at trial.

II. Error on Judgment Form

[2] Gillespie next argues that the judgment should be vacated and remanded for resentencing because the "Additional File No.(s) and Offense(s)" form attached to the judgment erroneously lists "Assault with a Deadly Weapon," a charge of which Gillespie was acquitted. He contends that this error renders his sentence "invalid as a matter of law" and that the judgment must be vacated because "the Superior Court did not specify which convictions were considered in pronouncing the consolidated judgment." We reject this argument because the record

unquestionably indicates that Gillespie was sentenced only for crimes he actually was convicted of committing, and the inclusion of the assault with a deadly weapon charge was a clerical error.

Here, Gillespie entered into a sentencing agreement with the State in which he admitted habitual felon status in exchange for his three convictions being consolidated into one sentence for second degree sexual offense, a Class C felony. That plea agreement expressly included only his three actual convictions, for second degree sexual offense, second degree kidnapping, and assault by strangulation. It did not include the charge of assault with a deadly weapon, for which he was not convicted. At sentencing, the trial court expressly referenced the plea agreement and described its terms, leaving no doubt that the trial court did not believe Gillespie had been convicted of assault with a deadly weapon, and leaving no doubt that Gillespie's sentence was not affected by that acquitted charge.

Gillespie relies on *State v. Moore* for the proposition that a consolidated judgment must be remanded for resentencing where the reviewing court is "unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant." 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990). But in *Moore*, one of the offenses the trial court considered at sentencing was improper and should not have been considered. Here, by contrast, we know that the trial court never considered the assault with a deadly weapon charge at sentencing because Gillespie was sentenced under a plea agreement that only included the three crimes he actually was convicted of committing. Accordingly, *Moore* is readily distinguishable.

Although the mistaken reference to "Assault with a Deadly Weapon" on an attachment to the judgment form did not affect Gillespie's sentence, that clerical error still must be corrected. A "clerical error" is defined as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008).

This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing. *State v. Roberts*, ___ N.C.

App. ___, ___, 767 S.E.2d 543, 556 (2014); *Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696-97; *see also State v. Llamas-Hernandez*, 189 N.C. App. 640, 655, 659 S.E.2d 79, 88 (2008) (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 363 N.C. 8, 673 S.E.2d 658 (2009) (noting that where the error had no effect on the sentence received, "it would be unnecessary to resentence defendant"). Accordingly, we hold that Gillespie is not entitled to resentencing, but we remand the judgment to the trial court to correct the clerical error on the "Additional File No.(s) and Offense(s)" form by removing the reference to "Assault with a Deadly Weapon."

Conclusion

For the reasons discussed above, we conclude that Gillespie did not receive ineffective assistance of counsel and the trial court did not commit plain error in admitting or striking various witness testimony in this case. Because Gillespie was sentenced in accordance with his agreement with the State, which included only those offenses he was actually convicted of committing, there is no need for resentencing. The trial court's judgment remains undisturbed, but we remand for the limited purpose of correcting the clerical error described above.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REMANDED IN PART.

Judges STEELMAN and INMAN concur.

STATE OF NORTH CAROLINA
v.
SHANNON JEROME MITCHELL

No. COA14-1228

Filed 7 April 2015

1. Evidence—witness testimony—defendant's incriminating statements prior to crime—relevancy—state of mind—premeditation—deliberation

The trial court did not abuse its discretion in a first-degree murder case by allowing witnesses to testify that defendant made statements before the shooting that he had come to town that day to shoot someone to get the keys to his grandmother's car. The statements illustrated defendant's state of mind near the time of the

shooting, which was relevant to the charge of first-degree murder under the theory of premeditation and deliberation.

2. Confessions and Incriminating Statements—recording of jailhouse call

The trial court did not abuse its discretion in a first-degree murder case by admitting into evidence the recording of the jailhouse telephone call defendant placed to his father. It was direct evidence showing defendant shot the victim and he knew it. It was particularly probative in light of defendant's defense that his actions were a result of his diagnosed intermittent explosive disorder and not premeditated and deliberate. The statements made immediately after defendant's arrest put into context defendant's responses in which he admitted shooting the victim.

3. Homicide—first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to alleged insufficient evidence. The evidence presented by the State was sufficient to withstand defendant's motion.

4. Homicide—first-degree murder—felony murder—discharging firearm into occupied property—motion to dismiss—sufficiency of evidence

The trial court did not err in a first-degree murder case by failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence. The evidence supported the felony charge of discharging a firearm into occupied property. The State presented substantial evidence from which a jury could find at least one of the three shots defendant fired was "into" occupied property. Further, substantial evidence showed defendant was located outside the vehicle when he shot.

5. Homicide—first-degree murder—felony murder—jury charge—committing another felony during murder

The trial court did not err in a first-degree murder case by submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. The State presented substantial evidence that defendant discharged a firearm into occupied property.

Appeal by defendant from judgment entered 16 May 2014 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 4 March 2015.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

TYSON, Judge.

Shannon Jerome Mitchell ("Defendant") appeals from judgment entered after a jury conviction of first-degree murder. We find no error in Defendant's conviction or the judgment entered thereon.

I. Factual Background

A grand jury indicted Defendant on one count of first-degree murder and one count of possessing a firearm while being a convicted felon on 20 May 2013. A jury trial was held on 28 April 2014 in New Hanover County Superior Court. Defendant pled guilty to possession of a firearm by a felon outside the presence of the jury. Judgment was continued on that charge until the conclusion of the trial. Defendant also stipulated to seven prior felony convictions within a twelve-year period, and prior conviction and record levels of III.

A. State's Evidence

Gilbert McClammy ("Gilbert") was renovating a house on Bladen Street in Wilmington, North Carolina for his stepson, Christopher James ("Christopher") and Christopher's girlfriend, Shiniqua Bunting ("Shiniqua"). Christopher and Shiniqua were expecting their first child together. Shiniqua is also the daughter of Defendant's girlfriend, Catrina Bunting ("Catrina").

On 27 April 2013, Gilbert offered to show Moise Tabon ("Moise"), his nephew, the house he was renovating. Moise and Gilbert stopped at Shiniqua's grandmother's house to pick up Shiniqua and Christopher and take them to the Bladen Street house.

Defendant and Catrina were also present at Shiniqua's grandmother's house. Defendant and Catrina asked Christopher to find out if Gilbert would give them a ride to a party. Gilbert agreed, so long as Defendant and Catrina contributed gas money. Shiniqua and Catrina rode in Gilbert's vehicle. Christopher and Defendant rode in Moise's

vehicle. After stopping at a gas station, both vehicles were driven to a trailer park in Monkey Junction, North Carolina.

Christopher and Moise both testified as they pulled up to the trailer park, Defendant stated he "came to town on that day to shoot a guy so he could get the keys to his grandmother's vehicle."

Gilbert parked his vehicle in the driveway in front of one of the trailers. Moise pulled in behind Gilbert's vehicle. Christopher, Shiniqua, Catrina, and Defendant exited the vehicles. Gilbert and Moise remained in the driver's seats of their respective vehicles.

Defendant and Catrina wanted to attend a party taking place in Sea Breeze, North Carolina. Shiniqua testified Defendant stated he was going to ask Gilbert whether he was going to drive Catrina and Defendant to the party. Defendant walked over to Gilbert's vehicle and "got in the car." When Defendant got into Gilbert's vehicle, his right leg and foot remained outside the vehicle.

Shiniqua and Christopher both testified they saw Gilbert lift his hands up to his face in a gesture indicating to them, "I can't do it" or "I don't know." Almost immediately, Shiniqua, Christopher, and Catrina heard three gunshots in rapid succession. After the third gunshot, Defendant was entirely outside of Gilbert's vehicle. He walked toward the location where Shiniqua, Gilbert, and Catrina were standing.

Catrina testified she observed Defendant exit Gilbert's vehicle with a gun in his hand. She saw Defendant place the gun in his waistband. Catrina testified Defendant approached her and asked, "What happened?" Gilbert's body fell out of his vehicle and onto the ground. Defendant asked Christopher to assist him in putting Gilbert's lifeless body back into the vehicle. Christopher refused and Defendant ran off.

Shiniqua called the police. New Hanover County Sheriff's Deputy David Swan arrested Defendant near the scene of the shooting. Defendant was charged with murder and taken to the booking area of the New Hanover County jail. All telephone calls from this area are recorded. Both individuals placing a call and the person receiving the call are informed the calls are subject to monitoring and recording.

While in the booking area, Defendant placed a telephone call to his father. A segment of this recorded call was admitted into evidence over Defendant's objection. The jury heard a portion of the recorded call, which consisted of the following conversation between Defendant and his father:

> Father: I told you. You wouldn't listen, Junior. You wouldn't listen. Now who you done shot now?
>
> Defendant: Trina daughter baby daddy, daddy. Man, I was just trying to talk to him, man, but . . .
>
> Father: That same gun, right?
>
> Defendant: Yeah, man.
>
> Father: See what I try to tell you. You don't do what God wants you to do. I told you from under up of safety. I told you, Junior.
>
> Defendant: I know, man.

2. Defendant's Evidence

Dr. George Corvin ("Dr. Corvin"), a general and forensic psychiatrist at North Raleigh Psychiatry, testified on Defendant's behalf as an expert witness in forensic psychiatry. Dr. Corvin interviewed Defendant for over two hours on 25 October 2013, reviewed discovery materials, and spoke with Defendant's family members. Dr. Corvin diagnosed Defendant with intermittent explosive disorder ("IED"). Dr. Corvin testified IED is an impulse control disorder characterized by recurrent behavioral outbursts representing a failure to control aggressive impulses. Dr. Corvin explained IED may lead to frequent verbal, threatening, destructive, or physically assaultive acts. Dr. Corvin also testified "the magnitude of the aggressiveness expressed during recurrent outbursts is grossly out of proportion to the provocation or to any precipitating psychosocial stressors."

Dr. Linda Graham ("Dr. Graham"), a psychiatrist at RHA Behavioral Health Services, also testified on Defendant's behalf as an expert witness in psychiatry. Dr. Graham evaluated Defendant as a walk-in patient in February 2013 for approximately one-half hour. Dr. Graham also diagnosed Defendant with IED.

On 16 May 2014, the jury returned a verdict finding Defendant guilty of first-degree murder. The jury found Defendant guilty both under the theory of premeditation and deliberation and under the theory of committing another felony during the murder.

