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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 20, 2017

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

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OF

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MARTHA GEER[3]

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

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
SHELLEY LUCAS EDWARDS[4]

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Alan Lagos

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[4] 1 January 2016.

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APPEAL AND ERROR

Appeal and Error—appealability—appellate rules—failure to timely comply—dismissal of appeal—Defendant's appeal from a trial court order dismissing their appeal was dismissed. Defendants failed to timely comply with the provisions of N.C. R. App. P. Rule 3 and plaintiff had taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the notice of appeal. **High Point Bank & Tr. Co. v. Fowler, 349.**

Appeal and Error—argument abandoned—dismissed—The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-269(f) that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant abandoned his argument that the trial court erred by denying his motion for appropriate relief requesting post-conviction DNA testing, he abandoned any argument under section 15A-269(f). **State v. Doisey, 441.**

Appeal and Error—constitutional issue—raised for first time on appeal—Defendant failed to preserve the issue of whether the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both assault with a deadly weapon with the intent to kill and inflicting serious injury and assault inflicting serious bodily injury. Defendant did not raise the issue at trial, and a defendant may not raise a constitutional issue for the first time on appeal. **State v. Baldwin, 413.**

Appeal and Error—interlocutory orders and appeals—multiple defendants—overlapping facts—Plaintiff's appeal of the trial court's order granting summary judgment in favor of one defendant was interlocutory and therefore properly before the Court of Appeals. Because plaintiff's medical malpractice lawsuit against multiple defendants involved the same underlying facts, different proceedings could result in inconsistent verdicts. **Hawkins v. Emergency Med. Physicians of Craven Cty., PLLC, 337.**

APPEAL AND ERROR—Continued

Appeal and Error—issue raised for first time on appeal—The Court of Appeals declined to address whether defendant's general consent to a search of his person extended to the digital contents of a GPS device because the State did not make that argument before the trial court. **State v. Clyburn, 428.**

Appeal and Error—no ruling by trial court—dismissed—The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-268 that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant did not make a written request pursuant to the statute, the trial court did not rule on such a request and it was not properly before the Court of Appeals. **State v. Doisey, 441.**

Appeal and Error—preservation of issues—failure to argue at trial—The Court of Appeals declined to take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols since they were never presented to the trial court. **State v. James, 456.**

Appeal and Error—preservation of issues—failure to argue—drugs—motion to dismiss—sampling technique—sufficiency of sample size—The trial court did not err in a drugs case by denying defendant's motion to dismiss based on the State's flawed evidence regarding an agent's alleged improper sampling technique. The agent was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss. Further, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance. **State v. James, 456.**

Appeal and Error—Rule of Evidence 403 objection—different Rule 403 argument on appeal—Defendant preserved his Rule 403 objection to the admission of his recorded interview with police. While he made new arguments on appeal for why the evidence was inadmissible under Rule 403, his argument remained based on Rule 403. **State v. Baldwin, 413.**

Appeal and Error—violation of multiple appellate rules—appeal dismissed—In an equitable distribution case, issues were dismissed for violation of the Appellate Rules where defendant did not argue that the trial court committed legal error and did not provide legal authority in support of his contentions. His arguments merely contained personal immunity, did not show prejudice, or raised a moot issue. **Comstock v. Comstock, 304.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—findings of fact—sufficiency of evidence—Although respondent mother challenged several of the district court's findings of fact as unsupported by the evidence in a child abuse, dependency, and neglect case regarding the mother's substance abuse problem; the paternal grandparents' ability to provide care; and the Mecklenburg County Department of Social Services, Youth and Family Services' reasonable efforts; there was competent evidence to support the pertinent findings. **In re N.B., 353.**

Child Abuse, Dependency, and Neglect—guardianship awarded to paternal grandparents—verification of adequate resources—cessation of reunification efforts—findings of fact—The trial court did not err in a child abuse, dependency, and neglect case by awarding guardianship to the paternal

grandparents allegedly without properly verifying that they would have adequate resources to care appropriately for the juveniles as required by N.C.G.S. § 7B-906.1(j). The findings exhibited that the trial court considered this factor. Further, the trial court ceased reunification efforts after making the necessary findings under N.C.G.S. § 7B-906.1(d)(3). **In re N.B., 353.**

CHILD VISITATION

Child Visitation—minimum requirements—frequency—length of time—supervision—The trial court's visitation order met the minimum requirements for visitation. The trial court accounted for the minimum frequency and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist. The trial court left it to respondent mother to coordinate with the family therapist regarding these visits. **In re N.B., 353.**

CONSTITUTIONAL LAW

Constitutional Law—double jeopardy—assault with a deadly weapon with the intent to kill and inflicting serious injury—assault inflicting serious bodily injury—Exercising its discretionary power under Rule 2 of the Rules of Appellate Procedure, the Court of Appeals held that the trial court violated defendant's right to be free from double jeopardy by sentencing him for both assault with a deadly weapon with the intent to kill and inflicting serious injury (AWDWIKISI) and assault inflicting serious bodily injury (AISBI). N.C.G.S. § 14-32.4(a) states that a person may be convicted of AISBI "[u]nless the conduct is covered under some other provision of law providing greater punishment." Defendant's AISBI conviction was vacated, and the case was remanded for resentencing on his AWDWIKISI conviction. **State v. Baldwin, 413.**

Constitutional Law—double jeopardy—attempted first-degree murder—assault with a deadly weapon with intent to kill and inflicting serious injury—The trial court did not err by denying defendant's motion to require the State to elect the offense upon which it would proceed at trial. Under *State v. Tirado*, 358 N.C. 551 (2004), convictions for attempted first-degree murder and assault with a deadly weapon with the intent to kill and inflicting serious injury—offenses that arose from the same conduct—did not subject the defendant to double jeopardy. **State v. Baldwin, 413.**

DAMAGES AND REMEDIES

Damages and Remedies—interest—basis of calculation—The trial court did not err in its award of prejudgment interest based on the full amount of compensatory damages awarded, $1,500,000.00. Although defendant contended that prejudgment interest should be calculated based only on the portion of compensatory damages for which defendant is responsible, the trial court's calculation was in accordance with the formula espoused by the North Carolina Supreme Court in *Brown v. Flowe*, 349 N.C. 520. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

DIVORCE

Divorce—equitable distribution—attorney fees—defendant's failure to provide adequate support—findings—not a child support action—The trial court did not err by awarding attorney's fees to plaintiff where defendant argued that

plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. Because the attorney's fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—brokerage account—marital property— The trial court did not err in an equitable distribution action by finding that a brokerage account was marital property. Defendant presented evidence tending to show that the brokerage account had some separate property attributes; however, competent evidence in the record supported the trial court's finding that the USAA Brokerage Account valued at $85,670 was marital property. However, as defendant conceded in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds." **Comstock v. Comstock, 304.**

Divorce—equitable distribution—debt—women, gambling, alcohol—not for the joint benefit of the parties—The trial court did not err in an equitable distribution action by finding that a portion of the debt on two credit cards were defendant's separate debt. Although defendant challenged the trial court's methodology, he did not challenge the amount of the debt at separation. The trial court also found that the pro se defendant failed to meet his burden of showing that charges for "women," "alcohol," and "gambling" were for the joint benefit of the parties. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—findings—evidentiary and ultimate—An equitable distribution order appropriately contained both "ultimate" and "evidentiary" findings necessary for appellate review of whether the property was equitably divided. The judgment was not fatally defective. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—home equity line of credit—defendant's separate debt—The trial court did not err by finding that a home equity line of credit was defendant's separate debt. The trial court's finding on this issue was supported by competent evidence. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—insurance policy—finding of stipulation—erroneous—The trial court erred in an equitable distribution action by finding that the parties stipulated that an insurance policy was marital property and by concluding that the policy value should be distributed to defendant. The parties did not stipulate that the policy was marital. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—insurance proceeds after tornado—amounts paid for materials—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, there was competent record evidence to support the trial court's findings regarding amounts paid by defendant for materials. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—considerations on remand—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court was instructed on remand to reconsider the entire distribution scheme, with a new date of distribution and, if requested by either party, consider additional evidence and arguments regarding changes in the condition or value of the marital home as well as distributional factors since the date of the last trial. However, the

parties should not be permitted a "second bite at the apple" with new evidence or arguments as to the classification or valuation of marital or divisible property or debts up to the final day of the equitable distribution trial. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—defendant's accounting—truthfulness—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's findings concerning defendant's truthfulness in her accounting for the proceeds both were and were not supported by the evidence. Her testimony supported the first finding regarding a payment to a particular individual, but there was no competent evidence in the record that defendant paid money from the insurance proceeds to four individuals who were not listed in her accounting to the court. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—failure to provide accounting—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, an unequal distribution in favor of plaintiff was reversed where the trial court put substantial weight on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence. The findings were based on the erroneous classification of the insurance proceeds as marital property when they were actually defendant's separate property. On remand, the trial court was instructed to make findings of fact upon all of the distributional factors upon which evidence was presented and reconsider the distributional factors. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—findings—partial replacement of roof—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's finding that defendant made the unilateral decision not to replace the entire roof of the structure, which was the primary purpose of the insurance proceeds, was supported by the testimony of defendant herself. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—kind of repairs performed—separate property—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, a finding of fact that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof was supported by competent record evidence. On remand, the trial court should consider these repairs as defendant's use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—not marital properly—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court erred by concluding that the proceeds were marital property that should be divided by the court. The parties' homeowner's insurance policy lapsed subsequent to their separation, and defendant took out a new homeowner's insurance policy on the marital residence in her sole name. Because the premiums on the policy were paid with defendant's assets, the proceeds from the homeowner's insurance policy were the separate property of defendant. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—unequal distribution—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, remanded on another issue, defendant argued that the trial court erred in making an unequal distribution in favor of plaintiff, but the insurance proceeds were defendant's separate property which was not subject to interim distribution or equitable distribution by the trial court. On remand the trial court must reconsider the distributional factors in light of the fact that the insurance proceeds were defendant's separate property. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—insurance proceeds after tornado—value of marital home—In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, there was competent evidence in the record to support some portions of the trial court's finding regarding the marital property, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. One particularly salient portion of this finding was not supported by the evidence: there was no evidence regarding the current value of the marital home. The sole appraisal in evidence addressed *only* the date of separation value of the home, and based on both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then. **Robbins v. Robbins, 386.**

Divorce—equitable distribution—IRA—separate property—resource for distributive award—The trial court did not err by ordering that more than 50% of an IRA's value be awarded to plaintiff. The IRA was not a marital asset as the parties stipulated that it was defendant's separate property. However, defendant's IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—orders concerning an IRA—interlocutory—Defendant's appellate arguments concerning certain orders in an equitable distribution action were dismissed where there was no indication from the record that all of the claims brought by the parties had been resolved, thus making the orders interlocutory. Defendant did not articulate any argument that the domestic relations order or the injunction order affected a substantial right. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—post-separation debt payments—source of funds—The trial court did not err by failing to make adequate findings of fact and conclusions of law about post-separation debt payments made by defendant. Fatal to defendant's argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. Assuming that defendant in fact made the alleged post-separation payments, he failed to establish that the source of these payments was his separate funds. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—post-separation debt payment—The trial court was not required to consider a post-separation debt payment as a distributional factor in its equitable distribution order where defendant failed to carry his burden and did not show that he could receive credit or reimbursement for his payment under these circumstances. Defendant made no argument that the HOA payments were made toward a divisible or marital debt. **Comstock v. Comstock, 304.**

DIVORCE—Continued

Divorce—equitable distribution—post-separation payments—mortgage and HOA dues—The trial court did not err by not crediting defendant with post-separation debt payments where defendant argued that the payments were used to keep property out of foreclosure due to plaintiff's alleged limited or non-payment of HOA dues while she lived in the home. Plaintiff stated that she paid the monthly mortgage amount and the monthly HOA fees and that both were fully paid when she moved out of the house. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—value of vehicle—de minimis error—The trial court's valuation of a vehicle in an equitable distribution action remained undisturbed where defendant correctly argued that the trial court's finding of value was not supported by competent evidence but nonetheless failed to establish prejudicial error. The erroneous vehicle value was 0.6% of the adjusted value of the marital estate, which constituted a de minimis error. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—wedding ring—findings—supported by evidence—written finding prevails—Competent evidence in an equitable distribution action supported the trial court's finding that defendant kept the wedding ring after separation and had possession of the wedding ring at the time of trial. With regard to the conflict between the trial court's oral statement during trial and the trial court's order, the written finding of fact in the trial court's order controlled. **Comstock v. Comstock, 304.**

Divorce—equitable distribution—wedding ring—past orders—other competent evidence supporting finding—Although defendant argued in an equitable distribution appeal that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of past orders to establish evidence of possession of the wedding ring, any such error was not prejudicial because it was already established that there was competent evidence supporting the trial court's finding that defendant had possession of the ring at the time of trial. **Comstock v. Comstock, 304.**

EQUITY

Equity—subrogation—erroneous quitclaim deed—The trial court did not err by granting plaintiff's motion for summary judgment to quiet title under the legal doctrine of equitable subrogation where June Withers was the sole owner of property; she and her daughter Rhonda sought a loan to refinance a prior deed of trust on the property, the new lender (PFS) required a quitclaim deed from June with June and Rhonda as joint tenants, and the closing attorney erroneously included June's other daughters on the deed. The doctrine of equitable subrogation applied because land is unique and the remedies at law identified by defendants were inadequate. **Bank of N.Y. Mellon v. Withers, 300.**

EVIDENCE

Evidence—accident reconstruction—expert opinion—reliability—The trial court did not err in a negligence case by admitting an expert's accident reconstruction testimony under N.C.G.S. 8C-1, Rule 702 that in his expert opinion, decedent's husband was "the cause of this accident." Plaintiff failed to show that the expert's testimony was unreliable. Also, plaintiff did not further challenge the admissibility of the expert's testimony. **Pope v. Bridge Broom, Inc., 365.**

EVIDENCE—Continued

Evidence—Rule of Evidence 403—recording of interview with police—The trial court did not err under Rule 403 by admitting a recording of defendant's interview with police after his arrest for shooting a man. The Court of Appeals rejected defendant's argument that the evidence had an undue tendency to suggest decision on an improper basis. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. **State v. Baldwin, 413.**

HOMICIDE

Homicide—attempted—jury instructions—imperfect self-defense—murderous intent—The trial court did not commit plain error by instructing the jury on attempted first-degree murder but failing to instruct on imperfect self-defense and attempted voluntary manslaughter. In light of the abundant evidence of defendant's murderous intent, defendant failed to show that, absent the alleged error, the jury probably would have acquitted him of the attempted first-degree murder charge. **State v. Baldwin, 413.**

Homicide—attempted—jury instructions—premeditation and deliberation—wounds inflicted after victim felled—The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled to determine whether defendant acted with premeditation and deliberation. The instructions at issue explained that the jury "may" find premeditation and deliberation from certain circumstances "such as" wounds inflicted after the victim was felled. There was no indication that the trial court believed the evidence supported the circumstances listed. **State v. Baldwin, 413.**

JURISDICTION

Jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—facially valid order from another state—The trial court had jurisdiction to adjudicate the children neglected and dependent even though they were the subject of a prior custody order in New York.. Nothing in the Uniform Child Custody Jurisdiction and Enforcement Act required North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C.G.S. § 50A-203(1). The New York Court's order was sufficient. **In re N.B., 353.**

MEDICAL MALPRACTICE

Medical Malpractice—summary judgment—proximate causation—The trial court did not err by granting summary judgment in favor of defendant doctor in a medical malpractice lawsuit. The affidavits of expert witnesses submitted by plaintiff were insufficient to create a genuine issue of material fact regarding proximate causation because they conflicted with the experts' deposition testimony. As for plaintiff's other argument, the deposition testimony of the expert witnesses was insufficient to create a genuine issue of material fact because none of the experts testified that decedent would not or probably would not have died but for the actions of defendant. **Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC, 337.**

NEGLIGENCE

Negligence—explosion at marina—negligence per se—evidence sufficient—In an action arising from an explosion at a marina while a boat was refueling, the

trial court did not err by instructing the jury on negligence and negligence *per se*. While defendant contends it presented sufficient evidence of the negligence of others to support giving the instruction on insulating negligence, the Court of Appeals was unable to find any conduct that superseded the original conduct of defendant where such conduct constituted a violation of a safety statute and proximately caused the death of the victim. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Negligence—explosion while fueling a boat—no cumulative error—In an action arising from an explosion and fire at a marina, there was no evidence in the record that the trial court's rulings resulted in confusion of the jury or undue prejudice to defendant such that a new trial was required. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Negligence—explosion while fueling boat—negligence per se—The trial court did not err where defendant argued that plaintiff failed to prove the elements of negligence and the trial court denied defendant's motion for judgment notwithstanding the verdict. Where there is a violation of a safety statute, the traditional role of the jury in determining whether a plaintiff has set forth a prima facie case of negligence is superseded, and defendant-violator is considered to be negligent as a matter of law, or negligent *per se*. In the instant case, the specific activity subject to regulation by the Fire Prevention Code was the use of certain gasoline nozzles containing a hold-open latch at a marina. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Negligence—explosion while fueling boat—proximate cause—In an action arising from an explosion at a marina while a boat was refueling, plaintiff put forth sufficient evidence, direct and circumstantial, as to the cause or origin of the explosion. The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Expert testimony is not required to establish the cause or origin. **Estate of Coppick v. Hobbs Marina Props., LLC, 324.**

Negligence—jury instructions—intervening negligence—superseding negligence—The trial court did not err in a negligence case by instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial was also rejected. **Pope v. Bridge Broom, Inc., 365.**

Negligence—jury instructions—negligence per se—Manual for Uniform Traffic Control Devices—The trial court did not err by denying plaintiff's request for a jury instruction on negligence per se or by denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se. Even assuming, without deciding, that defendant had a duty to comply with the Manual for Uniform Traffic Control Devices (MUTCD), the portions of the MUTCD that plaintiff suggested were violated did not create specific duties sufficient to be the basis for a claim of negligence per se. Further, because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed. While noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se. **Pope v. Bridge Broom, Inc., 365.**

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 19 December 2013. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his thirty-six month probationary period ended on or about 26 February 2012. **State v. Moore, 461.**

SEARCH AND SEIZURE

Search and Seizure—open container offense—search for additional evidence related to violations—In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was not justified as a search incident to arrest. Even though the officer had enough evidence to prosecute defendant for open container violations, he had a reasonable belief that evidence related to the violations might be found in defendant's center console. **State v. Fizovic, 448.**

Search and Seizure—open container offense—search incident to arrest—before arrest—In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's console should be treated as a search incident to citation because the officer only intended to give him a citation and he had not yet been arrested. At the time of the search, the officer had probable cause to arrest defendant for open container violations, which allowed the search to be justified as incident to arrest. **State v. Fizovic, 448.**

Search and Seizure—open container offense—search incident to citation—In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was an impermissible search incident to citation. Defendant never was issued a citation, and he was arrested for the open container offenses for which he was stopped. **State v. Fizovic, 448.**

Search and Seizure—reasonable expectation of privacy—digital contents of stolen GPS device—The Court of Appeals reversed and remanded the trial court's order granting in part defendant's motion to suppress evidence obtained from a search of the digital contents of a stolen GPS device found on his person. The trial court was instructed to make findings of fact regarding the manner in which defendant obtained the stolen device to determine whether he had a reasonable expectation of privacy in its digital contents. **State v. Clyburn, 428.**

Search and Seizure—search incident to arrest—digital contents of GPS device—not justified—In its order granting defendant's motion to suppress, the trial court properly concluded that a search of the digital contents of a GPS device found on defendant's person was not justified as a search incident to arrest. An individual's privacy interests in the digital contents of a GPS device are great, and a search of such a device does not further the government's interests in officer safety or the preservation of evidence. **State v. Clyburn, 428.**

SENTENCING

Sentencing—life imprisonment without parole—minor—first-degree murder—mitigating circumstances—findings—A sentence of life imprisonment

without parole for a minor convicted of first–degree murder was remanded where the conviction was not based solely on felony murder and the trial court's order made cursory, but adequate findings as to the mitigating circumstances set forth in N.C.G.S. § 15A-1340.19B(c)(1), (4), (5), and (6) but did not address factors (2), (3), (7), or (8). Factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor in the determination of whether the sentence of life imprisonment should be with or without parole Also, portions of the trial court's findings of fact were more recitations of testimony rather than evidentiary or ultimate findings of fact. Finally, if there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered. **State v. Antone, 408.**

Sentencing—prior record level—AOC report—identification of defendant— The trial court correctly determined that a defendant who plead guilty had six prior record points and was a felony record level III. Defendant received precisely the sentences for which he bargained, which were from the presumptive range of sentences for a defendant at felony sentencing level III. Defendant contended that he should have been sentenced at Level II because the State did not prove that one of the prior convictions was his. Although the birthdate on the AOC report was incorrect and the address was not defendant's address at the time of sentencing, it is not unusual for a person to have lived at a different address fourteen years earlier, and the discrepancy in the date of defendant's birth was not determinative. It is the role of the trial court to weigh the evidence, and the appellate court is bound by the trial court's determinations if supported by evidence in the record. **State v. Sturdivant, 480.**

SEXUAL OFFENDERS

Sexual Offenders—failure to register—failure to return verification form—motion to dismiss—insufficient evidence of receipt of verification form—The trial court erred by denying defendant's motion to dismiss for insufficient evidence that he actually received the verification form underlying his conviction of failure to register as a sex offender due to his failure to return the verification form. The judgments were vacated. **State v. Moore, 465.**

VENUE

Venue—specified in non-compete agreement—statutorily required to be in county of residence—The trial court did not err in denying defendant's motion to dismiss for improper venue where plaintiff brought an action to enforce a non-compete agreement which specified venue. A forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable only if the legislature has provided that said North Carolina county is a proper venue. The legislature has provided that this contract dispute must be tried in the county in which the plaintiff or defendant resides, but there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes. **A & D Envtl. Servs., Inc. v Miller, 296.**

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.

A&D ENVIRONMENTAL SERVICES, INC., PLAINTIFF
v.
JOEL E. MILLER, DEFENDANT

No. COA14-913

Filed 7 April 2015

Venue—specified in non-compete agreement—statutorily required to be in county of residence

The trial court did not err in denying defendant's motion to dismiss for improper venue where plaintiff brought an action to enforce a non-compete agreement which specified venue. A forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable only if the legislature has provided that said North Carolina county is a proper venue. The legislature has provided that this contract dispute must be tried in the county in which the plaintiff or defendant resides, but there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes.

Appeal by Defendant from order entered 6 June 2014 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 8 January 2015.

Graebe Hanna & Sullivan, PLLC, by M. Todd Sullivan and Mark R. Sigmon for Defendant-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, and Andrew L. Rodenbough for Plaintiff-Appellee.

DILLON, Judge.

Joel E. Miller ("Defendant") appeals from an order denying his motion to dismiss for improper venue pursuant to Rule 12(b)(3) of the Rules of Civil Procedure.[1] For the following reasons, we affirm.

I. Background

Plaintiff A&D Environmental Services, Inc., is a North Carolina corporation with its principal place of business in Guilford County. Plaintiff

1. Defendant also filed two notices of appeal regarding certain orders pertaining to a bond set by the trial court. However, Defendant has abandoned those appeals.

provides environmental services to clients throughout North Carolina and other states.

Defendant, a resident of Orange County, was hired by Plaintiff in 2011. As a condition of employment, Defendant signed a non-compete, non-solicitation, confidentiality agreement (the "Agreement"). The Agreement contained a clause entitled "Applicable Law, Exclusive Venue, Consent to Jurisdiction" which contained the following language:

> . . . . Moreover, any litigation under this Agreement shall be brought by either party exclusively in Mecklenburg County, North Carolina. . . . As such, the Parties irrevocably consent to the jurisdiction of the courts of Mecklenburg County, North Carolina (whether federal or state) for all disputes related to this Agreement. . . .

In 2014, Defendant resigned from Plaintiff and announced he was going to work for one of Plaintiff's competitors.