The trial court consolidated the conviction of possession of a firearm by a felon with the first-degree murder conviction. The trial court sentenced Defendant to life imprisonment without the possibility of parole.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) allowing witness testimony regarding Defendant's statements prior to the shooting; (2) admitting into evidence the recording of the jailhouse telephone call Defendant placed to his father; (3) failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to insufficient evidence; (4) failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence; and (5) submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. We address each issue in order.

III. Analysis

A. Defendant's Statements Prior to the Shooting

[1] Defendant argues the trial court erred by allowing Moise and Christopher to testify Defendant made statements that "he had come to town that day to shoot someone about getting the keys to his grandmother's car." Defendant argues the statements were not relevant. Defendant also asserts the prejudicial impact of these statements greatly outweighed their probative value under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2013). We disagree.

1. Standard of Review

"Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). However, whether to exclude evidence under Rule 403 is a decision within the trial court's discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007) (citation omitted), *cert. denied*, 552 U.S. 1271, 170 L.Ed.2d 377 (2008). Thus, "a trial court's ruling will be reversed on appeal only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kirby*, 206 N.C. App. at 457, 697 S.E.2d at 503 (citation and internal quotation marks omitted).

2. Analysis

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury." N.C. Gen. Stat. § 8C-1, Rules 401, 403 (2013).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a defendant's prior actions or conduct is admissible if it is relevant to any fact or issue other than the defendant's character. *State v. Beckelheimer*, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012).

Christopher and Moise both testified neither believed Defendant was referring to Gilbert when he stated he was going to "shoot a guy." Defendant filed a motion *in limine* to suppress statements he made to Moise. This motion was extended to the statements heard by Christopher. The trial court denied Defendant's motion after a *voir dire* evidentiary hearing.

Defendant argues the testimony of Moise and Christopher regarding the statements he made prior to shooting Gilbert were not relevant. He asserts both witnesses testified they did not believe Defendant was referring to shooting Gilbert. Defendant also asserts there was no probative value to outweigh the substantial prejudicial effect because this testimony was inadmissible "rank propensity evidence" barred by Rule 404(b). We disagree.

Rule 404(b) is a rule of inclusion, not exclusion. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. Our Supreme Court has stated Rule 404(b) is "subject to but one exception requiring the exclusion of evidence if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation and quotation marks omitted). Defendant's statements about his intent to shoot someone in order to retrieve the keys to his grandmother's car, made immediately prior to the shooting of Gilbert, is relevant and admissible evidence.

The statements made by Defendant illustrate his state of mind near the time of the shooting. *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (citation omitted) (holding evidence of victim's prior bad acts, although impermissible character evidence if only relevant to show victim's behavior at time of shooting, was relevant, admissible evidence to show defendant's state of mind); *see Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (noting Rule 404(b) is a rule of inclusion).

Here, Defendant's state of mind just prior to the time of the shooting is relevant to the charge of first-degree murder under the theory of premeditation and deliberation. Premeditation and deliberation are generally proved by circumstantial evidence, not direct evidence. Premeditation and deliberation may be inferred through evidence of a defendant's mental processes at the time of the crime. *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008), *cert. denied*, 588 U.S. 851, 175 L.E.2d 84 (2009). The State argues Defendant's "cavalier attitude and mindset towards shooting a person" is relevant circumstantial evidence to show premeditation and deliberation.

The trial court conducted a lengthy *voir dire* and made detailed findings of fact to support its decision to admit testimony of Defendant's statements just before he shot Gilbert. Defendant has failed to show the trial court abused its discretion in admitting this evidence. This argument is overruled.

B. Recorded Telephone Call Between Defendant and His Father

[2] Defendant asserts the trial court erred by allowing the recorded telephone call to his father to be admitted into evidence and be heard by the jury. Defendant argues any minimal probative value of this evidence was substantially outweighed by the danger of unfair prejudice. We disagree.

1. Standard of Review

Whether to exclude otherwise relevant evidence under Rule 403 rests within the trial court's discretion. This Court reviews the decision of the trial court for an abuse of that discretion. *State v. Sims*, 161 N.C. App. 183, 190, 588 S.E.2d 55, 60 (2003). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

2. Analysis

Defendant does not dispute the telephone call was relevant. Defendant only argues the recorded call should not have been admitted at trial pursuant to Rule 403. He asserts its probative value was outweighed by its prejudicial effect.

Defendant objected to the admission of the recorded call into evidence because of his father's statements of: "Now who you done shot now?" and "That same gun, right?" Defendant argues these statements may have caused the jury to believe Defendant had previously shot

another person with the same firearm he used at bar. Defendant's counsel had conceded in his opening statements Defendant had shot and killed Gilbert. Defendant contends the only effect of these statements was to "excite prejudice."

Concessions made in opening statements by counsel do not constitute evidence. *State v. Lewis*, 321 N.C. 42, 49, 361 S.E.2d 728, 733 (1987). The State was not relieved of its burden of proving Defendant had unlawfully shot and killed Gilbert beyond a reasonable doubt. The State sought to introduce the recorded telephone call between Defendant and his father as direct evidence showing Defendant shot Gilbert. The telephone call also served as direct evidence that Defendant *knew* he had shot Gilbert. The telephone call was particularly probative in light of Defendant's defense that his actions were a result of his diagnosed IED and not premeditated and deliberate. The statements made by Defendant and his father immediately after Defendant's arrest put into context Defendant's responses in which he admitted shooting Gilbert.

Defendant failed to show the trial court abused its discretion in admitting the recorded telephone conversation into evidence. This argument is overruled.

C. Sufficiency of the Evidence: Premeditation and Deliberation

[3] Defendant argues the trial court erred in denying his motion to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime." *State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted).

Evidence does not have to be irrefutable or uncontroverted to be substantial. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002). Substantial evidence "need only be such as would satisfy a reasonable mind as being adequate to support a conclusion." *Id.* (citation and internal quotation marks omitted). Whether substantial evidence has been

presented requires us to "examine[] the sufficiency of the evidence presented but not its weight." *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citation omitted). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

2. Analysis

Defendant argues the State presented insufficient evidence for a jury to convict him of first-degree murder based on premeditation and deliberation.

> Premeditation has been defined by [our Supreme Court] as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. An unlawful killing is committed with deliberation if it is done in a cool state of blood, without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. The intent to kill must arise from a fixed determination previously formed after weighing the matter.

State v. Corn, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (citations and internal quotation marks omitted).

"Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985) (citation omitted), *cert. denied*, 476 U.S. 1165, 90 L.Ed.2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Our Supreme Court delineated several factors from which premeditation and deliberation may be inferred. These circumstances include:

> (1) *lack of provocation* on the part of the deceased, (2) the *conduct and statements* of the defendant *before and after* the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the *dealing of lethal blows after the* deceased has been *felled and rendered helpless*, (6) evidence that the *killing was done in a brutal manner*, and (7) the nature and number of the victim's wounds.

State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (citation and quotation marks omitted) (emphasis supplied), *cert. denied*, 513 U.S. 1198, 131 L.Ed.2d 147 (1995). Neither all nor any certain combination of factors is required. The presence of any one factor may be sufficient. *Id.*

Defendant contends "[a]n analysis of the facts in the instant case reveal insubstantial evidence of premeditation and deliberation." We disagree.

All evidence shows a complete lack of provocation by Gilbert. Gilbert had no prior history of confrontation or disputes with Defendant. Several witnesses testified Gilbert was seen putting his hands up in a gesture they believed to mean "now is not the time," "I can't do it," or "I don't know" moments before he was shot repeatedly. No evidence shows Gilbert being argumentative or combative. Gilbert was unarmed and sitting inside his vehicle.

Just prior to the shooting, Defendant told Moise and Christopher he was going to shoot a man over a trivial matter. While both men testified they did not believe Defendant was referring to Gilbert, both also testified they were troubled by Defendant's cavalier attitude toward firearms and violent behavior. Defendant also asked Christopher to assist him in placing the lifeless Gilbert back inside the vehicle after his body fell out.

The State also presented evidence that Gilbert had a minor dispute with Shiniqua, the daughter of Defendant's girlfriend, Catrina. Defendant was aware of this incident. Evidence showed Defendant may have felt some need to intervene in the matter between Gilbert and Shiniqua. Defendant asked Shiniqua about the incident on the day of the shooting.

Defendant shot Gilbert three times. Two of the wounds were fatal. One of the gunshots entered Gilbert's body from the back. The State argued such a wound allows for the inference that Gilbert may have been turning away from or otherwise trying to escape from Defendant.

The evidence presented by the State was sufficient to withstand Defendant's motion to dismiss. The weight to be given the evidence admitted was for the jury to resolve. *Benson*, 331 N.C. at 552, 417 S.E.2d at 765 (citation omitted). The jury returned a verdict finding Defendant guilty of first-degree murder on the theory of premeditation and deliberation. This argument is overruled.

D. Sufficiency of the Evidence: Felony Murder

[4] Defendant argues the trial court erred by denying his motion to dismiss the charge of first-degree murder based upon his commission of another felony during the murder. Defendant contends the State failed

to present sufficient evidence of the underlying felony of discharging a firearm into occupied property to survive his motion to dismiss.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime." *Cody*, 135 N.C. App. at 727, 522 S.E.2d at 780 (citation and internal quotation marks omitted).

> Substantial evidence is such relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. In examining the evidence, the court must view any contradictions or discrepancies in the light most favorable to the State, allowing all reasonable inferences to be drawn therefrom. A motion to dismiss is properly denied where there is substantial evidence supporting a finding that the offense charged was committed.

State v. Alexander, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002) (citations and internal quotation marks omitted).

2. Analysis

Pursuant to N.C. Gen. Stat. § 14-34.1, "[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm . . . into any . . . vehicle . . . while it is occupied is guilty of a Class E felony" N.C. Gen. Stat. § 14-34.1(a) (2013). Our Supreme Court has held a firearm is discharged "into" occupied property "even if the firearm itself is inside the property, so long as the person discharging it is not inside the property." *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988).

Defendant argues the State's evidence was insufficient to establish that he was outside of the vehicle when he shot Gilbert. We disagree.

Christopher and Shiniqua both testified to having observed Defendant fire the shots that killed Gilbert. Shiniqua testified Defendant's right leg was located outside of the vehicle, with his right foot on the ground, when Defendant fired the third and final shot. She also testified the lower half of Defendant's left leg and the lower half of his right arm were the only parts of Defendant inside the door frame. Additional testimony showed Defendant's left leg was "almost out" of the vehicle.