Within a month of Defendant's resignation, Plaintiff commenced this action in Guilford County Superior County to enforce its rights under the Agreement. Thereafter, Defendant moved to dismiss the action for improper venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2013), arguing that the Agreement required any action to be maintained in Mecklenburg County. Defendant's motion was denied by the trial court. Defendant timely filed a notice of appeal from the order.

II. Jurisdiction

This appeal is interlocutory. However, as this Court has held that a denial of a motion to enforce a contract clause providing for exclusive venue affects a substantial right, *see, e.g.*, *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) (stating "North Carolina case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right"), this appeal is properly before this Court.

III. Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his Rule 12(b)(3) motion to dismiss the action. For the reasons stated below, we hold that based on our Supreme Court's opinion in *Gaither v. Charlotte Motor Car Co.*, 182 N.C. 498, 109 S.E. 362 (1921), we are compelled to affirm the decision of the trial court.

In *Gaither*, the plaintiff filed a breach of contract suit in Richmond County, his county of residence. *Id.* at 498, 109 S.E. at 363. The defendant moved to transfer the action to Mecklenburg County based on a clause in the contract providing that any action "shall be brought in the city of Charlotte." *Id.* Our Supreme Court affirmed an order of the trial court denying the defendant's motion to transfer venue, stating that "the general policy of the courts is to disregard contractual provisions to the effect that an action shall be brought either in a designated court or a designated county to the exclusion of another court or another county in which the action, by virtue of a statute, might properly be maintained." *Id.* at 499, 109 S.E. at 363. The Supreme Court based its holding on two separate grounds: First, the regulation of venue in North Carolina "is a matter within the discretion of the Legislature." *Id.* That is, it is within the province of the Legislature to decide in which county or counties an action brought in North Carolina must be maintained; and parties cannot by stipulation strip the Legislature of this power. *Id.* at 500, 109 S.E. at 363-64. Second, parties cannot by stipulation strip a particular superior court of its *jurisdiction* – or legal right – to determine a particular action. *Id.*

In 1992, our Supreme Court affirmed the holding in *Gaither* based on the first ground described above – that parties could not by stipulation strip the Legislature of its power to determine which counties in North Carolina would be proper to maintain an action - stating that "[t]he *Gaither* decision is correct on its facts[.]" *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992). However, the Court disavowed *Gaither* to the extent that it could be read "to condemn forum selection clauses as depriving North Carolina courts of jurisdiction[.]" *Id.* at 144, 423 S.E.2d at 783. In holding that a forum selection clause which favored a court *in another State* was enforceable, our Supreme Court stated that its holding was not at odds with *Gaither*, but that *Gaither* was distinguishable: "There is a difference between attempting to fix the venue by contract within the State of North Carolina, where the North Carolina legislature provides for venue for all cases . . . , and attempting to fix the venue by contract in another state." *Id.* at 143, 423 S.E.2d at 782.

In sum, our Supreme Court in *Perkins* recognized that its holding in *Gaither* is still good law. *Id.* (holding that "[t]he *Gaither* decision is correct on its facts"). Specifically, our Supreme Court in *Perkins* continued to recognize that parties may not strip our Legislature of its power to determine in which county or counties that actions maintained *in this State* must be prosecuted. Neither party cites, nor has our research

uncovered, a case in which our Supreme Court has overruled its holding in *Gaither* as distinguished in *Perkins*. Therefore, we hold that a forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable *only if* our Legislature has provided that said North Carolina county is a proper venue.

In the present action, Defendant seeks to enforce a contract provision requiring that lawsuits arising thereunder be prosecuted in Mecklenburg County. In this case, our Legislature has provided that this contract dispute "*must* be tried in the county in which the [Plaintiff] or [Defendant] . . . reside[s.]" N.C. Gen. Stat. § 1-82 (2013) (emphasis added). However, there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes. Regarding Defendant, the record discloses that he is a resident of Orange County. Regarding Plaintiff corporation, there is nothing in the record showing that it is a resident - for venue purposes - of Mecklenburg County. As a domestic corporation, Plaintiff is considered a resident of the county where it maintains its "registered or principal office" and also any county where it "maintains a place of business[.]" N.C. Gen. Stat. § 1-79(a)(1) and (2) (2013). Here, Defendant fails to point to any evidence in the record – and our search through the record has failed to find any such evidence – showing that Plaintiff maintains a place of business in Mecklenburg County; and, further, Defendant did not dispute Plaintiff's assertion in its verified complaint that its principal place of business is in Guilford County. Therefore, we conclude that the trial court did not err in denying Defendant's motion to dismiss based on improper venue.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS SUCCESSOR TO JP MORGAN CHASE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE OF HOLDERS OF EQUITY ONE ABS, INC. MORTGAGE PASS THROUGH CERTIFICATES SERIES 2003-2, PLAINTIFF

v.

JUNE WITHERS, CHARLES L. STEEL, IV, SOLELY IN HIS CAPACITY AS GUARDIAN OF THE ESTATE OF JUNE WITHERS, RHONDA WITHERS, MARGARET YOUNG, ROBERT YOUNG, SHELIA SMITH, FAYE KEARNEY, ROBERT KEARNEY, NORTH CAROLINA DEPARTMENT OF REVENUE, BRANCH BANKING AND TRUST COMPANY AND HSBC MORTGAGE SERVICES, INC., DEFENDANTS

No. COA14-1111

Filed 7 April 2015

Equity—subrogation—erroneous quitclaim deed

The trial court did not err by granting plaintiff's motion for summary judgment to quiet title under the legal doctrine of equitable subrogation where June Withers was the sole owner of property; she and her daughter Rhonda sought a loan to refinance a prior deed of trust on the property, the new lender (PFS) required a quitclaim deed from June with June and Rhonda as joint tenants, and the closing attorney erroneously included June's other daughters on the deed. The doctrine of equitable subrogation applied because land is unique and the remedies at law identified by defendants were inadequate.

Appeal by defendants from an order for summary judgment to quiet title under the doctrine of equitable subrogation entered 9 May 2014 by Judge Howard E. Manning, Jr. in Durham County Superior Court. Heard in the Court of Appeals 17 February 2015.

Ragsdale Liggett, by Dorothy Bass Burch and Ashley H. Campbell, for The Bank of New York Mellon, plaintiff-appellee.

Berman & Associates, by Gary K. Berman, for Margaret Young, Shelia Smith, and Faye Kearney, defendant-appellants.

CALABRIA, Judge.

In 2002, June ("June") Withers was the sole owner of the property located at 121 West Cornwallis Road in Durham, NC (the "property"). At the time, June and her daughter, Rhonda ("Rhonda") Withers, sought a home loan from Popular Financial Services ("PFS") to refinance the prior

deed of trust on the property from Accredited Home Lenders ("AHL"). To qualify for the loan, June and Wanda agreed to two conditions: (1) that PFS would have a first position lien on the property through a deed of trust executed by June and Rhonda Withers and (2) that June would execute a quitclaim deed with June as grantor and June and Rhonda as joint tenants. Accordingly, PFS instructed the closing attorney Natasha Newkirk ("Newkirk") to prepare a deed with June as the grantor and June and Rhonda as joint tenants and to pay the prior deed of trust to AHL in full.

Newkirk prepared a quitclaim deed that not only included June and Rhonda as grantees, but also mistakenly included June's three other daughters, Margaret Young ("Young"), Shelia Smith ("Smith"), and Faye Kearney ("Kearney"). Therefore, June conveyed an undivided interest to June, Rhonda, Young, Smith, and Kearney as tenants in common. On 10 January 2003, Newkirk recorded both the erroneous quitclaim deed and the deed of trust in Durham County. Therefore, June and Rhonda shared only a two-fifth interest in the property instead of the entire property. Newkirk, as directed by PFS, also paid the AHL deed of trust in full. PFS assigned the PFS deed of trust to the Bank of New York Mellon ("plaintiff").

On 6 March 2012, plaintiff filed an action against the five tenants seeking, *inter alia*, to reform the deed of trust to include the portions of property held by Young, Smith, and Kearney so as to impose a constructive trust on the entirety of the property or, in the alternative, to equitably subrogate the deed of trust to the prior deed of trust held by AHL. June passed away on 28 December 2013. Rhonda executed a quitclaim deed to plaintiff transferring the entirety of her interest in the property, including any interest obtained following the passing of her mother, June. Therefore, the only remaining defendants were Young, Smith, and Kearney.

Plaintiff and the remaining defendants filed motions for summary judgment. After a hearing, the trial court denied plaintiff's attempts to reform the deed of trust and to impose a constructive trust and granted defendants' motions for summary judgment on those issues. At the same time, the trial court granted plaintiff's motion for summary judgment to quiet title under the legal doctrine of equitable subrogation. Defendants appeal.

On appeal, defendants argue the trial court erred in granting summary judgment on the equitable subrogation claim for three reasons. First, defendants contend that plaintiff and defendants never agreed

that Newkirk would use the funds to pay the prior deed of trust to AHL in full. Second, defendants maintain that plaintiff was not "excusably ignorant" of Newkirk's mistake. Third, defendants claim plaintiff had an adequate remedy at law.

The standard of review for summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment will be upheld when the record indicates that there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007) (citations and quotations omitted).

Equitable subrogation is a

> general rule [that] one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant.

Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 15, 86 S.E.2d 745, 755 (1955). It applies "when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 114, 336 S.E.2d 694, 697–98 (1985) (citations omitted).

Equitable subrogation is based in equity and the purpose is "the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice." *Journal Pub. Co. v. Barber*, 165 N.C. 478, 487–88, 81 S.E. 694, 698 (1914). "When the equities of a case favor equitable subrogation, the party in whose favor the right of subrogation exists is entitled to all of the remedies and security which the creditor had against the person whose debt was paid." *Am. Gen. Fin. Servs., Inc. v. Barnes*, 175 N.C. App. 406, 409, 623 S.E.2d 617, 619 (2006) (citing *Trustees of Garden of Prayer Baptist Church*, 78 N.C. App. at 114, 336 S.E.2d at 698) (quotations omitted). The doctrine of equitable subrogation requires "both that the money should have been advanced for the purpose of discharging the prior encumbrance, and that [such money] should have actually been so applied."

Peek, 242 N.C. at 15–16, 86 S.E.2d at 756 (internal quotations and citations omitted).

In the present case, plaintiff's predecessor in interest, PFS, loaned June and Rhonda Withers $63,425.00 to pay the prior deed of trust to AHL in full for the property at 121 West Cornwallis Road in exchange for a first position lien on that property. PFS provided the funds, directed the closing attorney to pay the prior deed of trust in full, and the closing attorney followed their directions regarding using the funds to pay the prior deed of trust to AHL in full. As part of the transaction, PFS required June to execute a quitclaim deed transferring the property to June and Rhonda as joint tenants. The closing attorney failed to follow PFS' instructions and mistakenly prepared the quitclaim deed with June as grantor and all three daughters, along with June and Rhonda, as joint tenants. When the closing attorney prepared the quitclaim deed, she directly contradicted PFS' instructions. As a result of this oversight, the deed of trust from PFS secured only two-fifths of the property, instead of the entire property. Since equity requires that the funds were advanced for the purpose of discharging the prior encumbrance, equity would not allow the attorney's mistake to defeat the agreed purpose of the transaction, which was to secure a loan by granting a first position lien on the property at 121 Cornwallis Road. Therefore, as a matter of law, the trial court correctly applied the doctrine of equitable subrogation to allow PFS, and its successor in interest, plaintiff, to an equitable subrogation of their rights to AHL to claim a first position lien on the entire property.

Defendants contend that despite satisfying all the requirements of equitable subrogation, plaintiffs should not receive an equitable benefit because there are adequate remedies at law. According to defendants, equity does not apply when the party seeking equity has a full and complete remedy at law. *Daugherty v. Cherry Hospital*, 195 N.C. 97, 102, 670 S.E.2d 915, 919 (2009) (citations and quotations omitted). As a general rule, "[e]quity supplements the law. Its office is to supply defects in the law where, by reason of its universality, it is deficient, to the end that rights may be protected and justice may be done as between litigants." *Town of Zebulon v. Dawson*, 216 N.C. 520, 522, 5 S.E.2d 535, 537 (1939). However, the remedies defendants identify are inadequate because of the failure to account for the unique nature of real property. According to the Supreme Court of North Carolina, "[l]and is an extremely important and long-valued asset in this state and throughout this country." *Powell v. City of Newton*, 364 N.C. 562, 572, 703 S.E.2d 723, 730 (2010) (Martin, J. concurring). In fact, "it has long been established, both in this state and throughout this country, that land is a special and unique

asset . . . .” *Id.* at 573–74, 703 S.E.2d at 731 (Hudson, J. dissenting). Due to land’s unique nature, damage claims against individuals are an inadequate substitute for a first position lien on real property.

Since land is unique and the remedies at law identified by defendants are inadequate, the doctrine of equitable subrogation applies. Therefore, as a matter of law, the trial court correctly concluded that plaintiff was entitled to equitable subrogation. The trial court correctly granted summary judgment in favor of plaintiff since it was entitled to judgment as a matter of law and no issues of material fact existed. Accordingly, we affirm the trial court’s judgment.

Affirmed.

Judges McCullough and Dietz concur.

ASHLEY COMSTOCK, PLAINTIFF
v.
CHRISTOPHER COMSTOCK, DEFENDANT

No. COA14-731

Filed 7 April 2015

1. Appeal and Error—violation of multiple appellate rules—appeal dismissed

In an equitable distribution case, issues were dismissed for violation of the Appellate Rules where defendant did not argue that the trial court committed legal error and did not provide legal authority in support of his contentions. His arguments merely contained personal immunity, did not show prejudice, or raised a moot issue.

2. Divorce—equitable distribution—findings—evidentiary and ultimate

An equitable distribution order appropriately contained both “ultimate” and “evidentiary” findings necessary for appellate review of whether the property was equitably divided. The judgment was not fatally defective.

3. Divorce—equitable distribution—value of vehicle—de minimis error

The trial court’s valuation of a vehicle in an equitable distribution action remained undisturbed where defendant correctly argued

that the trial court's finding of value was not supported by competent evidence but nonetheless failed to establish prejudicial error. The erroneous vehicle value was 0.6% of the adjusted value of the marital estate, which constituted a de minimis error.

4. Divorce—equitable distribution—brokerage account—marital property

The trial court did not err in an equitable distribution action by finding that a brokerage account was marital property. Defendant presented evidence tending to show that the brokerage account had some separate property attributes; however, competent evidence in the record supported the trial court's finding that the USAA Brokerage Account valued at $85,670 was marital property. However, as defendant conceded in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds."

5. Divorce—equitable distribution—wedding ring—findings—supported by evidence—written finding prevails

Competent evidence in an equitable distribution action supported the trial court's finding that defendant kept the wedding ring after separation and had possession of the wedding ring at the time of trial. With regard to the conflict between the trial court's oral statement during trial and the trial court's order, the written finding of fact in the trial court's order controlled.

6. Divorce—equitable distribution—wedding ring—past orders—other competent evidence supporting finding

Although defendant argued in an equitable distribution appeal that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of past orders to establish evidence of possession of the wedding ring, any such error was not prejudicial because it was already established that there was competent evidence supporting the trial court's finding that defendant had possession of the ring at the time of trial.

7. Divorce—equitable distribution—insurance policy—finding of stipulation—erroneous

The trial court erred in an equitable distribution action by finding that the parties stipulated that an insurance policy was marital property and by concluding that the policy value should be distributed to defendant. The parties did not stipulate that the policy was marital.

8. Divorce—equitable distribution—home equity line of credit—defendant's separate debt

The trial court did not err by finding that a home equity line of credit was defendant's separate debt. The trial court's finding on this issue was supported by competent evidence.

9. Divorce—equitable distribution—post-separation payments—mortgage and HOA dues

The trial court did not err by not crediting defendant with post-separation debt payments where defendant argued that the payments were used to keep property out of foreclosure due to plaintiff's alleged limited or non-payment of HOA dues while she lived in the home. Plaintiff stated that she paid the monthly mortgage amount and the monthly HOA fees and that both were fully paid when she moved out of the house.

10. Divorce—equitable distribution—post-separation debt payment

The trial court was not required to consider a post-separation debt payment as a distributional factor in its equitable distribution order where defendant failed to carry his burden and did not show that he could receive credit or reimbursement for his payment under these circumstances. Defendant made no argument that the HOA payments were made toward a divisible or marital debt.

11. Divorce—equitable distribution—debt—women, gambling, alcohol—not for the joint benefit of the parties

The trial court did not err in an equitable distribution action by finding that a portion of the debt on two credit cards were defendant's separate debt. Although defendant challenged the trial court's methodology, he did not challenge the amount of the debt at separation. The trial court also found that the pro se defendant failed to meet his burden of showing that charges for "women," "alcohol," and "gambling" were for the joint benefit of the parties.

12. Divorce—equitable distribution—post-separation debt payments—source of funds

The trial court did not err by failing to make adequate findings of fact and conclusions of law about post-separation debt payments made by defendant. Fatal to defendant's argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. Assuming that defendant in fact made the alleged post-separation payments, he failed to establish that the source of these payments was his separate funds.

13. Divorce—equitable distribution—IRA—separate property—resource for distributive award

The trial court did not err by ordering that more than 50% of an IRA's value be awarded to plaintiff. The IRA was not a marital asset as the parties stipulated that it was defendant's separate property. However, defendant's IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award.

14. Divorce—equitable distribution—attorney fees—defendant's failure to provide adequate support—findings—not a child support action

The trial court did not err by awarding attorney's fees to plaintiff where defendant argued that plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. Because the attorney's fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances.

15. Divorce—equitable distribution—orders concerning an IRA—interlocutory

Defendant's appellate arguments concerning certain orders in an equitable distribution action were dismissed where there was no indication from the record that all of the claims brought by the parties had been resolved, thus making the orders interlocutory. Defendant did not articulate any argument that the domestic relations order or the injunction order affected a substantial right.

Appeal by defendant from orders entered 10 February 2014 and 7 March 2014 by Judge Ronald L. Chapman in Mecklenburg County District Court. Heard in the Court of Appeals 21 January 2015.

Krusch & Sellers, P.A., by Rebecca K. Watts, for plaintiff-appellee.

Christopher Comstock, Pro Se.

ELMORE, Judge.

Defendant appeals *pro se* from an injunction order freezing his IRA account, an equitable distribution order, and a domestic relations order. After careful consideration, we dismiss, in part; affirm, in part; and reverse, in part.

I. Facts

Ashley Comstock (plaintiff) and Christopher Comstock (defendant) married on 6 May 2002 and separated on 10 June 2010. Plaintiff filed a complaint for divorce from bed and board, child custody, child support, equitable distribution, and attorney's fees on 17 June 2010. The parties divorced on 16 December 2011 by a Judgment of Divorce entered in Mecklenburg County.

On 27 November 2012 and 22 March 2013, the trial court heard evidence and arguments related to the equitable distribution of the parties' marital and divisible property. The property and debt at issue during the hearing and on appeal include: a 2009 Ford Expedition acquired during the marriage, a USAA Investments brokerage account ending in 3120 acquired during the marriage and in defendant's sole name, plaintiff's wedding ring stipulated as marital property, a USAA whole life insurance policy owned by the parties during the marriage, a home equity line of credit (HELOC) on the date of separation on marital property located at 7505 Torphin Court in Charlotte, post-separation payments made by defendant on marital property located at 9630 Blossom Hill Drive in Huntersville, debt acquired through a USAA Mastercard ending in 5755 and a USAA Rewards American Express card both in defendant's individual name, and a U.S. Trust IRA.

After hearing arguments of counsel, hearing testimony of the parties, and reviewing the court file and exhibits presented, the trial court ordered, in pertinent part, that defendant owed plaintiff a distributive award of $137,762.65 and $20,000 in attorney's fees related to plaintiff's claim for child custody.

II. Analysis

Issues #11, #13, #14, and #15

[1] We first address in unison defendant's issues #11, #13, #14, and a portion of #15 on appeal. For the following reasons, we dismiss these issues.

Pursuant to North Carolina Appellate Procedure Rule 28(a)(6), "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. App. R. 28(b)(6). Accordingly, "it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal." *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010). This Court shall also dismiss issues,

with few exceptions not applicable to the case at bar, if an appellant fails to preserve an issue for appellate review:

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. App. R. 10(a)(1). Moreover, we generally dismiss "moot" issues. *See Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). An issue is moot "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[.]" *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

In the body of defendant's argument relating to issue #11 on appeal, he states, "[t]o add insult to injury, the trial court allowed [p]laintiff's trial attorney to essentially interject his belief of how debt should be classified in equitable distribution cases and how the trial court's evidentiary standards should be determined according to misplaced case law[.]" Defendant does not argue that the trial court committed legal error, he does not provide any legal authority in support of his contention, and his purported argument merely articulates his distaste towards the conduct of plaintiff's trial attorney.

In issue #13, defendant argues that the delayed entry of the equitable distribution order prejudiced him. However, defendant points to absolutely no legal authority in support of his contention. He entirely fails to set forth the relevant standard of review and legal authority for determining whether a trial delay constitutes error. Defendant's argument merely contains his personal opinion about the delayed entry of the equitable distribution order and is devoid of any legal reasoning. Moreover, he fails to make any argument to show how the delay affected the outcomes of the findings or conclusions in the trial court's equitable distribution order. *See Wall v. Wall*, 140 N.C. App. 303, 314, 536 S.E.2d 647, 654 (2000).

In issue #14, defendant argues that the trial court erred by denying his presentation of evidence during the injunction and final equitable distribution trial hearing on 7 February 2014. However, defendant failed to preserve this issue for appellate review.

Defendant points us to the following colloquy in support of his position that the trial court erred by denying his presentation of evidence:

> DEFENDANT: Well, Your Honor, as I also have delineated in the email, there is a substantial equity in the marital, former marital home.
>
> THE COURT: Okay. And as I said in my response, saying about all (unintelligible), I can't do that because I'm bound by the evidence.
>
> DEFENDANT: Are you not accepting evidence today, Your Honor?
>
> THE COURT: No, we're finished with the evidence.
>
> DEFENDANT: Okay.
>
> THE COURT: We're just determining the wording of my judgment at this point[.]

It is clear from the colloquy above that defendant never objected to the trial court's ruling that he could not present any further evidence. Moreover, after reviewing the remaining portion of the 7 February 2014 hearing, defendant failed to make any objection related to the presentation of evidence.

The second portion of defendant's issue #15 relates to the trial court's alleged error by "grossing up" the award to plaintiff of $137,762.65 to $185,979.58 due to the early withdrawal penalty and taxation on the IRA proceeds. Although the equitable distribution order provided for a "grossing up" of the distributive award, the trial court entered an Amended Domestic Relations Order on 12 August 2014, which ordered a transfer of $157,762.65 from defendant's IRA to plaintiff. This amount represents the $137,762.65 distributive award and $20,000 in attorney fees. Thus, the "grossing up" amount was never included in the actual transfer of funds. As such, even if the trial court erred by "grossing up" the distributive award in the equitable distribution order, the issue is moot at this point in light of the superseding Amended Domestic Relations Order.

For the foregoing reasons, we dismiss issues #11, #13, #14, and a portion of #15 on appeal.

Issue #1: The Equitable Distribution Judgment

[2] First, defendant argues that the trial court's equitable distribution judgment is fatally defective because many of the findings contain "evidentiary" facts rather than "ultimate" facts. We disagree.

In equitable distribution actions, the trial court must conduct a three-pronged analysis: "(1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d 495, 498 (2010).

Moreover, a trial court must "make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C. Gen. Stat. § 50-20(j) (2013). Findings of fact can be "ultimate" or "evidentiary" in nature. *Smith v. Smith*, 336 N.C. 575, 579, 444 S.E.2d 420, 422-23 (1994) (citation and quotation marks omitted). "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts." *Id.* (citation and quotation marks omitted). A trial court's order

> does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts[.] [I]t does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Williamson v. Williamson, 140 N.C. App. 362, 364, 536 S.E.2d 337, 338-39 (2000) (citation and quotation marks omitted).