Christopher also testified he heard the first two shots, and saw Defendant fire the third shot. He testified when Defendant fired the third shot, he also saw Defendant's right leg located outside of the vehicle, and his right foot was on the ground. Part of Defendant's left leg, slightly below the knee, was in the vehicle. Christopher also testified Defendant's hips, chest, and head were all outside of the vehicle. Defendant's right arm, up to approximately the middle of his forearm, was extended into the vehicle.

The State presented substantial evidence from which a jury could find at least one of the three shots Defendant fired was "into" occupied property. Any discrepancies or contradictions in the evidence were for the jury to resolve. *Benson*, 331 N.C. at 544, 417 S.E.2d at 761 (citation omitted) (holding "contradictions and discrepancies do not warrant dismissal . . . [but] are for the jury to resolve"). We conclude substantial evidence shows Defendant was located outside the vehicle when he shot Gilbert. *Alexander*, 152 N.C. App. at 705-06, 568 S.E.2d at 320 (holding substantial evidence existed from which a jury could find defendant discharged a firearm into occupied property where defendant was "almost leaning inside the car . . . definitely standing outside and in the crease of the door" when he shot the victim).

The evidence supports the felony charge of discharging a firearm into occupied property. The jury could properly convict Defendant of first-degree murder based on committing another felony during the murder. Defendant's argument is overruled.

E. Jury Instruction of First-degree murder Based On Felony Murder

[5] Defendant argues the trial court erred by submitting to the jury the charge of first-degree murder on the theory of felony murder as a permissible verdict, as the underlying felony was not supported by the law or the facts of the case.

1. Standard of Review

> This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated

> that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation and internal quotation marks omitted).

2. Analysis

Defendant argues no evidence presented at trial supports the felony charge of discharging a firearm into occupied property. This charge was the underlying felony upon which the trial court permitted the jury to convict Defendant of first-degree murder based on a theory of felony murder.

As discussed above, the State presented substantial evidence that Defendant discharged a firearm into occupied property. The trial court's jury instruction permitting the jury to convict Defendant of first-degree murder based on a theory of felony murder was supported by the law and the facts in evidence. The trial court properly submitted the instructions and charge to allow the jury to convict Defendant of first-degree murder based on a theory of felony murder. This argument is overruled.

IV. Conclusion

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or in the trial court's judgment entered thereon.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.

STATE v. SANDERS

[240 N.C. App. 260 (2015)]

STATE OF NORTH CAROLINA
v.
MATTHEW SANDERS

No. COA14-818

Filed 7 April 2015

Probation and Parole—probation revocation hearing—held after probation ended—no subject matter jurisdiction

The Court of Appeals vacated the trial court's order revoking defendant's probation because the trial court lacked subject matter jurisdiction. Defendant's offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, on 7 January 2014. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his sixty-month probationary period ended on or about 17 April 2012.

Appeal by defendant from judgment entered 7 January 2014 by Judge Alma L. Hinton in Wake County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

The Exum Law Office, by Mary March Exum, for defendant-appellant.

BRYANT, Judge.

Where defendant was not subject to a tolling period because his offenses were committed prior to 1 December 2009 and his probation revocation hearing was held after 1 December 2009, defendant's probationary period had expired and the trial court lacked jurisdiction to revoke defendant's probation.

On 1 November 2006, defendant Matthew Sanders pled guilty to one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation in 06 CRS 70064-65, with sentencing to be continued. By judgment entered 17 April 2007, defendant was sentenced to a term of 35 to 42 months imprisonment. The trial court suspended defendant's sentence and imposed a term of supervised probation for 60 months.

On 13 November 2008, a violation report was filed alleging defendant had violated probation by testing positive for cocaine and marijuana and by being in arrears towards his monetary obligations. On 31 March 2009, the trial court entered an order finding defendant was in compliance with the terms of his probation and to continue with his probation.

A new violation report, filed 29 March 2010, alleged that defendant had violated his probation by testing positive for cocaine, being in arrears on his monetary conditions, and by being currently unemployed. After a hearing, the trial court entered an order on 11 May stating that defendant "continues to test positive for cocaine" and that "defendant has been [sic] violated once and was continued on probation. *This case is currently in Toll status.*" (emphasis added).

In August 2010, a third violation report was filed alleging defendant had tested positive for cocaine and marijuana, had been convicted of assault/threat against a government official in 09 CRS 209018, and received a new case of probation.[1] By order entered 2 December, the trial court ordered defendant to have a TASC assessment completed within 45 days of entry and to serve 10 days in jail. A second order entered by the trial court on 24 February 2011 ordered defendant to attend a residential program at Day Dart Cherry[2] for 90 days.

On 19 July 2012, a violation report was entered alleging defendant had tested positive for cocaine and marijuana. Another report, entered 10 August, raised the same allegation. A third report, entered 7 September, stated that defendant had violated probation by testing positive for marijuana. Additional reports entered 11 October and 8 November further alleged defendant had tested positive for marijuana; the 11 October report also stated that defendant had failed to report for a scheduled office appointment. On 3 December 2012, the trial court ordered defendant to report to jail on 1 January 2013 for violating probation. After defendant failed to comply with the trial court's order, another violation report was entered 4 January 2013 for failure to report as directed.

On 24 July 2013, a violation report was entered alleging defendant had been convicted and placed on twelve months supervised probation

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1. Other than defendant's probation case in 06 CRS 70064-65, no other probation cases are before this Court in this appeal.

2. Day Dart Cherry is a residential treatment facility for chemical dependency administered by the North Carolina prison system which assists probationers in transitioning back to their communities.

in 12 CRS 2111169 for driving while impaired. By order entered 7 January 2014, the trial court revoked defendant's probation and sentenced defendant to 35 to 42 months imprisonment, with credit for 314 days already served. Defendant appeals.

On appeal, defendant raises two issues as to whether the trial court (I) lacked subject matter jurisdiction to revoke defendant's probation, and (II) lacked jurisdiction to enter orders prior to the revocation of probation.

I.

Defendant contends the trial court lacked subject matter jurisdiction to revoke defendant's probation. We agree.

This Court reviews *de novo* the issue of whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

"A court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005) (quoting *State v. Hicks*, 148 N.C. App. 203, 204, 557 S.E.2d 594, 595 (2001)). Pursuant to N.C. Gen. Stat. § 15A-1344,

> [a]t any time prior to the expiration or termination of the probation period or in accordance with subsection (f) of this section, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. . . . If a probationer violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345 . . . may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any . . . .

N.C.G.S. § 15A-1344(d) (2009). Prior to a 2009 amendment, a portion of subsection (d) read as follows: "The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which . . . could result in revocation proceedings against him for violation of the terms of this probation." *Id.* However, other than as provided

in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term. *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations omitted). Pursuant to N.C.G.S. § 15A-1344(f), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred *and* that a written probation violation report had been filed. Also, the trial court must find good cause for the extension, modification, or revocation. N.C.G.S. § 15A-1344(f). As such, a defendant's probation could be extended upon findings of specific actions that occurred prior to the end of a defendant's probationary period. However, on this record there is no indication that N.C.G.S. § 15A-1344(f) is applicable. Indeed, the State's argument as to jurisdiction is based solely on an application of the tolling provision. The tolling provision of N.C.G.S. § 15A-1344(d) was repealed in 2009, thus ending the tolling provision for defendants whose probation violation hearings were held after 1 December 2009. 2009 N.C. Sess. Laws ch. 372, § 20. Further, the tolling provision that was then moved to N.C.G.S. § 15A-1344(g) and allowed for a credit against a defendant's probation if a pending criminal charge resulted in an acquittal or dismissal was then removed when subsection (g) was repealed. *See* 2011 N.C. Sess. Laws 84, 87, ch. 62, § 3. Therefore, because there was no applicable tolling period, the trial court had no jurisdiction to revoke defendant's probation for offenses committed before 1 December 2009 and where defendant's probation revocation hearing was held after 1 December 2009. We hold that the trial court's jurisdiction over defendant ended on or about 17 April 2012, 60 months after defendant was placed on probation on 17 April 2007.

Our holding in this case, that the trial court lacked jurisdiction to revoke defendant's probation, is controlled by this Court's recent opinion in *State v. Sitosky*, ___ N.C. App. ___, 767 S.E.2d 623 (2014), *review and stay denied*, ___ N.C. ___, ___ S.E.2d ___ (March 5, 2015); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

In *Sitosky*, the defendant was placed on probation in 2008 for offenses committed in 2007. In a probation violation hearing held in 2014, the defendant's probation was revoked for offenses committed since her probation began in 2008. This Court vacated and remanded

finding that based on the 2009 North Carolina Session Law, a defendant "who committed her offenses . . . *prior to 1 December 2009* but had her revocation hearing *after 1 December 2009* was not covered by either statutory provision — § 15A-1344(d) or § 15A-1344(g) — authorizing the tolling of probation periods for pending criminal charges." *Sitosky*, ___ N.C. App. at ___, 767 S.E.2d at 626.

In reviewing the record before this Court, it is clear that defendant committed his offenses on 3 November 2006, prior to 1 December 2009. Defendant's probation revocation hearing was held on 7 January 2014, almost seven years after his 60 month probation order was entered on 17 April 2007, and well after 1 December 2009. As such, based on this Court's holding in *Sitosky*, the trial court lacked jurisdiction to revoke defendant's probation. Accordingly, the order of the trial court revoking defendant's probation must be vacated. Also, accordingly, we need not address defendant's second issue on appeal.

VACATED.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JACOB MARK SPIVEY

No. COA14-1046

Filed 7 April 2015

1. Indictment and Information—injury to real property—victim—legal entity capable of owning property

The indictment charging defendant with injury to real property was invalid on its face because it contained no allegation that the victim, Katy's Great Eats, was a legal entity capable of owning property, and the name of the victim did not otherwise import a corporation or other entity capable of owning property.

2. Indictment and Information—victim's name misspelled—corrected

The trial court did not err by allowing the State, after resting its case, to correct the name of the victim in the indictment that charged defendant with assault with a deadly weapon from "Christina Gibbs"

to "Christian Gibbs." The misspelling appeared inadvertent and did not mislead or surprise defendant as to the nature of the charges against him.

Appeal by Defendant from judgments entered 9 May 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brent D. Kiziah, for the State.

W. Michael Spivey, for the Defendant.

DILLON, Judge.

Jacob Mark Spivey ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of one count of assault with a deadly weapon inflicting serious injury, six counts of assault with a deadly weapon, one count of felony hit and run, one count of injury to real property, and one count of reckless driving to endanger. We find no error in all but one of these convictions, arresting judgment on the charge of injury to real property, vacating the conviction, and remanding the case for resentencing.