Here, the "ultimate" facts are facts that address the requirements of the three-pronged analysis: identification of the property as marital, divisible, or separate, a determination of the date of separation value of the property, and a determination of the distribution of the property. The "evidentiary" facts are facts upon which the "ultimate" facts regarding classification, value, and distribution are based.

The equitable distribution order in this case appropriately contains both "ultimate" and "evidentiary" findings necessary for us to review whether the property was equitably divided. Accordingly, defendant's argument fails because the equitable distribution judgment is not "fatally defective." *See Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) ("[P]roper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.").

Issue #2: 2009 Ford Expedition

[3] Defendant argues that the trial court's finding of fact #12 that the 2009 Ford Expedition had a net value of $11,890 was not supported by competent evidence. While we agree with defendant, he has failed to establish any prejudicial error.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

Stipulations are judicial admissions and are binding upon the parties absent well-established exceptions not relevant to the present case. *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 582, 709 S.E.2d 367, 371 (2011). "A stipulated fact is not for the consideration of the jury, and the jury may not decide such fact contrary to the parties' stipulation." *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979). In a non-jury trial, a trial court "acts as both judge and jury, thus resolving any conflicts in the evidence." *Matter of Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996).

During the marriage, the parties acquired a 2009 Ford Expedition. The trial court classified the vehicle as marital property. In the Final pretrial Order, the parties stipulated that the vehicle should be distributed to defendant. The trial court was also bound by the parties' stipulation that the loan balance on the vehicle was $21,235.05. Instead, the trial court's loan balance value in its order is $19,560. The trial court calculated the vehicle's net value of $11,890 to be distributed to defendant by taking the date of separation value of $31,450 (Kelley Blue Book value presented by plaintiff) less the unstipulated loan amount of $19,560. Had the stipulated loan amount been used in the calculation, the net value to be distributed to defendant for the vehicle would have been $10,214.95, resulting in a difference of $1,675.05.

The trial court found the total marital estate to be $286,229.30 ($280,877.30 distributed to defendant + $5,352 to plaintiff). A reduction

in defendant's distribution by $1,675.05 would have changed the marital estate's value to $284,554.25 ($279,202.25 distributed to defendant + $5,352 to plaintiff). The $1,675.05 value is 0.6% of the adjusted value of the marital estate, which constitutes a *de minimis* error. As such, the trial court's erroneous calculation does not warrant reversal. However, because we reverse and remand this matter on issue #6, the trial court should also correct and apply this finding on remand. *See Dechkovskaia v. Dechkovskaia*, __ N.C. App. __, __, 754 S.E.2d 831, 835 (2014), *review denied*, __ N.C. App. __, __, 758 S.E.2d 870 (2014) (holding that for a marital estate worth $591,702, a $5,000 calculation error in the value of the marital residence was *de minimis*).

Defendant also argues that the trial court assigned an erroneous fair market value to the vehicle of $31,450 because it based this figure on plaintiff's testimony of the "Kelley Blue Book valuation with the incorrect model year, accessories, condition, and mileage inputs. [Defendant] provided a valuation of $28,170[.]" We disagree.

In making findings of fact, "[t]he fact that the trial judge believed one party's testimony over that of the other and made findings in accordance with that testimony does not provide a basis for reversal in this Court." *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986).

Defendant essentially asks this Court to re-weigh the evidence on appeal, which we are unable to do. Competent evidence presented by plaintiff showed that the Kelley Blue Book value of the vehicle at the date of separation was $31,450. *See State v. Dallas*, 205 N.C. App. 216, 220, 695 S.E.2d 474, 477 (2010) (holding that "the use of the Kelley Blue Book for determining the value of [vehicles]" is admissible). Nothing in the record indicates that plaintiff relied on a value based on the incorrect vehicle and inputs. Accordingly, the trial court's valuation of the vehicle will remain undisturbed.

Issue #3: USAA Investments Brokerage Account

[4] Next, defendant argues that the trial court erred by finding that the USAA Brokerage Account ending in 3120 and valued at $85,670 was marital property. We disagree.

"[T]he distribution of marital property is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *O'Brien v. O'Brien*, 131 N.C. App. 411, 416, 508 S.E.2d 300, 304 (1998). The equitable distribution process requires that the trial court initially classify all of the distributable property as either marital, separate, or divisible. N.C. Gen. Stat. § 50-20(a) (2013). Marital property

includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties." *Simon v. Simon*, __ N.C. App. __, __, 753 S.E.2d 475, 478 (2013) (citation and quotation marks omitted). Separate property includes:

> all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance.

N.C. Gen. Stat. § 50-20(b)(2) (2013). The party seeking to classify the property as marital must show by a preponderance of the evidence "that the property: (1) was acquired by either spouse or both spouses; and (2) was acquired during the course of the marriage; and (3) was acquired before the date of the separation of the parties; and (4) is presently owned." *Langston v. Richardson*, 206 N.C. App. 216, 220, 696 S.E.2d 867, 871 (2010) (citation and quotation marks omitted). If the party meets this burden, the opposing party seeking to show that the property is separate must then prove by a preponderance of the evidence

> that the property was: (1) acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage (third-party gift provision); or (2) acquired by gift from the other spouse during the course of marriage and the intent that it be separate property is stated in the conveyance (inter-spousal gift provision); or (3) was acquired in exchange for separate property and no contrary intention that it be marital property is stated in the conveyance (exchange provision).

Id. at 220-21, 696 S.E.2d at 871 (citation and quotation marks omitted). Here, there is no dispute that the account was acquired by defendant in 2007, during the marriage, and that it was in existence at the time of separation. Thus, the dispositive question is whether the trial court erred by ruling that defendant did not meet his burden of showing that the account was separate property.

Upon a review of the record, defendant presented evidence tending to show that the brokerage account had some separate property attributes. He testified that the funds in that account were inherited from his mother. He also recalled establishing the account with the inherited

funds and always kept the inherited funds in a separately held account in his own name (the account at issue here was in defendant's name only).

However, as defendant concedes in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds[.]" Evidence at trial established that defendant cashed two checks for the inherited funds within three days prior to 3 July 2007 and 18 January 2008 for $113,409.48 and $3,402.47, respectively. The funds in the account appear to stem from deposits made during the course of 2008, with the first deposit being made 29 January 2008 for $52,000.

Accordingly, competent evidence in the record supports the trial court's finding that the USAA Brokerage Account ending in 3120 and valued at $85,670 was marital property. *See Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 725 (1993) ("[A]n equitable distribution order will not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered . . . has resulted in a[n] obvious miscarriage of justice.").

Issue #4: The Wedding Ring

[5] Defendant challenges the trial court's distribution of the wedding ring, arguing that 1.) no credible evidence was offered to support the finding that defendant had possession of the ring and 2.) the finding was incongruent with the trial court's oral statement during trial that no sufficient evidence supported a finding that defendant took the ring. We disagree. We initially note that defendant does not dispute that plaintiff's wedding ring is marital property valued at $5,000.

After reviewing the record, competent evidence supported the trial court's finding that defendant kept the ring after separation and had possession of the wedding ring at the time of trial. Plaintiff testified that on 1 September 2010, she placed the ring in a jewelry box under the sink in her bathroom. While she was out of the house that day, defendant entered her residence and removed items from the house. When plaintiff returned to the residence, she checked the jewelry box and found that the ring was missing. As of the trial date, plaintiff had not located the ring. Thus, defendant's argument fails.

With regard to the conflict between the trial court's oral statement during trial that no sufficient evidence supported a finding that defendant took the ring and the trial court's order finding that defendant "kept the ring and said ring was in [defendant]'s possession at the time of trial", the written finding of fact in the trial court's order controls.

The trial court initially made its oral statement on the first day of trial, before all of the evidence was presented and issues were ruled upon. Later at trial, evidence was presented that brought into question defendant's credibility. After weighing the credibility of the witnesses and the evidence in totality, the trial court entered a final order reflecting its findings. Defendant essentially attempts to appeal from the trial court's oral ruling, which is impermissible under the circumstances of this case. *See In re Hawkins*, 120 N.C. App. 585, 587, 463 S.E.2d 268, 270 (1995) (holding that the trial court had not entered a final order from which an appeal could be taken when it made an oral ruling during trial because it had not ruled on all issues); *see also* N.C. R. Civ. P. § 1A-1, Rule 58 (2013) ("[J]udgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Accordingly, we overrule defendant's argument on appeal.

Issue #5: "Testimony" of Plaintiff's Attorney

[6] Next, defendant argues that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of past orders to establish evidence that defendant had possession of the wedding ring in violation of North Carolina Civil Procedure Rule 46. We disagree.

Even accepting defendant's argument as true, such error was not prejudicial because we have already established above that plaintiff's testimony provided competent evidence in support of the trial court's finding that defendant had possession of the ring at the time of trial, notwithstanding the alleged conduct of plaintiff's trial attorney. Accordingly, defendant's argument fails.

Issue #6: USAA Whole Life Insurance Policy

[7] Defendant also argues the trial court erred in finding that the parties stipulated that the USAA Whole Life Insurance policy was marital property and by concluding that the policy value should be distributed to defendant. We agree.

After reviewing the record, the parties did not stipulate that the policy was marital. The parties offered conflicting testimony on this issue and defendant contended that the policy was separate. Because the purported stipulation was the only finding in support of the trial court's distribution of the policy to defendant as marital property in the amount of $32,428, the distribution was also made in error. Accordingly, we reverse these portions of the order (finding of fact #33 and conclusion of law #9a) and remand to the trial court to: 1.) consider the evidence presented

with regard to the policy, 2.) classify the policy as marital, separate, or divisible, and 3.) distribute the policy value accordingly.

Issue #7: Home Equity Line of Credit (HELOC)

[8] Next, defendant argues that the trial court erred in its finding that the HELOC was defendant's separate debt. We disagree.

Marital debt is "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Becker v. Becker*, 127 N.C. App. 409, 414, 489 S.E.2d 909, 913 (1997) (citation and quotation marks omitted). The party claiming that debt is marital carries the burden of proof to show "the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife." *Id.* at 415, 489 S.E.2d at 913. (citation and quotation marks omitted)

Here, defendant alleged the HELOC was marital debt. There is no dispute that the HELOC existed on the date of separation in the amount of $38,938. Thus, the dispositive issue is whether defendant met his burden of showing that the debt was for the joint benefit of the parties. Defendant testified that plaintiff was aware of the HELOC and

> [w]e basically used them to live and build stuff around the house. I mean, we spent a lot of money at Lowe's, I fixed things the way she wanted them, working around the house, in the yard. . . . [I]t was spent around the house. . . . [We] built a tree house for the boys in the back yard[.]

However, plaintiff testified that she was never aware that defendant acquired the HELOC, never signed the paperwork on the HELOC, and she only learned about the debt after they separated. She further testified that she did not know for what purpose defendant used the HELOC money.

After weighing the credibility of the parties' testimony, the trial court, in its discretion, ultimately concluded that defendant failed to meet his burden and ruled that the debt was separate. The trial court's finding on this issue was supported by competent evidence. Thus, the trial court did not err by finding that the debt was separate.

Issue #8: Alleged Post-Separation Debt Payments Associated with Blossom Hill Drive Property

[9] Next, defendant argues that the trial court erred by failing to credit defendant with post-separation debt payments made in the amount of

$5,334. His argument hinges on the premise that the post-separation debt payments were used to keep the property at 9630 Blossom Hill Drive out of foreclosure due to plaintiff's alleged limited or non-payment of HOA dues from July 2010 until March 2012 while she lived in the home. Accordingly, defendant challenges the trial court's finding that when plaintiff lived in the home, she "paid the . . . HOA dues . . . for the home" as being unsupported by competent evidence.

However, plaintiff testified that in August 2009 the couple purchased the Blossom Hill Drive property. On the date of separation (10 June 2010) they both lived at that address, but after separation plaintiff lived there until 15 March 2012. From 10 June 2010 until 15 March 2012 plaintiff stated that she paid the monthly mortgage amount of $980 and the monthly HOA fees of $110 and that the mortgage and HOA fees were fully paid when she moved out of the house. Thus, defendant's argument fails.