I. Background

The evidence tended to show the following: In the evening hours of 11 January 2013, Defendant stepped outside of a bar, variously referred to at trial as "Katy's," "Katy's Bar and Grill," "Katy's Grill and Bar," and "Katy's Great Eats." Christina Short and another bar patron were already outside, talking with one another. Ms. Short began to tell jokes about President Obama, and turned to Defendant, who had been standing by himself nearby, and asked him which presidential candidate he voted for. Defendant replied that he had voted for President Obama. Ms. Short responded by laughing at Defendant and calling him "a stupid little f—er." Defendant went back inside the bar.

A few minutes later, Defendant came back outside. As he was walking towards his car, Ms. Short asked him whether his daddy had bought him his car. Defendant responded by getting into his car, backing it up across the parking lot, and then driving it forward *into* the front of the bar, hitting Ms. Short, and injuring a number of people inside, including a man named Christian Gibbs.

Police apprehended Defendant nearby, and he confessed to intentionally driving his car into the bar but maintained that he intended only to injure Ms. Short and not to kill her.

Defendant was indicted on a variety of charges stemming from the incident. The matter came on for a jury trial. The jury found Defendant guilty of one count of assault with a deadly weapon inflicting serious injury (for injuries to Ms. Short), one count of injury to real property (for damage to the bar), six counts of assault with a deadly weapon (for injuries to six patrons inside the bar), and other charges.

The court entered four judgments in total sentencing Defendant to active time as well as probation with additional conditions upon his release. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal, which concern the adequacy of two of the indictments. As he raises no other arguments, any challenges to his remaining convictions are waived. *See* N.C. R. App. P. 10.

A. Injury to Real Property

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of injury to real property. Specifically, Defendant contends that the indictment – charging him with damaging the "real property, front patio, façade, and porch of the restaurant, the property of Katy's Great Eats" – was invalid on its face because it failed to allege that "Katy's Great Eats" was a legal entity capable of owning property. We agree. Accordingly, we arrest the judgment and vacate Defendant's conviction for injury to real property.

A facially invalid indictment can be challenged at any time because it, as well as any trial or conviction that results from it, is a nullity. *State v. Call*, 353 N.C. 400, 428-29, 545 S.E.2d 190, 208 (2001).

It is a requirement that the indictment charging *certain* crimes involving property contain an allegation concerning the identity of the victim whose property was the subject matter of the crime. *See*, *e.g.*, *State v. Price*, 170 N.C. App. 672, 673-74, 613 S.E.2d 60, 62 (2005) (injury to personal property); *State v. Phillips*, 162 N.C. App. 719, 720-21, 592 S.E.2d 272, 273 (2004) (larceny); *State v. Woody*, 132 N.C. App. 788, 789-90, 513 S.E.2d 801, 802-03 (1999) (conversion); *State v. Ellis*, 33 N.C. App. 667, 669, 236 S.E.2d 299, 301 (1977) (embezzlement). However, *other* crimes involving property do not have this requirement. *See*, *e.g.*, *State v. Norman*, 149 N.C. App. 588, 592-93, 562 S.E.2d 453, 456-57 (2002)

(breaking and entering with felonious intent to steal); *State v. Burroughs*, 147 N.C. App. 693, 696-97, 556 S.E.2d 339, 342 (2001) (attempted robbery with a firearm).

Our Court has held that the crime of injury to real property – for which Defendant was indicted and convicted – belongs to the former group, requiring that the indictment contain an allegation concerning the identity of the victim. *State v. Lilly*, 195 N.C. App. 697, 703, 673 S.E.2d 718, 722 (2009). *See also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

For crimes – such as injury to real property – where the name of the victim must be alleged, our Supreme Court has explained that "[t]he name of the owner of [the] property [] is not a material part of the offence charged in the indictment," but is required to be alleged "to identify the transaction, so that the defendant, by proper plea may protect himself against another prosecution for the same offence." *State v. Bell*, 65 N.C. 313, 314 (1871) (victim is a natural person); *see also State v. Grant*, 104 N.C. 908, 910, 10 S.E. 554, 555 (1889) (corporate victim). However, our Supreme Court has held that where the victim is not a natural person, the indictment *must* allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity *unless* the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity. *State v. Thornton*, 251 N.C. 658, 661-62, 111 S.E.2d 901, 903-04 (1960). In *State v. Patterson*, 194 N.C. App. 608, 671 S.E.2d 357 (2009), for example, we stated that if the victim is a corporation, the requirement of *Thornton* is satisfied either where the indictment expressly alleges that the corporation is an entity capable of owning property, or where the corporate name alleged indicates that the entity is a corporation, "through the use of the word 'incorporated' or the like[.]" *Id.* at 613, 671 S.E.2d at 360. In *Patterson*, we held that an indictment was invalid on its face where it merely identified the victim as "First Baptist Church of Robbinsville," because the name stated in the indictment did not clearly allege that the church was a corporation, nor did the indictment further allege that the church was an entity capable of owning property. *Id.* at 614, 671 S.E.2d at 360. *See also Woody*, 132 N.C. App. at 791, 513 S.E.2d at 803 (holding that an indictment identifying the victim using the term "unlimited" or "association" was not sufficient).

In the present case, the indictment does not contain any allegation that the victim, "Katy's Great Eats," is a legal entity capable of owning property, and the name "Katy's Great Eats" does not otherwise import a corporation or other entity capable of owning property, as required. We,

therefore, must conclude that the indictment charging Defendant with injury to real property is invalid on its face. Accordingly, we arrest the judgment on this charge and vacate Defendant's conviction, remanding the matter for resentencing.

B. Assault with a Deadly Weapon

[2] Defendant also argues that the evidence presented at trial varied fatally from one of the indictments charging him with assault with a deadly weapon and the trial court erred in allowing the State to amend this indictment. Specifically, Defendant contends that the court erred in allowing the State, after resting its case and over Defendant's objection, to correct the victim's name in the indictment from "Christina Gibbs" to "Christian Gibbs." We disagree.

Amending an indictment is statutorily prohibited. N.C. Gen. Stat. § 15A-923(e) (2013). However, our Supreme Court has interpreted the term "amendment" as it is used in the statute to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). Therefore, where the evidence varies from the charge in the indictment, "[a] change in [the] indictment does not constitute an amendment where the variance [is] inadvertent and [the] defendant [is] neither misled nor surprised as to the nature of the charges." *State v. Campbel*l, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 (1999). Furthermore, where the indictment does not vary *materially* from the evidence at trial, the indictment is not fatally defective even if it is never amended. *State v. Isom*, 65 N.C. App. 223, 226, 309 S.E.2d 283, 285 (1983). In either case, whether the variance is material depends upon whether the defendant was surprised, misled, or otherwise prejudiced *because of* the variance. *See, e.g.*, *State v. Cameron*, 73 N.C. App. 89, 92-93, 325 S.E.2d 635, 637 (1985).

In numerous cases we have held that the correction of misspellings, the addition of omitted last names, and the switching of interposed names did not qualify as amendments within the meaning of the statutory prohibition. *See, e.g.*, *State v. Holliman*, 155 N.C. App. 120, 126-27, 573 S.E.2d 682, 687 (2002) (one letter misspelled in the victim's name); *State v. McNair*, 146 N.C. App. 674, 676-77, 554 S.E.2d 665, 668 (2001) (one letter misspelled in the defendant's name); *State v. Marshall*, 92 N.C. App. 398, 401-02, 374 S.E.2d 874, 875-76 (1988) (omitted last name); *State v. Mason*, 222 N.C. App. 223, 227, 730 S.E.2d 795, 798-99 (2012) (interposed first, middle, and last name); *State v. Bailey*, 97 N.C. App.

472, 475-76, 389 S.E.2d 131, 133 (1990) (interposed first and last name). We have recognized these corrections as appropriate before trial or after the State rests its case as long as the defendant is not prejudiced. *See Holliman*, 155 N.C. App. at 126-27, 554 S.E.2d at 668; *McNair*, 146 N.C. App. at 676-77, 554 S.E.2d at 668.

In the present case, one of the indictments charging Defendant with assault with a deadly weapon mistakenly identified the victim as "Christina Gibbs" rather than "Christian Gibbs." The State moved to amend the indictment to correct this mistake after resting its case. The trial court heard argument and allowed the amendment. On direct examination two days beforehand, Mr. Gibbs had testified that he was among those present inside the bar at the time of the collision, and further, that the fender of Defendant's vehicle actually made contact with his leg when it came through the front of the building. Subsequently, Defendant's counsel cross-examined Mr. Gibbs. As in *Bailey*, the mistake in the present case appears to have been inadvertent, and we do not believe Defendant was "misled or surprised as to the nature of the charges against him." 97 N.C. App. at 476, 389 S.E.2d at 133. Therefore, we hold that the change did not qualify as an amendment within the meaning of the statutory prohibition.

Defendant cites our Supreme Court's decision in *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), in support of his argument. We find the present case far more analogous to *Holliman* than *Abraham*. In *Holliman*, the victim's name was misspelled. 153 N.C. App. at 126, 573 S.E.2d at 687. We reasoned that "the indictment sufficiently served the purpose of placing defendant on notice of the charge in order for him to prepare a defense," concluding that there had been no error in correcting the misspelling. 155 N.C. App. at 126-27, 573 S.E.2d at 687. In the present case, the change did not name a completely different victim, as it had in *Abraham*.[1] See 338 N.C. at 339-40, 451 S.E.2d at 143-44. Instead, it inverted the letters "n" and "a" in the victim's first name, correcting a misspelling. The present case is, therefore, distinguishable. Accordingly, this argument is overruled.

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1. We note that we have previously clarified that *Abraham* is not a "blanket prohibition on changing the name of the victim in a criminal indictment," and is, therefore, not inconsistent with allowing for the "correct[ion] [of] inadvertent mistakes in an indictment[.]" *McNair*, 146 N.C. App. at 678, 554 S.E.2d at 669.

III. Conclusion

We arrest judgment on the charge of injury to real property and vacate the conviction, remanding the case to the trial court with instructions to resentence Defendant consistent with this opinion. We find no error in the challenged conviction of assault with a deadly weapon.

NO ERROR in part; VACATED AND REMANDED in part.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JAMAR ISHMEAL WRIGHT, DEFENDANT

No. COA14-997

Filed 7 April 2015

Robbery—dangerous weapon—failure to instruct—extortion not a lesser-included offense

The trial court did not commit error, much less plain error, in a robbery with a dangerous weapon case by failing to instruct the jury on the charge of extortion. Defendant's contention that the crime of extortion was a lesser included offense of armed robbery failed the definitional test adopted by our Supreme Court.