[10] Defendant also argues that the trial court made inadequate findings regarding his post-separation debt payment of $5,334 to repurchase the property from HOA lien foreclosure. He contends that the trial court was required to give defendant a dollar for dollar credit in the division of the property, order that plaintiff reimburse defendant, or treat his payments as distributional factors. We disagree.

"The trial court is required to consider all debts of the parties in determining an equitable distribution." *Edwards v. Edwards*, 110 N.C. App. 1, 12-13, 428 S.E.2d 834, 839 (1993). "If the debt is marital, the court has discretion to apportion or distribute the debt in an equitable manner." *Id.* at 13, 428 S.E. 2d. at 839.

Although the trial court found that "in or about February 2013 [defendant] made a payment of $5,334 to repurchase said property from the homeowner's association[,]" there is no finding to indicate how or whether it considered those payments in equitable distribution. The trial court found that:

> the home should be distributed to [defendant]. . . . [T]he Court values said home at $0 due to the pending foreclosure proceedings. . . . [T]he Court is also valuing the debt associated with the home at $0 because it appears as though said debt will be discharged in the foreclosure and neither party will actually pay said debt.

However, the trial court was not required to make findings related to its consideration of the $5,334 payment in its equitable distribution order. It is undisputed that the outstanding HOA fees owed to the HOA

were for the time period on and after March 2012, which was after the date of the parties' separation. Defendant makes no argument that the HOA payments were made towards a divisible or marital debt. Because defendant failed to carry his burden, the trial court was not required to consider the $5,334 payment as a distributional factor in its equitable distribution order.

Moreover, defendant has failed to show that he can receive credit or reimbursement for his payment under these circumstances. *See id.* at 11, 428 S.E.2d at 839. ("Defendant does not argue that these [expenses] were marital debts, so she is not entitled to credit on that ground."). Thus, defendant's argument fails.

Issues #9, #10: Credit Card Debt

[11] Defendant's next arguments are interrelated and will thus be discussed in unison. Defendant argues that the trial court erred in finding that a portion of the debt in USAA MasterCard credit card debt account ending in 5755 and a USAA Rewards American Express credit card debt account ending in 4791 were defendant's separate debt. We disagree.

During the marriage, defendant acquired debt with the MasterCard (which was in his individual name). Although defendant challenges the methodology by which the trial court classified the MasterCard debt as marital or separate, he does not challenge the total balance of the debt at the date of separation being $13,101 or the charged amounts found on Plaintiff's Exhibit 33, which is a spreadsheet that was offered during trial to show credit card charges by defendant purportedly used for "women[,]" including websites, dating, hotels, strip clubs ($11,652.78); "alcohol" ($1,377.49), "cigars," and "gambling."

After reviewing the specific nature of the charges, the trial court found that defendant failed to meet his burden of proving that the charges related to "women" and "alcohol" were incurred for the joint benefit of the parties. Thus, it found that $13,030.27 was defendant's separate debt on the MasterCard.

Similarly, with regard to the American Express credit card debt, the card was in defendant's individual name. The uncontested date of separation balance on the card was $14,536. Plaintiff's Exhibit 34 was a spreadsheet that listed the same categories of charges incurred by defendant in Exhibit 33. The trial court found, without dispute, that the amounts allocated to "women" were $1,749.56 and $2,787 to "gambling[,]" respectively. The trial court once again determined that defendant failed to meet his burden to establish that these two categories

were for the joint benefit of the parties and accordingly classified them as defendant's separate debt totaling $4,536.56.

As previously discussed, because defendant sought to classify the credit card debt as marital, he carried the burden of proof at trial on this issue. The trial court as the finder of fact had the authority to believe none, some, or all of the parties' testimony. After considering the evidence presented by plaintiff and defendant, the trial court, within its discretion, concluded that defendant failed to meet his burden of proof to establish that the portions of the MasterCard and American Express credit card debt were marital. Defendant has also failed to provide any legal authority to demonstrate that the trial court abused its discretion in making such determinations. Thus, his arguments fail.

Issue #12: Other Alleged Post-Separation Debt Payments

[12] Next, defendant argues that the trial court erred by failing to make adequate findings of fact and conclusions of law regarding $76,981 in post-separation debt payments made by defendant. Defendant contends that he made post-separation payments of $59,790 for Trophin Court mortgage payments, payments on a HELOC secured on that property ($3,000), HOA fees associated with that property ($1,170), and two credit card accounts ($13,021). He further claims that he paid these post-separation debts from the USAA Investment Brokerage Account ending in 3120. As such, he avers that the trial court was required to give defendant a dollar for dollar credit in the division of the property, order that plaintiff reimburse defendant, or treat his payments as distributional factors. We disagree.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (*from non-marital or separate funds*) for the benefit of the marital estate." *Shope v. Pennington*, __ N.C. App. __, __, 753 S.E.2d 688, 690 (2014) (citation and quotation marks omitted). A defendant is not entitled to credit "for those payments toward marital debt if those payments were made using marital funds." *Id.*

Fatal to defendant's argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. The trial court found, and we agreed, in issue #3 above, that this account was marital property. Thus, assuming *arguendo* that defendant in fact made the alleged post-separation payments, he has nevertheless failed to establish that the source of these payments was from his separate funds. Accordingly, the trial court was not required to give defendant

credit for his alleged post-separation payments in the equitable distribution proceeding. Thus, defendant's argument fails.

Issue #15: U.S. Trust IRA

[13] Defendant argues that the trial court erred by ordering that more than 50% of the U.S. Trust IRA's value be awarded to plaintiff in violation of N.C. Gen. Stat. § 50-20.1 (2013). We disagree.

In relevant part, the trial court found:

> 32. [Defendant] is the owner of a U.S. Trust IRA which consists of funds that [he] inherited from his parents. The date of separation value of said IRA was $234,987. The parties have stipulated, and the Court so finds, that said IRA is [defendant's] separate property.

According to the provisions of N.C. Gen. Stat. § 50-20, "the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20 (2013). Thus, the trial court must distribute the marital and divisible property. *Id.* Accordingly, N.C. Gen. Stat. § 50-20.1 contemplates the equitable distribution of those marital portions of pension and retirement benefits. The statute restricts a trial court from awarding a party more than 50% of the marital portion of the earning party's benefits with some limited exceptions. N.C. Gen. Stat. § 50-20.1.

Here, the U.S. Trust IRA was not a marital asset as the parties stipulated that it was defendant's separate property. As such, it was not subject to division through equitable distribution, and the restrictions in N.C. Gen. Stat. § 50-20.1 do not apply. However, defendant's U.S. Trust IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award. *See Sauls v. Sauls*, __ N.C. App. __, __, 763 S.E.2d 328, 331-32 (2014). Thus, defendant's argument fails.

Issue #16: Attorney's Fees

[14] Defendant argues that the trial court erred by awarding attorney's fees to plaintiff because plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. We disagree.

In relevant part, pursuant to N.C. Gen. Stat. § 50-13.6 (2013), the trial court in a proceeding for custody or support "may in its discretion order payment of reasonable attorney's fees to an interested party acting

in good faith who has insufficient means to defray the expense of the suit." However,

> [b]efore ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

Id. Here, the trial court ordered defendant to pay a portion of plaintiff's attorney's fees related to her successful child custody claim. The trial court found that "[plaintiff] is an interested party acting in good faith who does not have sufficient means to defray the expense of this action and is entitled to an award of attorney's fees to be paid by [defendant]" for "fees related to her claim for child custody[.]" Because the attorney's fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances. Thus, defendant's argument fails.

Issues #17, #18: Injunction/Order Freezing Defendant's IRA Account and Domestic Relations Order

[15] Finally, defendant's issues #17 and #18 relate to alleged errors arising from the trial court's order entitled "injunction/order freezing defendant's IRA account" and the domestic relations order. However, defendant's appeal from the injunction order and domestic relations order are interlocutory. Although N.C. Gen. Stat. § 50-19.1 (2013) allows for a party to appeal from an order "adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution" despite the pendency of other claims in the same action, an injunction order and domestic relations order are not included on the list of immediately appealable interlocutory orders. *See* N.C. Gen. Stat. § 50-19.1.

There is no indication from the record that all of the claims brought by the parties have been resolved, thus making the orders in question interlocutory. Defendant does not articulate any argument that the domestic relations order or the injunction order affects a substantial right. Thus, we dismiss these issues on appeal.

Assuming *arguendo* that defendant's appeal from the injunction order and the domestic relations order is properly before this Court, his argument nevertheless fails. Defendant argues that because the equitable distribution order is fatally defective, the trial court's subsequent injunction order and domestic relations order constitute reversible error. However, we previously ruled in issue #1 that the equitable distribution order is not fatally defective. Thus, defendant cannot prevail on this issue.

III. Conclusion

In sum, we dismiss defendant's issues #11, #13, #14, and a portion of #15. We also dismiss defendant's appeal as it pertains to issues #17 and #18 because they arise from the injunction order and domestic relations order, which are both interlocutory.

We reverse the equitable distribution order as it relates to the USAA Whole Life insurance policy (issue #6) and remand for classification and appropriate distribution. We also remand to correct the loan balance value of the 2009 Ford Expedition (issue #2) on the order. Finally, we affirm all other portions of the equitable distribution order to the extent that they remain unaffected by our rulings with regard to issues #2 and #6.

Dismissed, in part; affirmed, in part; reversed, in part.

Judges DAVIS and TYSON concur.

ESTATE OF COPPICK v. HOBBS MARINA PROPS., LLC

[240 N.C. App. 324 (2015)]

THE ESTATE OF NATHAN RICHARD COPPICK, BY ITS ADMINISTRATOR RICHARD G. COPPICK, PLAINTIFF
v.
HOBBS MARINA PROPERTIES, LLC; HOBBS WESTPORT MARINA, LLC; CHAMPIONSHIP CHARTERS, INC.; JOSEPH CLIFTON CHAMPION; AND PETROLEUM EQUIPMENT & SERVICE, INC., DEFENDANTS

No. COA14-127

Filed 7 April 2015

1. Negligence—explosion while fueling boat—negligence per se

The trial court did not err where defendant argued that plaintiff failed to prove the elements of negligence and the trial court denied defendant's motion for judgment notwithstanding the verdict. Where there is a violation of a safety statute, the traditional role of the jury in determining whether a plaintiff has set forth a prima facie case of negligence is superseded, and defendant-violator is considered to be negligent as a matter of law, or negligent *per se*. In the instant case, the specific activity subject to regulation by the Fire Prevention Code was the use of certain gasoline nozzles containing a hold-open latch at a marina.

2. Negligence—explosion while fueling boat—proximate cause

In an action arising from an explosion at a marina while a boat was refueling, plaintiff put forth sufficient evidence, direct and circumstantial, as to the cause or origin of the explosion. The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Expert testimony is not required to establish the cause or origin.

3. Negligence—explosion at marina—negligence per se—evidence sufficient

In an action arising from an explosion at a marina while a boat was refueling, the trial court did not err by instructing the jury on negligence and negligence *per se*. While defendant contends it presented sufficient evidence of the negligence of others to support giving the instruction on insulating negligence, the Court of Appeals was unable to find any conduct that superseded the original conduct of defendant where such conduct constituted a violation of a safety statute and proximately caused the death of the victim.

4. Negligence—explosion while fueling a boat—no cumulative error

In an action arising from an explosion and fire at a marina, there was no evidence in the record that the trial court's rulings resulted in confusion of the jury or undue prejudice to defendant such that a new trial was required.

5. Damages and Remedies—interest—basis of calculation

The trial court did not err in its award of prejudgment interest based on the full amount of compensatory damages awarded, $1,500,000.00. Although defendant contended that prejudgment interest should be calculated based only on the portion of compensatory damages for which defendant is responsible, the trial court's calculation was in accordance with the formula espoused by the North Carolina Supreme Court in *Brown v. Flowe*, 349 N.C. 520.

Appeal by defendant Petroleum Equipment and Service, Inc., from judgment entered 11 April 2013 by Judge Forrest D. Bridges in Lincoln County Superior Court. Heard in the Court of Appeals 12 August 2014.

Sigmon, Clark, Mackey, Hutton, Hanvey & Ferrell, PA, by Forrest A. Ferrell and Jason White, Weaver, Bennett & Bland, P.A., by Michael David Bland, and Kennedy & Wulforst, P.A., by D. Todd Wulforst, for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Kimberly Sullivan, for defendant-appellant.

BRYANT, Judge.

Where the evidence was sufficient to support the jury verdict finding that the death of Nathan Coppick was caused by defendant's negligence and properly based on the doctrine of negligence *per se*, we find no error in the trial court's denial of defendant's motion for judgment notwithstanding the verdict or new trial. We also find no error in the trial court's assessment of interest on the compensatory damage award in accordance with North Carolina General Statutes, section 24-5.

On 27 March 2013, a jury trial commenced in Lincoln County Superior Court, the Honorable Forrest Donald Bridges, Judge presiding. Plaintiff, The Estate of Nathan Richard Coppick, by its Administrator Richard G. Coppick, had filed suit alleging negligence against defendants Hobbs Marina Properties, LLC; Hobbs Westport Marina, LLC;

Championship Charters, Inc.; Joseph Clifton Champion; and Petroleum Equipment & Service, Inc. Prior to trial, plaintiff voluntarily dismissed its claim against defendants Championship Charters, Inc., and Joseph Clifton Champion. The record is silent as to the outcome of the proceedings against Hobbs Marina Properties, LLC, and Hobbs Westport Marina, LLC. But, at trial, the only defendant plaintiff proceeded against was Petroleum Equipment & Service, Inc. (hereinafter "defendant").

The evidence at trial tended to show that on 10 June 2008, Nathan Coppick was working at the Hobbs Westport Marina in Denver, North Carolina. Shortly before four o'clock that afternoon, the Championship II, an eighty-foot-long charter vessel with two fuel tanks (one twenty gallon tank, one ten gallon tank) was positioned at Hobbs Westport Marina for refueling. The gas pump was activated, and recorded video surveillance admitted as substantive evidence and played for the jury showed Nathan pulling a gasoline hose toward the gasoline receptacle located at the rear of the Championship II. Nathan then walked away from the gasoline receptacle and headed toward the front of the boat. According to the clock shown on the recorded video surveillance, after six minutes had elapsed, a vapor cloud was visible on the port side of the vessel in "real close proximity" to the fueling area. Then there were two explosions. The first explosion occurred as Nathan was stepping off a ladder from the second deck onto the center of the stern (the back of the boat). When the second explosion occurred, fire engulfed the stern of the Championship II. Nathan was killed instantly.

Evidence showed that defendant provided the fuel dispensing system equipment, including nozzles, used at the marina. The nozzle on the hose Nathan used to refuel the Championship II was a non-pressure-activated nozzle with a hold-open latch. Richard Strickland, Chief Fire Code Consultant with the North Carolina Department of Insurance, Office of State Fire Marshal, and Rebecca Warr, Safety Compliance Officer with the North Carolina Department of Labor, testified that use of gasoline nozzles with a hold-open latch at a marina was a violation of the North Carolina Fire Code and OSHA regulations.

The jury found defendant negligent and liable for Nathan Coppick's death. The jury awarded plaintiff $1,500,000.00, and the trial court entered judgment in accordance with the jury award. Defendant filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a motion for a new trial. The trial court denied the motion. Defendant appeals.

In its appeal from the denial of its motion for JNOV and alternatively, new trial, defendant contends the trial court erred in denying the motion. Defendant also challenges the trial court's instructions on negligence and negligence *per se*, the trial court's failure to instruct on insulating negligence, certain evidentiary rulings of the trial court, and the award of prejudgment interest.

"A motion for JNOV is essentially a renewal of a motion for a directed verdict. The standard to be employed by a trial judge in determining whether to grant a judgment notwithstanding the verdict is the same standard employed in ruling on a motion for a directed verdict." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 185-86 (2002) (citations omitted).

> 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. The non-movant is given the benefit of every reasonable inference which may legitimately be drawn from the evidence, resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.

Trantham v. Michael L. Martin, Inc., ___ N.C. App. ___, ___, 745 S.E.2d 327, 331 (2013) (quotations and citations omitted).

Negligence / Negligence Per Se

[1] Defendant argues that plaintiff failed to prove the elements of negligence and, thus, the trial court erred in denying defendant's motion for JNOV. Defendant contends plaintiff failed to establish that defendant owed Nathan Coppick a duty of care, and failed to put forth evidence that defendant installed the nozzle used by Nathan at the time of his death. We disagree.

> In order to set out a *prima facie* claim of negligence against [the defendant], [the] plaintiff was required to present evidence tending to show that (1) [the defendant] owed a duty to [the] plaintiff; (2) [the defendant] breached that duty; (3) such breach constituted an actual and proximate cause of plaintiff's injury; and, (4) [the] plaintiff suffered damages in consequence of the breach.

Cucina v. City of Jacksonville, 138 N.C. App. 99, 102, 530 S.E.2d 353, 355 (2000) (citation omitted). However, where there is a violation of a safety statute, the traditional role of the jury in determining whether plaintiff has set forth a prima facie case of negligence is superseded, and defendant-violator is considered to be negligent as a matter of law, or negligent *per se*.

> The statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply – proof of the breach of the statute is proof of negligence. The violator is liable if injury or damage results, irrespective of how careful or prudent he has been in other respects.

Cowan v. Transfer Co. & Carr v. Transfer Co., 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964).

> The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*. A public safety statute is one imposing upon the defendant a specific duty for the protection of others. Significantly, even when a defendant violates a public safety statute, the plaintiff is not entitled to damages unless the plaintiff belongs to the class of persons intended to be protected by the statute, and the statutory violation is a proximate cause of the plaintiff's injury.

Stein v. Asheville City Bd. Of Educ., 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (citations and quotations omitted).

Defendant's duty of care argument, which in effect challenges the duty imposed pursuant to the public safety statute in question—here, the N.C. Building Code—must fail. *See Stultz v. Thomas*, 182 N.C. 470, 473, 109 S.E. 361, 362 (1921) (holding that "[a] failure to discharge an affirmative duty imposed by law has been held by us, in a number of cases, to constitute an act of negligence *per se* . . . . In fact, a breach of a legal duty, or a duty imposed by law, comes within the very definition of negligence[.]" (citations omitted)).

Pursuant to General Statutes, section 143-138, "[t]he [Building] Code may regulate activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion, or related hazards. Such fire prevention code provisions shall be considered the minimum standards necessary to preserve and protect public health and safety . . . ." N.C. Gen. Stat. § 143-138(b1) (2013). "The N.C. Building Code has the force

of law[,] . . . and a violation thereof is negligence *per se*." *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 22, 189 S.E.2d 749, 754 (1972) (citations omitted). "[T]he Code imposes liability on any person who constructs, supervises construction, or designs a [structure] or alteration thereto, and violates the Code such that the violation proximately causes injury or damage." *Olympic Products Co. v. Roof Sys., Inc.*, 88 N.C. App. 315, 329, 363 S.E.2d 367, 375 (1988) (citation omitted).

In the instant case, the specific activity subject to regulation by the Code was the use of certain nozzles containing a hold-open latch. "Dispensing of Class I, II or IIIA liquids into the fuel tanks of marine craft shall be by means of an approved-type hose equipped with a listed automatic-closing nozzle *without a latch-open device*." N.C. Fire Prevention Code § 2209.3.3 (2002) (emphasis added). As a producer, installer and maintainer of fuel dispensing systems which are placed on premises that pose a danger of fire or explosion, defendant is subject to the duty imposed under the code.

Defendant argues that it could not be found liable based on negligence *per se* absent a showing of a violation of the code and a showing that defendant knew or should have known of the violation. Plaintiff, however, points to evidence in the record that defendant admitted to being a general contractor licensed by the State of North Carolina and, as such, is required to have knowledge of the North Carolina Building Code before obtaining a general contractor license. *See* N.C. Gen. Stat. § 87-10(b) (2013) ("Application for license [for General Contractors]" "(b) The Board shall conduct an examination . . . of all applicants for license to ascertain . . . (ii) the qualifications of the applicant in reading plans and specifications, knowledge of relevant matters contained in the North Carolina State Building Code . . . ; (iii) the knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors [and] construction . . . .").

Despite defendant's contention that the Code does not specify who is responsible for compliance with the section that regulates nozzles and hoses at marine fueling stations, plaintiff's evidence showed that the responsibility for complying with the Code fell upon the marina owner and upon the person or entity who installed the nozzles. Plaintiff's evidence, as presented by Chief Fire Code Consultant for the North Carolina Department of Insurance Office of State Fire Marshal Richard Strickland, showed that the Code placed on defendant a duty to provide to marinas the approved type of hose equipped with the proper nozzles, and that providing a prohibited nozzle constitutes negligence *per se*.

Q. So the law of our state, then, would require as of 2002 that you cannot place a nozzle on a fuel-dispensing system at a marina that contains a hold-open latch; is that correct?

A. That is correct.

Q. And to do so would be illegal in that it violates the North Carolina State Building Code, correct?

A. Yes, it would be in violation of [the] North Carolina State Building Code.

In support of its argument that the trial court erred in denying defendant's motion for JNOV and, alternately, a new trial, defendant contends that plaintiff failed to establish defendant installed the gasoline nozzle Nathan used when re-fueling the charter boat, the Championship II. Plaintiff responds that the evidence presented at trial established defendant was the only company, contractor, or supplier to provide and maintain the fuel dispensing equipment. Evidence in the record supports plaintiff's response that defendant was the sole supplier and installer of fuel dispensing equipment to the marina, including the types of nozzles alleged to be in violation of the statute.

For example, Nick Harmon, who worked at the marina in the summer of 2005, 2006, and 2007 as assistant dock manager, then as dock manager, testified that nozzles containing hold-open latches[1] were used "very often" in fueling the boats. With six fueling points and multiple boats coming in, a person could start refueling one vessel, then move to a second boat and refuel it. Harmon testified that nozzles containing hold-open latches were used to refuel the Championship II, as well as other boats. Harmon recalled defendant installing and maintaining the nozzles containing hold-open latches: "I knew [defendant's] mechanics and techs very well" but knew of no other company that provided maintenance for the fuel dispensers.

Further, defendant made the following pertinent factual admissions which were allowed as evidence before the jury: that on 27 July 2006, defendant installed five new gasoline nozzles on the fuel dispensers at the marina; that the dispensers were "automatic-closing nozzles which contained hold-open latches"; that defendant's records showed that defendant had performed maintenance/service work on the fuel

1. Nozzles containing hold-open latches allow gasoline to flow continuously without the necessity of an attendant applying pressure to the nozzle.

dispensing system at the marina every year since 1998; and, that the nozzle on the fuel dispenser involved in the 10 June 2008 fire and explosion on the Championship II would dispense 10 gallons of fuel per minute if set on full speed with the hold-open latch engaged.

This evidence, presented by plaintiff at trial, tended to show that defendant installed and maintained fuel delivery equipment, including gasoline nozzles that contained hold-open latches, which was in violation of the Fire Code referenced above. Such a violation, plaintiff contends, constitutes negligence *per se*.

Defendant, at trial and now on appeal, urges our review of contradictory testimony regarding the type of nozzle used by Nathan and the installation of the nozzle. However, for purposes of ruling on a motion for JNOV, the trial court must resolve all conflicts, contradictions, and inconsistencies in the light most favorable to the non-movant, here, plaintiff. *See Trantham*, ___ N.C. App. at ___, 745 S.E.2d at 331. Taken in the light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference, there was sufficient evidence presented to the jury for the jury to find that defendant installed and performed routine maintenance on the fuel dispensing system at Hobbs Westport Marina, including changing the fuel dispensing nozzles.