Appeal by Defendant from judgment entered 11 February 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Kevin P. Bradley for Defendant-appellant.

DILLON, Judge.

Jamar Ishmeal Wright ("Defendant") appeals from a conviction of robbery with a dangerous weapon. For the following reasons, we find no error in Defendant's trial.

I. Background

Defendant was indicted for robbery with a dangerous weapon and other charges arising from an incident which occurred when allegedly he entered the residence of another and brandished a gun. Defendant was tried by a jury. At trial, the State offered evidence which tended to show as follows: Chanel Brown asked Michael Kurz to repair her car by buying and installing a new alternator. She gave him $150.00. However, on the day in question, Mr. Kurz used the $150.00 to post bond for a crime he was charged with, planning to replace the money and repair Ms. Brown's car the next day. Hours after Mr. Kurz posted bond using Ms. Brown's money, Ms. Brown and two others forcibly entered the home of Mr. Kurz that he shared with his mother in order to get back Ms. Brown's money. After some discussion, Ms. Brown left the Kurz residence only to return soon later with Defendant. Defendant threatened the Kurzes, pulling out an automatic handgun. Mr. Kurz told Defendant that he would make arrangements with Ms. Brown for the next morning, but Defendant responded that Mr. Kurz' proposal was unacceptable.

Defendant and the others decided to take a computer belonging to Mr. Kurz' mother as "collateral[,]" which was worth approximately $1,000.00. They informed Mr. Kurz that when he gave Ms. Brown the $150.00 they would return the computer, "maybe," and that he "might get it back[.]" They further threatened to kill Mr. Kurz and his mother if Mr. Kurz called the police.

The next day police went to Ms. Brown's apartment, but she informed them that she and her companions had not taken anything from the Kurz residence. However, in fact, Ms. Brown had hidden the computer from the police. The computer was never returned to the Kurzes.

Defendant did not present any evidence at trial.

The jury found Defendant guilty of robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 64 to 89 months of imprisonment. Defendant timely filed a written notice of appeal.

II. Analysis

Defendant argues on appeal that extortion, a Class F felony, is a lesser included offense of robbery with a dangerous weapon, a Class D felony, and that the trial court committed plain error in failing to instruct the jury on this lesser included offense. Essentially, Defendant contends that there was evidence from which a jury could have convicted Defendant of extortion based on the testimony that Defendant took the

computer as collateral and brandished the gun to coerce Mr. Kurz to refund to Ms. Brown the $150.00 she had given him. We disagree.

A. Lesser included offense

Defendant argues that "[b]ecause the essential elements of extortion—obtaining something of value by coercion—are essential elements of armed robbery, extortion is a lesser included offense of robbery with a dangerous weapon." Defendant further contends that "[a]rmed robbery refines the elements of extortion by requiring the coercion to be by use or threatened use of a firearm or other dangerous weapon, by requiring property to be taken and not just anything of value, and by requiring intent to deprive the victim of the property permanently." As Defendant's argument presents a question of law, our standard of review is *de novo*. *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011).

"It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when . . . there is evidence from which the jury could find that defendant committed the lesser included offense." *State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (marks omitted).

Here, we must first determine whether extortion is a lesser included offense of robbery with a dangerous weapon. In *State v. Weaver*, our Supreme Court adopted a "definitional" test rather than a "factual" test for determining whether one crime is a lesser included offense of another crime:

> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

State v. Weaver, 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982) (emphasis in original), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993). Thus, the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains at least one essential element

that is *not* an essential element of the greater crime, then the lesser crime is not a lesser included offense.

On the one hand, N.C. Gen. Stat. § 14-118.4 (2012) provides, in pertinent part, that a person is guilty of extortion if that person "threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity . . . ." Although not defined in the statute, "obtain" means "[t]o succeed in gaining possession of as the result of planning or endeavor; acquire." The American Heritage College Dictionary 943 (3d ed. 1997). "The definition of extortion in G.S. 14-118.4 covers any threat made with the intention to wrongfully obtain 'anything of value or any acquittance, advantage, or immunity.' " *State v. Greenspan*, 92 N.C. App. 563, 567, 374 S.E.2d 884, 886 (1989).

On the other hand, the elements necessary to constitute armed robbery under this section are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and (3) whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87 (2012).

Both armed robbery and extortion involve a threat. However, the subject matter of the threat is much broader for the crime of extortion. Specifically, where armed robbery requires that the subject matter be *personal property* which is taken and carried away, extortion permits obtaining "*anything* of value or any acquittance, advantage, or immunity." *See* N.C. Gen. Stat. § 14-118.4. A thing "of value or acquittance, advantage, or immunity" could involve coercing someone not to file a civil suit or to go to the police rather than coercing someone to hand over an item of personal property. Therefore, Defendant's contention that the crime of extortion is a lesser included offense of armed robbery fails the definitional test adopted by our Supreme Court. *See Weaver*, 306 N.C. at 635, 295 S.E.2d at 378-79. Accordingly, we hold that the trial court did not commit error, much less plain error, in failing to instruct the jury on the charge of extortion.

NO ERROR.

Judges GEER and STEPHENS concur.

UNION COUNTY BOARD OF EDUCATION, PLAINTIFF
v.
UNION COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA14-633

Filed 7 April 2015

1. Schools and Education—appropriation of funds—legal standard—harmless error

The trial court did not abuse its discretion in a case requesting the appropriation of additional funds to a board of education by allowing plaintiff to argue an alleged improper legal standard in plaintiff's opening statements. While plaintiff's argument was technically correct, plaintiff's statement of the standard to the jury was misleading. However, as a result of the trial court's instructions and the verdict sheets, defendant was not prejudiced and thus it was harmless error.

2. Schools and Education—additional funding—evidence outside scope of proposed budget for pertinent fiscal year not allowed

The trial court erred by allowing plaintiff Union County Board of Education to present evidence of claimed needs outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year. N.C.G.S. § 115C-431(c) was never intended to open the door to allow the fact finder to consider evidence outside the scope of the proposed budget and award funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools.

3. Evidence—current school expense funding—sufficiency of evidence—outside scope of proposed budget

Although defendant board of commissioners contended that the trial court erred in a case seeking additional school funding to plaintiff board of education by denying its motions for a directed verdict based on insufficient evidence, plaintiff presented evidence tending to show current expense funding was needed to meet state mandates and policies and capital outlay funding was needed to maintain and repair school facilities. However, having determined that much of plaintiff's evidence was outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year and should not have been admitted into evidence at trial, the case was remanded for a new trial.

4. Schools and Education—additional funding—requested instructions—proposed budget—students performing below grade level

The trial court did not err in a case seeking additional school funding to a board of education by failing to issue requested instructions limiting the jury's consideration to the proposed budget for the 2013-2014 fiscal year. The instructions closely followed the language of N.C.G.S. § 115C-431 and were not overly broad. However, the trial court erred by instructing the jury that students performing below grade level were not obtaining a sound basic education since the instructions likely misled the jury.

Appeal by defendant from judgment entered 10 October 2013 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 2 December 2014.

Schwartz & Shaw, P.L.L.C., by Richard Schwartz and Brian C. Shaw, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Perry, Bundy, Plyler, Long & Cox, LLP, by H. Ligon Bundy and Christopher Cox, for defendant-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jill R. Wilson and Julia C. Ambrose; and the North Carolina School Boards Association, by Allison B. Schafer and Christine T. Scheef, on behalf of the North Carolina School Boards Association, amicus curiae.

Smith Moore Leatherwood LLP, by Elizabeth Brooks Scherer, Matthew Nis Leerberg, and Thomas E. Terrell, Jr., on behalf of the North Carolina Association of County Commissioners, amicus curiae.

McCULLOUGH, Judge.

The Union County Board of Commissioners ("defendant") appeals from a judgment ordering it to appropriate additional funds to the Union County Board of Education's ("plaintiff") local current expense and capital outlay funds for the 2013-2014 fiscal year. For the following reasons, we grant a new trial.

I. Background

This case concerns funding provided by defendant to plaintiff for the 2013-2014 fiscal year. The School Budget and Fiscal Control Act (the "Act"), N.C. Gen. Stat. § 115C-422 *et seq.*, governs such funding.

In general, the Act requires that "[e]ach local school administrative unit shall operate under an annual balanced budget resolution[,]" N.C. Gen. Stat. § 115C-425(a) (2013), which shall include at least the following funds: the State Public School Fund; the local current expense fund; and the capital outlay fund. N.C. Gen. Stat. § 115C-426(c) (2013). Pertinent to this case,

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or [N.C. Gen. Stat. §§] 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(e).

The capital outlay fund shall include appropriations for:

> (1) The acquisition of real property for school purposes, including but not limited to school sites, playgrounds, athletic fields, administrative headquarters, and garages.
>
> (2) The acquisition, construction, reconstruction, enlargement, renovation, or replacement of buildings and other structures, including but not limited to buildings for classrooms and laboratories, physical and vocational

> educational purposes, libraries, auditoriums, gymnasiums, administrative offices, storage, and vehicle maintenance.
>
> (3) The acquisition or replacement of furniture and furnishings, instructional apparatus, data-processing equipment, business machines, and similar items of furnishings and equipment.
>
> (4) The acquisition of school buses as additions to the fleet.
>
> (5) The acquisition of activity buses and other motor vehicles.
>
> (6) Such other objects of expenditure as may be assigned to the capital outlay fund by the uniform budget format.
>
> . . . .
>
> Appropriations in the capital outlay fund shall be funded by revenues made available for capital outlay purposes by the State Board of Education and the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or [N.C. Gen. Stat. §§] 115C-501 to 115C-511, the proceeds of the sale of capital assets, the proceeds of claims against fire and casualty insurance policies, and other sources.

N.C. Gen. Stat. § 115C-426(f).

Furthermore, plaintiff and defendant are encouraged under the Act "to conduct periodic joint meetings during each fiscal year[]" "[i]n order to promote greater mutual understanding of immediate and long-term budgetary issues and constraints[.]" N.C. Gen. Stat. § 115C-426.2 (2013). "In particular, the boards are encouraged to assess the school capital outlay needs, to develop and update a joint five-year plan for meeting those needs, and to consider this plan in the preparation and approval of each year's budget under [the Act]." *Id.* Concerning budgets, the Act outlines a process and timeline for the preparation, proposal, approval, and submission by plaintiff to defendant of each year's budget; as well as defendant's action on plaintiff's proposed budget. *See* N.C. Gen. Stat. §§ 115C-427 to -429.

In the present case, on 15 April 2013, plaintiff submitted its proposed budget for the 2013-2014 fiscal year to defendant in accordance with the

requirements of N.C. Gen. Stat. § 115C-429(a).[1] In the budget, plaintiff requested $86,180,152 in local current expense funding and $8,357,859 in capital outlay funding. Upon review of plaintiff's proposed budget, on 17 June 2013, defendant adopted the county 2013-2014 budget ordinance. The budget ordinance included appropriations to plaintiff in the amount of $82,260,408 for local current expense and $3,000,000 for capital outlay, resulting in shortfalls of $3,919,744 for local current expense and $5,357,859 for capital outlay.

In response to the county 2013-2014 budget ordinance, on 18 June 2013, plaintiff adopted a resolution in which it determined "the amounts of money appropriated by [defendant] for the 2013-2014 school year to [plaintiff's] local current expense fund and capital outlay fund [were] not sufficient . . . to support a system of free public schools[.]" Thus, plaintiff directed its Chairman, superintendent, and attorneys to take the appropriate steps under N.C. Gen. Stat. § 115C-431 to resolve the budget dispute. In reaching the determination that the appropriations by defendant were inadequate, plaintiff indicated that, in addition to considering the amount of funds appropriated by defendant and defendant's ability to provide additional funding, it "considered the cumulative effect of the County of Union's inadequate appropriations for current expense and capital outlay in the preceding fiscal years[.]"

In accordance with the procedures set forth in N.C. Gen. Stat. § 115C-431(a) and (b), plaintiff and defendant participated in a joint meeting on 24 June 2013 in an attempt to resolve the budget dispute. When the parties failed to reach an agreement at the joint meeting, the parties participated in mediation sessions on 24 June, 28 June, and 31 July 2013. The mediation efforts concluded on 31 July 2013 with the mediator declaring an impasse.

The following day, 1 August 2013, plaintiff initiated this action against defendant pursuant to N.C. Gen. Stat. § 115C-431(c). In plaintiff's complaint, plaintiff sought "a determination of (i) the amount of money legally necessary from all sources and (ii) the amount of money legally necessary from [defendant], in order to maintain a system of free public schools as defined by State law and State Board of Education policy."

Defendant responded to plaintiff's complaint by answer filed 12 August 2013, the same day the case came on for trial in Union County Superior Court before the Honorable W. Erwin Spainhour.

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1. "Fiscal year" is defined in the Act as "the annual period for the compilation of fiscal operations. The fiscal year begins on July 1 and ends on June 30." N.C. Gen. Stat. § 115C-423(4) (2013).

Following a lengthy trial, on 10 October 2013, the jury returned a verdict finding that $326,498,487 in current expense funding and $89,184,005 in capital outlay funding was legally necessary from all sources in order to maintain a system of free public schools. The jury also found that an additional $4,973,134 in current expense funding and an additional $86,184,005 in capital outlay funding, beyond the amounts already appropriated by defendant, was legally necessary from defendant in order to maintain a system of free public schools.

The trial court entered judgment on the jury verdict ordering defendant "to appropriate to the local current expense fund of . . . [p]laintiff . . . the additional amount of $4,973,134 for fiscal year 2013-2014, above that amount appropriated in the Union County Budget Ordinance adopted on June 17, 2013[]" and "to appropriate to the capital outlay fund of . . . [p]laintiff . . . the additional amount of $86,184,005 for fiscal year 2013-2014, above that amount appropriated in the Union County Budget Ordinance adopted on June 17, 2013." The trial court also authorized defendant, in accordance with N.C. Gen. Stat. § 115C-431, "to levy such taxes on property as it may choose to make up the difference, if any, when added to other revenues available for these purposes." Defendant filed notice of appeal from the judgment on 17 October 2013.

II. Discussion

Defendant raises the following four issues on appeal: whether the trial court erred by (1) allowing plaintiff to argue an improper legal standard in its opening statements; (2) allowing plaintiff to present evidence of claimed needs outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year; (3) denying defendant's motions for a directed verdict; and (4) instructing the jury to apply a broad rather than restrictive definition of the amount legally necessary to maintain a system of free public schools in Union County.

1. Plaintiff's Opening Statements

[1] Defendant first argues the trial court erred by allowing plaintiff to argue an improper legal standard in plaintiff's opening statements. As both parties agree, we review the trial court's decisions regarding opening statements for an abuse of discretion. *See State v. Speller*, 345 N.C. 600, 606, 481 S.E.2d 284, 287 (1997) ("The control of opening statements rests in the discretion of the trial court.").

During opening statements in this case, plaintiff stated the following while explaining the issues to be decided by the jury:

> The issue that you're going to be asked to decide is the amount of money needed from the Commissioners to maintain the schools. It's not the amount of money needed to open the doors. That's not the standard. The standard is higher than that. We're going to open the doors. Come hell or high water, we're going to open the doors when those kids come. I'm going to get that off the table right now. So that's not an issue. But the standard is much higher than that, and the expectations are much higher than that. So the amount needed is now in your hands. It's up to you to determine. It's entirely up to you.
>
> The Courts have made clear that the amount needed is not that which is absolutely necessary; it's that which is legally necessary, and reasonable and useful for the purposes sought. In making your decision, you have an opportunity to touch the future --

Upon hearing plaintiff's explanation of "the amount needed," defendant objected on the basis that plaintiff incorrectly stated the legal standard. The trial court, however, allowed plaintiff to continue without correction, stating, "[w]ell, it's [sic] opening statement. We'll see where -- what the evidence will show." Now on appeal, defendant contends the trial court erred because plaintiff's statement of the legal standard was similar to that rejected by our Supreme Court in *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 681 S.E.2d 278 (2009).

At the time *Beaufort* was decided, in any action brought to resolve a budget dispute pursuant to N.C. Gen. Stat. § 115C-431(c), "the trial court [was] charged to 'find the facts as to the amount of money necessary to maintain a system of free public schools, and the amount of money needed from the county to make up this total.' " *Id.* at 503, 681 S.E.2d at 281 (quoting N.C. Gen. Stat. § 115C-431(c) (2007)).

In *Beaufort*, our Supreme Court addressed the constitutionality of the statutory framework in N.C. Gen. Stat. § 115C-431(c) for resolving budget disputes and reviewed whether the statutory framework was properly applied in the case. *Id.* at 502, 681 S.E.2d at 280. In doing so, the Court considered "the meaning of the terms 'necessary' and 'needed,' as used in [N.C. Gen. Stat. § 115C-]431(c), in light of Article IX, Section 2(2) of the State Constitution." *Id.* at 505, 681 S.E.2d at 283. Upon recognizing the terms were "susceptible to reasonable interpretations of varying strictness," and that, "[i]f a fact-finder were to interpret 'necessary' or

'needed' in [N.C. Gen. Stat. § 115C-]431(c) expansively, there [was] a danger that the resulting verdict could intrude on a county commission's funding discretion under Article IX, Section 2(2) . . . [,]" the Court adopted a restrictive interpretation of the terms "necessary" and "needed." *Id.* at 505-06, 681 S.E.2d at 283. The Court explained that, "[s]o construed, [N.C. Gen. Stat. § 115C-]431(c)'s requirement that county commissions provide the minimum level of funding required by state law does not abrogate their discretionary authority to contribute more." *Id.*

Our Supreme Court then addressed whether the *Beaufort* trial court erred when it "instructed the jury that the word 'needed' in [N.C. Gen. Stat. § 115C-]431(c) means that which is reasonable and useful and proper or conducive to the end sought." *Id.* at 507, 681 S.E.2d at 283 (quotation marks omitted). Having determined a restrictive interpretation of the terms "necessary" and "needed" was necessary to preserve the discretionary authority of county commissions, the Court held the instruction to the jury in *Beaufort* "conveyed an impermissible, expansive definition" and was in error. *Id.* Thus, the Court remanded the case for a new trial noting the following:

> At that trial, the trial court should instruct the jury that [N.C. Gen. Stat. § 115C-]431(c) requires the County Commission to provide that appropriation *legally necessary* to support a system of free public schools, as defined by Chapter 115C and the policies of the State Board. The trial court should also instruct the jury, in arriving at its verdict, to consider the educational goals and policies of the state, the budgetary request of the local board of education, the financial resources of the county, and the fiscal policies of the board of county commissioners. *See* [N.C. Gen. Stat.] § 115C–426(e) (2007). Anything beyond this measure of damages impermissibly infringes upon the discretionary authority of the County Commission under Article IX, Section 2(2) of the State Constitution and may not be awarded by a jury.

Id. at 507, 681 S.E.2d at 283-84 (emphasis added).[2]

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2. Subsequent to the *Beaufort* decision and during the pendency of the current budget dispute, prior to the filing of this case, the General Assembly amended N.C. Gen. Stat. § 115C-431(c) to reflect the Court's holding in *Beaufort*. Thus, N.C. Gen. Stat. § 115C-431(c) now charges the fact finder to determine the amount of money "legally necessary" as opposed to the amount of money "needed" and "necessary." 2013 N.C. Sess. Laws 2013-141, sec. 1, eff. June 19, 2013.

As noted above, in this case, plaintiff stated to the jury during its opening statements that the standard to be applied in determining the amount of funding "is not that which is absolutely necessary; it's that which is legally necessary, and reasonable and useful for the purposes sought." Although, the standard communicated by plaintiff to the jury is similar to the one rejected in *Beaufort*, plaintiff contends its use of the "reasonable and useful" language was not inconsistent with *Beaufort* because the language was joined to the correct standard, "legally necessary," by the conjunction "and" and therefore did not supersede what was "legally necessary." While plaintiff's argument is technically correct, we find plaintiff's statement of the standard to the jury misleading and, therefore, hold the trial court erred in allowing plaintiff to communicate a standard that included language mirroring that rejected in *Beaufort*. Nevertheless, we hold the error was harmless.

In charging the jury in *Beaufort*, the trial court instructed the jury to apply a broad definition of "needed" and "necessary" to determine the amount of funding to be awarded. In the present case, however, the overly broad language rejected in *Beaufort* was only communicated to the jury in plaintiff's opening statements. Following weeks of evidence, the trial court instructed the jury that it must apply the law it provides in the jury instructions and stated the proper legal standard as follows:

> The issue to be decided by you, the jury, is as follows:
>
> "What amount of money is *legally necessary* from all sources and what amount of money is *legally necessary* from the board of county commissioners in order to maintain a system of free public schools as defined by state law and State Board of Education policy?"

(Emphasis added.) The trial court then repeatedly emphasized the proper legal standard throughout its instructions to the jury without reference to the language rejected in *Beaufort*. Moreover, the trial court provided the jury with verdict sheets incorporating the correct legal standard. As a result of the trial court's instructions and the verdict sheets, we hold defendant was not prejudiced by plaintiff's improper statements during its opening statements to the jury.

2. Evidence

[2] Defendant next argues the trial court erred by allowing plaintiff to present evidence of claimed needs outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year.

Generally, we review the trial court's decisions regarding the admissibility of evidence for abuse of discretion, *see State v. Shuford*, 337 N.C. 641, 649, 447 S.E.2d 742, 747 (1994), and "[e]videntiary errors are [considered] harmless unless . . . a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Yet, a trial court's rulings on relevancy are not technically discretionary and therefore are not afforded as much deference. *See Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004).

On the day the case came on for trial, 12 August 2013, defendant filed a motion in limine in which defendant sought to exclude the following:

> 4. Any suggestion, information, documents, statements, or evidence of capital outlay needs that . . . [p]laintiff did not request . . . [d]efendant to fund in its 2013-2014 [fiscal year] budget, or information, documents, statement, or evidence of the future capital outlay needs of . . . [p]laintiff upon the grounds that . . . [p]laintiff is required by [N.C. Gen. Stat. §] 115C-521(b) to present its request for capital needs for each fiscal year with its annual budget, and [d]efendant has no duty to fund any item of [p]laintiff's capital needs until . . . [p]laintiff has made a request for such needs.
>
> 5. Any suggestion, information, documents, statements, or evidence that [d]efendant has failed to provide adequate funding for current expense and/or capital outlay in years preceding the 2013-2014 fiscal year, upon the grounds that the issue before the Court concerns whether . . . [d]efendant has adequately funded . . . [p]laintiff's proposed 2013-2014 budget request, in order for . . . [p]laintiff to "support a system of free public schools." Plaintiff has the annual right and duty under [N.C. Gen. Stat. §] 115C-431 to institute a proceeding each year for additional funding if it determines that [d]efendant has not adequately provided sufficient local funds to support a system of free public schools for that fiscal year. Once [p]laintiff has accepted the money appropriated by [d]efendant for a fiscal year and has adopted its own budget, it has acknowledged that it has been adequately funded for that fiscal year, and may not later contend that it was inadequately funded for that year.

During arguments on the motion, defendant explained to the trial court that plaintiff indicated it had capital outlay needs beyond those in the proposed budget and that it would seek additional capital outlay funding beyond the $5,357,859 portion of the proposed budget for capital outlay that defendant did not fund in the county budget ordinance. Defendant indicated "that's what [the] motion is directed at; is [plaintiff's] contention that they are entitled to present evidence and seek more than they requested in their . . . [proposed budget]." Defendant then asserted plaintiff was bound by the proposed budget for the 2013-2014 fiscal year.

In response, plaintiff looked to the language of N.C. Gen. Stat. § 115C-431(c) and argued the statute was specific and clear that "the issue to be submitted to the jury is that the jury finds the amount needed to maintain a system of free public schools[.]" Plaintiff then argued they should be able to present any evidence of the actual needs of the school system without regard to its proposed budget for the 2013-2014 fiscal year because there was nothing in N.C. Gen. Stat. § 115C-431(c) restricting the jury's consideration to the proposed budget. Plaintiff stated N.C. Gen. Stat. § 115C-431 does not even mention the proposed budget as a consideration for the jury.

Upon considering the arguments, the trial court denied defendant's motion, reasoning that N.C. Gen. Stat. § 155C-431(c) was very specific and any evidence relating to the amount of money legally necessary from all sources and the amount of money legally necessary from defendant to support the school system, regardless of whether plaintiff requested funding for it in the proposed budget, should be considered by the jury. Thereafter, over defendant's objections at trial, the trial court allowed plaintiff to present evidence outside the scope of its proposed budget for the 2013-2014 fiscal year.

In order to determine whether the trial court erred in allowing evidence outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year, we must determine the scope of the proceedings; specifically whether the proceedings are limited to the proposed budget. Upon review, we hold the budget dispute proceedings are limited to a consideration of the proposed budget for the fiscal year at issue and, therefore, the trial court erred in this case by allowing evidence outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year into evidence at trial.

In reaching this conclusion, we interpret N.C. Gen. Stat. § 115C-431(c) in the context of the Act. As this Court explained in *Baumann-Chacon v. Baumann*,

> [t]he principal goal of statutory construction is to accomplish the legislative intent. The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish. Individual expressions must be construed as part of the composite whole and be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. The Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute.

212 N.C. App. 137, 140, 710 S.E.2d 431, 434 (2011) (quotation marks and citations omitted); *see also Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) ("Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish.").

As stated in N.C. Gen. Stat. § 115C-424, "[i]t [was] the intent of the General Assembly by enactment of [the Act] to prescribe for the public schools a uniform system of budgeting and fiscal control." N.C. Gen. Stat. § 115C-424 (2013). In order to accomplish this goal, the Act provides a step-by-step budget process. In *Beaufort*, our Supreme Court summarized the process as follows:

> The local school board first creates a budget setting out its estimate of the cost of providing education within its locale for the upcoming year and submits that budget to the county commission. *See* [N.C. Gen. Stat.] § 115C–429(a) (2007). The county commission then determines the amount of funds to be appropriated to the school board. *See* [N.C. Gen. Stat.] § 115C–429(b) (2007). If there is a dispute between the school board and the county commission, the two boards meet with a mediator in an effort to negotiate a compromise. *See* [N.C. Gen. Stat.] § 115C–431(a). If there is still no agreement, representatives from the two boards enter a formal mediation. *See* [N.C. Gen. Stat.] § 115C–431(b). If no agreement can be reached at the mediation, the school board may file an action in superior court. *See* [N.C. Gen. Stat.] § 115C–431(c).

363 N.C. at 503, 681 S.E.2d at 281.

N.C. Gen. Stat. § 115C-431(c), which governs a schools board's suit against a county commission, provides the following:

> (c) Within five days after an announcement of no agreement by the mediator, the local board of education may file an action in the superior court division of the General Court of Justice. Either board has the right to have the issues of fact tried by a jury. When a jury trial is demanded, the cause shall be set for the first succeeding term of the superior court in the county, and shall take precedence over all other business of the court. However, if the judge presiding certifies to the Chief Justice of the Supreme Court, either before or during the term, that because of the accumulation of other business, the public interest will be best served by not trying the cause at the term next succeeding the filing of the action, the Chief Justice shall immediately call a special term of the superior court for the county, to convene as soon as possible, and assign a judge of the superior court or an emergency judge to hold the court, and the cause shall be tried at this special term. The judge shall find, or if the issue is submitted to the jury, the jury shall find the facts as to the following in order to maintain a system of free public schools as defined by State law and State Board of Education policy: (i) the amount of money legally necessary from all sources and (ii) the amount of money legally necessary from the board of county commissioners. In making the finding, the judge or the jury shall consider the educational goals and policies of the State and the local board of education, the budgetary request of the local board of education, the financial resources of the county and the local board of education, and the fiscal policies of the board of county commissioners and the local board of education.
>
> All findings of fact in the superior court, whether found by the judge or a jury, shall be conclusive. When the facts have been found, the court shall give judgment ordering the board of county commissioners to appropriate a sum certain to the local school administrative unit, and to levy such taxes on property as may be necessary to make up this sum when added to other revenues available for the purpose.

N.C. Gen. Stat. § 115C-431(c).

Plaintiff, just as it argued at trial, looks to this language and argues N.C. Gen. Stat. § 115C-431(c) is specific as to the issues to be decided by the jury and because there is no language restricting the jury's determination to those amounts sought in its proposed budget, all evidence related to its funding needs was properly admitted. Plaintiff further argues the General Assembly could have easily limited the proceedings to a consideration of those amounts in the proposed budget had it intended to so.

Although N.C. Gen. Stat. § 115C-431(c) does not explicitly state that the proceedings are limited to plaintiff's proposed budget, sub-section (c) does include plaintiff's proposed budget as one of the mandatory considerations for the fact finder in determining the amounts legally necessary to maintain a system of free public schools. *See* N.C. Gen. Stat. § 115C-431(c) ("In making the finding, the judge or the jury shall consider . . . the budgetary request of the local board of education . . . ."). Moreover, it is evident from the remainder of N.C. Gen. Stat. § 115C-431 that the proposed budget is the principal focus of the entire dispute resolution process. Prior to the filing of a lawsuit under N.C. Gen. Stat. § 115C-431(c), N.C. Gen. Stat. §§ 115C-431(a) and (b) require plaintiff and defendant to attempt to settle the budget dispute at a joint meeting and, if necessary, through additional mediation efforts. N.C. Gen. Stat. § 115C-431(a), which sets forth guidelines for the joint meeting, states that "[a]t the joint meeting, the *entire school budget* shall be considered carefully and judiciously, and the two boards shall make a good-faith attempt to resolve the differences that have arisen between them." N.C. Gen. Stat. § 115C-431(a) (emphasis added).

Based on the language of the N.C. Gen. Stat. § 115C-431, we hold the amounts requested in plaintiff's proposed budget are what are at issue in a budget dispute under N.C. Gen. Stat. § 115C-431. This result seems common sense, as a budget dispute only arises when defendant does not fully fund plaintiff's proposed budget.

We find further support for this conclusion when N.C. Gen. Stat. § 115C-431 is viewed in the context of the entire budget process, considering the respective roles of plaintiff and defendant.

N.C. Gen. Stat. § 115C-521(b), which is outside the Act but related to the budget process, provides the following:

> It shall be the duty of the boards of education of the several local school administrative school units of the State to make provisions for the public school term by providing adequate school buildings equipped with suitable

> school furniture and apparatus. *The needs and the cost of those buildings, equipment, and apparatus, shall be presented each year when the school budget is submitted to the respective tax-levying authorities.* The boards of commissioners shall be given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped, and it shall be the duty of the several boards of county commissioners to provide funds for the same.

N.C. Gen. Stat. § 115C-521(b) (2013) (emphasis added). Thus, as defendant argues, it is plaintiff's role to determine the capital outlay needs of the school system each year and to include those costs in their proposed budget each year. Defendant then reviews plaintiff's proposed budget and makes appropriations.

While plaintiff acknowledges that its role is to determine the amount of funding necessary, it argues the proposed budget is just an estimate and it is the fact finder who determines the amount legally necessary. Plaintiff argues limiting the evidence to the proposed budget in this case would have the effect of authorizing legally insufficient funding because the fact finder found funding beyond the amount requested in plaintiff's proposed budget was legally necessary. Plaintiff further contends that defendant was well aware of the school system's outstanding capital needs from prior years that were unfunded and therefore defendant had reasonable time to make funding decisions. We are not persuaded by plaintiff's arguments.

N.C. Gen. Stat. § 115C-521(b) makes clear that plaintiff must assess the capital needs of the school system and present those needs to defendant "each year." Each year is then treated individually in the budget process. By implication, if plaintiff does not initiate the dispute resolution process in N.C. Gen. Stat. § 115C-431, it has accepted that the appropriations by defendant were sufficient for that year. Unfunded requests from prior year's proposed budgets are not automatically carried forward and considered in subsequent years. If plaintiff wants those previously unfunded amounts considered, it must include them in the proposed budget for the 2013-2014 fiscal year.

Moreover, plaintiff's argument that limiting the evidence to those amounts requested in its proposed budget would authorize legally insufficient funding presumes that plaintiff requested an amount of funds below the amount legally necessary to maintain a system of free public

schools. We do not accept this presumption. While plaintiff's proposed budget may be an estimate, it is not a blind guess and we do not accept plaintiff's suggestion that it underestimated the capital outlay needs of the school system by over $80,000,000.

The purpose of the budget dispute resolution process outlined in N.C. Gen. Stat. § 115C-431 is to provide an expedited process to resolve budget disputes between a board of education and a board of county commissioners when the board of education's proposed budget is not fully funded. We hold N.C. Gen. Stat. § 115C-431(c) was never intended to open the door to allow the fact finder to consider evidence outside the scope of the proposed budget and award funding beyond that requested by the board of education, whose duty it is to request sufficient funding to maintain a system of free public schools.

3. Directed Verdict

[3] At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict on the ground that plaintiff failed to present sufficient evidence for the jury to decide the amount of money legally necessary to maintain a system of free public schools. The trial court denied both motions.

In this third issue on appeal, defendant now contends the trial court erred in denying its motions for a directed verdict.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

"[U]nder [N.C. Gen. Stat.] § 115C–431(c), a school board must present evidence of (1) the amount of money it needs to maintain its school system, and (2) the amount it needs from the county in order to have

the necessary amount." *Duplin Cnty. Bd. of Educ. v. Duplin Cnty. Bd. of Cnty. Comm'rs*, 201 N.C. App. 113, 122, 686 S.E.2d 169, 174 (2009). As the Court made clear in *Beaufort*, the amount of money "needed" or "necessary" is that amount "legally necessary" to support a system of free public schools. 363 N.C. at 507, 681 S.E.2d at 283.

In the present case, defendant argues "[plaintiff] failed to meet its basic burden of proof to show what amount was legally necessary to maintain a system of free public schools, and, thus, in turn failed to show how [defendant's] funding fell short of the legally necessary level." Defendant asserts plaintiff "simply failed to present evidence on the annual cost of providing a county-wide system of education both as to capital and current expenditures."

Upon a review of the evidence, we disagree. Specifically, plaintiff presented evidence tending to show current expense funding was needed to meet state mandates and policies and capital outlay funding was needed to maintain and repair school facilities. However, having determined above that much of plaintiff's evidence was outside the scope of plaintiff's proposed budget for the 2013-2014 fiscal year and should not have been admitted into evidence at trial, we remand for a new trial; it is too difficult to distinguish what evidence in the weeks long trial was within the scope of plaintiff's proposed budget.

4. Jury Instructions

[4] In the final issue on appeal, defendant contends the trial court erred in issuing a broad rather than restrictive definition of the amount of money legally necessary to maintain a system of free public schools. Specifically, defendant argues the trial court erred by failing to issue requested instructions limiting the jury's consideration to the proposed budget for the 2013-2014 fiscal year and by instructing the jury that students performing below grade level were not obtaining a sound basic education. Because similar jury instructions are likely to be issued on retrial, we address defendant's arguments.

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must

> be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

Defendant first argues the trial court erred by not instructing the jury to limit its consideration to those amounts plaintiff requested in its proposed budget for the 2013-2014 fiscal year. We disagree.

A review of the trial court's instructions to the jury reveals that the instructions closely followed the language of N.C. Gen. Stat. § 115C-431 and were not overly broad. In fact, the trial court included language directing the jury to consider "the budgetary request of [plaintiff,]" among other factors provided in N.C. Gen. Stat. § 115C-431(c). We hold these instructions were sufficient to present the law to the jury, and had the trial court properly limited the evidence to the scope of plaintiff's proposed budget, plaintiff's requested instruction would have been unnecessary.

Defendant also argues the trial court misled the jury when it misinterpreted the elements of a sound basic education set forth in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997), and *Hoke Cnty. Bd. of Educ. v. State of North Carolina*, 358 N.C. 605, 599 S.E.2d 365 (2004). Specifically, defendant takes issue with the following instructions:

> The North Carolina Constitution provides every child the constitutional right to a sound basic education . . . .
>
> A student who is performing below grade level . . . is not obtaining a sound basic education in the subject matter being tested. A student who is performing at grade level or above . . . is obtaining a sound basic education . . . .

Defendant argues these instructions misled the jury to believe that "students were only being provided a sound basic education if they were performing at grade level, suggesting if any student was not so performing, [Union County] was not providing a sound basic education and, thus, failing to provide a system of free public schools."

Upon review, we agree that this portion of the trial court's instructions likely misled the jury and was error. School funding cannot guarantee student performance; but only the opportunity for students to receive a sound basic education. That is why in *Leandro*, our Supreme

Court expressly rejected the notion that our constitution provides every child the right to a sound basic education, noting "[s]ubstantial problems have been experienced in those states in which the courts have held that the state constitution guaranteed the right to a sound basic education[]" and "the framers of our Constitution did not intend to set such an impractical or unattainable goal." 346 N.C. at 350-51, 488 S.E.2d at 257. Instead, the Court held "Article IX, Section 2(1) of the North Carolina Constitution requires that all children have the *opportunity* for a sound basic education . . . ." *Id* at 351, 488 S.E.2d at 257 (emphasis added).

III. Conclusion

Having determined the budget dispute resolution process outlined in N.C. Gen. Stat. § 115C-431 concerns plaintiff's proposed budget for the 2013-2014 fiscal year, we hold the trial court erred in allowing evidence outside the scope of the proposed budget for the 2013-2014 fiscal year into evidence and remand for a new trial.

NEW TRIAL.

Judges CALABRIA and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 APRIL 2015)

BERTRAND v. CABELLO No. 14-265	Catawba (10CVD3566)	Affirmed
BIRCKHEAD v. N.C. DEP'T OF PUB. SAFETY No. 14-890	N.C. Industrial Commission (W63959)	Affirmed
CITIBANK, N.A. v. MICHAUX No. 14-667	Durham (10CVD5483)	Affirmed
ELIZABETH TOWNES HOMEOWNERS ASS'N, INC. v. JORDAN No. 14-767	Mecklenburg (11CVS5323)	Affirmed
ESPEY v. SELECT PORTFOLIO SERVS., INC. No. 14-961	Buncombe (13CVS1933)	Dismissed
HAILEAB v. JOHN Q. HAMMONS HOTELS No. 14-333	N.C. Industrial Commission (886537) (W06274)	Affirmed
IN RE FORECLOSURE OF BRITTAIN No. 14-1078	Henderson (12SP513)	Affirmed in Part, Dismissed in Part.
IN RE FORECLOSURE OF VICKS No. 14-222	Union (11SP659)	Affirmed
IN RE A.B. No. 14-1108	Forsyth (12J198)	Affirmed
IN RE A.T.H. No. 14-1197	Guilford (12JT523) (12JT524) (12JT528)	Affirmed
IN RE A.W. No. 14-1051	Cleveland (10JT154) (13JT10) (13JT11)	Affirmed
IN RE C.M. No. 14-780	Mecklenburg (13JB710)	Affirmed

IN RE D.W.L. No. 14-1145	Buncombe (12JT14)	Affirmed
IN RE L.L.B. No. 14-1106	Columbus (11JT92)	Affirmed
IN RE L.T.L. No. 14-1154	Guilford (12JT409-411)	Affirmed
IN RE N.K.M. No. 14-855	Chatham (12JT70)	Affirmed
IN RE R.W. No. 14-1081	Dare (11JT44)	Affirmed
IN RE S.W. No. 14-992	Vance (13JA20)	Affirmed
KIRKWOOD v. KIRKWOOD No. 14-702	Craven (10CVD1142)	Affirmed
LAMM v. TILL No. 14-828	Iredell (11CVS175)	No Error
MINAR v. MURRAY No. 14-968	Guilford (10CVD12467)	Reversed and Remanded
PAYTON v. BARNES TRANSP. No. 14-510	N.C. Industrial Commission (X67842)	Dismissed
SCHOTT v. STIWINTER No. 14-220	Buncombe (11CVS6168)	Reversed and Remanded
STATE v. BYRD No. 14-1087	Guilford (11CRS85093) (12CRS24017)	No Error
STATE v. CARTER No. 14-864	Randolph (12CRS53047)	No Error
STATE v. CLEMONS No. 14-745	Wake (12CRS217865)	No Error
STATE v. DEANS No. 14-1071	Wake (12CRS209176)	Affirmed
STATE v. GAUSE No. 14-1085	Mecklenburg (07CRS211736-38)	No Error in Part, Vacated and Remanded in Part.

STATE v. GUNTER No. 14-942	Haywood (10CRS359) (10CRS360) (10CRS362) (10CRS50204)	No prejudicial error
STATE v. HODGE No. 14-724	Buncombe (12CRS64155-56) (13CRS178-180) (13CRS323)	No prejudicial error
STATE v. ISTVAN No. 14-1027	Brunswick (13CRS3615) (13CRS701815)	No Error
STATE v. LONG No. 14-1217	Graham (11CRS50639)	No Error
STATE v. MORGAN No. 14-776	Gaston (11CRS66211) (11CRS66220) (11CRS66221)	Remanded for Resentencing
STATE v. RAVENELL No. 14-941	Iredell (09CRS60091) (09CRS60093) (10CRS1193) (10CRS59082)	Vacated and remanded.
STATE v. WASH. No. 14-1183	Cabarrus (11CRS55611) (12CRS3)	No Error
STINES v. CARTER No. 14-59	Buncombe (13CVD2976)	Affirmed in part; reversed and remanded in part
VAN ANTWERP v. BILOBRAN No. 14-661	Pitt (12CVD596)	Affirmed

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