This evidence was sufficient to support the trial court's instruction on negligence *per se* which followed the pattern jury instructions and properly stated the law as to negligence and negligence *per se*. Therefore, this evidence was sufficient to prove that defendant was subject to the safety statute at issue in this litigation and that defendant's actions were in violation of the statute and, thus, sufficient to prove liability for negligence *per se*, provided there was proximate cause. *See Stein*, 360 N.C. at 326, 626 S.E.2d at 266 ("The general rule in North Carolina is that the violation of a public safety statute constitutes negligence *per se*. . . . [The plaintiff may recover if he] belongs to the class of persons intended to be protected by the statute, and the statutory violation is a proximate cause of the plaintiff's injury." (citations omitted)). Therefore, we review defendant's arguments regarding proximate cause.

Proximate Cause

[2] Defendant contends plaintiff failed to establish that any conduct of defendant proximately caused the explosion on 10 June 2008. We disagree.

"The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the

reasonable foresight of the defendant." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 431-32, 677 S.E.2d 485, 504 (2009) (citation omitted). "Actual causation may be proved by circumstantial evidence, and this principle is equally as true in fire cases as in any other tort liability case." *Collins v. Caldwell Furniture Co.*, 16 N.C. App. 690, 694, 193 S.E.2d 284, 286 (1972) (citation omitted). "[W]hat is the proximate cause of an injury is ordinarily a question for the jury." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 235, 311 S.E.2d 559, 566 (1984) (citation and quotations omitted); *see also Jenkins v. Helgren*, 26 N.C. App. 653, 658, 217 S.E.2d 120, 123 (1975) ("Certainly it is both probable and foreseeable that fire will be the consequence of a serious fire hazard. Beyond question the fumes which defendants here allowed to accumulate constituted a serious fire hazard as a direct consequence of which the damaging fire occurred. One whose negligence creates the hazard of fire cannot escape responsibility merely because the source of the triggering spark may not be shown." (citations omitted)).

Defendant states that no expert testified as to the cause or origin of the explosion, and that plaintiff relied entirely upon circumstantial evidence. However, expert testimony was not required to establish the cause or origin of the explosions. *See Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 411-12, 590 S.E.2d 866, 871 (2004) ("It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons. Where, as in the instant case, the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." (citation omitted)).

Here, plaintiff put forth sufficient evidence, both direct and circumstantial, as to the cause or origin of the explosion. For example, the nozzle and hose used to refuel the Championship II just prior to the explosion was plaintiff's Exhibit 38D. Exhibit 38D, along with the remaining nozzles taken from the marina, utilized a "hold-open latch." When refueling a boat, marina dockhands could "engage the hold-open latch and then go about doing other business[,]" because the hold-open latch is supposed to disengage and stop the flow of fuel when the gasoline reaches the top of the tank being filled. However, one marina customer described an overflow of fuel from the gasoline tank on his boat as he refueled on 7 June 2008—three days before the explosion. "I looked over the side and gas was coming back out of the boat -- or out of the spigot. So I jumped out of the boat, flipped the [dispenser] off, the gas, so it stopped."

Q. How much gas do you think roughly spilledout?

A. Well, I mean, I don't know. Usually I didn't fill up unless the tank was close to empty . . ., but I would say at least a couple gallons. Maybe not quite that much.

The nozzles used at the marina had three speeds; "the fastest was 10 gallons a minute, the middle one was about 5 gallons a minute, and the lowest one was 2 gallons a minute."

Q. . . . [F]rom the time that nozzle was put in and switched on until the explosion, how long [was that]?

A. It appeared to be about six minutes.

. . .

Q. So just using simple math, that would have meant that 60 gallons of gas was pumped during that time?

. . .

Q. . . . So if [the nozzle] worked, it might have shut off [when the tank was full], but if it didn't work, if it pumped that whole time, 6 times 10 is 60 gallons of gas would have been pumped into whatever tank that nozzle was in?

A. It could have.

At least one defense witness testified that the fuel nozzle used to refuel the Championship II had not "clicked off" prior to the explosion. Also, evidence at trial showed that the manufacture date on the nozzle, Exhibit 38D, matched the month defendant invoiced the marina for a standard nozzle, indicating that defendant sold the nozzle that was used by Nathan Coppick to refuel the Championship II on 10 June 2008.

In addition to the testimony and exhibits, the jury was able to view as substantive evidence the video recording of events leading up to the explosions, and to decide, along with other evidence, whether plaintiff had established proximate cause. This evidence, taken in the light most favorable to plaintiff, was sufficient to enable the jury to find that the gas dispenser nozzle used in refueling the Championship II failed to shut-off after the tank reached maximum capacity, causing excess gasoline to spill out into the surrounding water. Further, from this evidence the jury could find that a vapor cloud appeared shortly before the excess gasoline spilled into the water and then ignited, resulting in two explosions

and a fire which engulfed the stern of the Championship II and killed Nathan Coppick. On this record there was sufficient evidence of negligence *per se*, including evidence of proximate cause, to survive a motion for JNOV and, alternatively, a new trial. *See Trantham*, ___ N.C. App. at ___, 745 S.E.2d at 331 (citations and quotations omitted). Defendant's arguments are overruled.

Jury Instructions

[3] Based on our preceding analysis, we overrule defendant's contentions that the trial court erred by instructing the jury on negligence and negligence *per se*. However, while we disagree with defendant, we nevertheless review defendant's argument that the trial court erred in denying its request for an instruction on insulating negligence.

> 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.

Boykin v. Kim, 174 N.C. App. 278, 286, 620 S.E.2d 707, 713 (2005) (citations and quotations omitted).

> An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted.

Hairston, 310 N.C. at 236, 311 S.E.2d at 566-67 (citation omitted). "Insulating negligence means something more than a concurrent and contributing cause. It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury." *Id.* at 236, 311 S.E.2d at 566 (citations omitted).

Defendant contends it presented sufficient evidence as to the negligence of others to support giving the instruction on insulating negligence. Defendant argues that its evidence showed, for example: that the owner/operator of the Championship II allowed the vessel to be refueled with the boat systems on; that the marina officers instructed marina employees to use the fuel dispensing nozzles containing hold-open latches; that the marina cashier failed to oversee the fuel dispensing process; and that the marina changed fuel dispensing nozzles and failed to test them.

While defendant points to conduct noted above which may have contributed to the cause of the 10 June 2008 explosion, defendant fails to direct our attention to conduct which reasonably may have been viewed as "a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question," *id.* at 236, 311 S.E.2d at 566, that is, the explosion and fire that led to the death of Nathan Coppick. From our independent review of the record, we are unable to find any conduct that supersedes the original conduct of defendant where such conduct constituted a violation of a safety statute and which proximately caused the death of Nathan Coppick. *See id.* at 236, 311 S.E.2d at 566-67. Therefore, we hold that the trial court properly denied defendant's request for an instruction on insulating negligence. Accordingly, defendant's argument is overruled.

Evidentiary Rulings

[4] Defendant argues that the trial court erred in evidentiary rulings and other rulings, resulting in a manifest abuse of discretion. Defendant contends the trial court erred in allowing witnesses to testify to damages he or she sustained as a result of Nathan Coppick's death, allowing two witnesses to "vouch for other testimony that [had] been given," admitting a photograph of Nathan Coppick's body where it was found after the explosion, and overruling defendant's objection to plaintiff's cross-examination of defendant's president. While defendant acknowledges that, standing alone, the contested admissions would likely not amount to reversible error, defendant nevertheless contends that the cumulative effect of these rulings was prejudicial. Defendant further argues that the admission of the contested evidence resulted in confusion of the jury and prejudice to defendant requiring a new trial.

However, other than defendant's assertions, we see no evidence in the record that the trial court's rulings resulted in confusion of the jury and/or undue prejudice to defendant such that a new trial is required. Accordingly, we overrule this argument.

Prejudgment Interest

[5] Defendant argues that the trial court erred in its award of prejudgment interest based on the full amount of compensatory damages awarded, $1,500,000.00. Defendant contends prejudgment interest should be calculated based only on the portion of compensatory damages for which defendant is responsible. We disagree.

As defendant concedes, our Supreme Court previously addressed this issue in *Brown v. Flowe*, 349 N.C. 520, 507 S.E.2d 894 (1998). In *Brown*, the Court directly rejected the defendant's argument that a trial court should subtract the amount of settlements received from joint tortfeasors from the total compensatory award before calculating the prejudgment interest. *Id.* at 526, 507 S.E.2d at 898. The Court reasoned that this proposed method was "prohibited by the plain language of N.C.G.S. § 24–5, which requires calculation of prejudgment interest on the entire compensatory-damages verdict." *Id.*

To calculate prejudgment interest when judgment is rendered against one, but not all, tortfeasors, our Supreme Court outlined the following process:

> (1) adding prejudgment interest at the legal rate to the entire compensatory damages award as N.C.G.S. § 24–5(b) requires, (2) adding interest at the legal rate to the settlement sum from the date of settlement until the date of judgment, and (3) subtracting the second calculation from the first to determine the amount of compensatory damages [the] defendant owes to [the] plaintiff.

Id. at 527, 507 S.E.2d at 898; *see also Boykin*, 174 N.C. App. at 288, 620 S.E.2d at 714 (holding that pre-judgment interest is to be awarded before a set-off is given for the settlement amount).

Here, the trial court applied prejudgment interest at a rate of eight percent (8%) per annum to the total $1,500,000.00 compensatory award beginning 9 June 2010, the date the claim was filed, through 11 April 2013, the date of entry of judgment, less any credits to which defendant may be entitled by law. In a post-trial hearing, the trial court explained that to calculate the share of the total award due from each party, the trial court would follow the following formula: "[First,] [a]dding prejudgment interest at the legal rate to the entire compensatory damages. . . . [Second], adding interest at the legal rate to the settlement sum from the date of settlement until the date of judgment and [third,] subtracting the second calculation from the first." This is in accordance with

the formula espoused by our Supreme Court in *Brown*. Accordingly, we overrule defendant's argument and find no error in the judgment and award of the trial court.

NO ERROR.

Chief Judge McGEE and Judge STROUD concur.

ANNETTE M. HAWKINS, As Administratrix of the Estate of RICHARD V. HAWKINS, JR., DECEASED, Plaintiff

v.

EMERGENCY MEDICINE PHYSICIANS OF CRAVEN COUNTY, PLLC, GARY H. LAVINE, M.D., EAGLE HOSPITALIST CONNECTIONS, LLC, ANUBHI GOEL, M.D., CAROLINAEAST HEALTH SYSTEM, doing business as CarolinaEast Medical Center, also doing business as Craven Regional Medical Center, CAROLINAEAST PHYSICIANS, WILLIAM H. BOBBITT, III, M.D., and JOHN A. WILLIAMS, III, M.D., Defendants

No. COA14-877

Filed 7 April 2015

1. Appeal and Error—interlocutory orders and appeals—multiple defendants—overlapping facts

Plaintiff's appeal of the trial court's order granting summary judgment in favor of one defendant was interlocutory and therefore properly before the Court of Appeals. Because plaintiff's medical malpractice lawsuit against multiple defendants involved the same underlying facts, different proceedings could result in inconsistent verdicts.

2. Medical Malpractice—summary judgment—proximate causation

The trial court did not err by granting summary judgment in favor of defendant doctor in a medical malpractice lawsuit. The affidavits of expert witnesses submitted by plaintiff were insufficient to create a genuine issue of material fact regarding proximate causation because they conflicted with the experts' deposition testimony. As for plaintiff's other argument, the deposition testimony of the expert witnesses was insufficient to create a genuine issue of material fact because none of the experts testified that decedent would not or probably would not have died but for the actions of defendant.

Appeal by plaintiff from order entered 2 April 2014 by Judge W. Allen Cobb, Jr. in Craven County Superior Court. Heard in the Court of Appeals 3 February 2015.

BUTLER DANIEL & ASSOCIATES, PLLC, by A. L. Butler Daniel and Erin K. Pleasant, for plaintiff.

CRANFILL SUMNER & HARTZOG, LLP, by Jaye E. Bingham-Hinch and Christopher M. Hinnant, for defendants.

ELMORE, Judge.

Annette M. Hawkins ("plaintiff"), executrix of the estate of Richard V. Hawkins, Jr., appeals the trial court's order granting summary judgment in favor of Gary H. Lavine, M.D., and Emergency Medical Physicians of Craven County, PLLC (collectively "defendants").

I. Background

The facts of this case are largely undisputed. In the early morning hours of 15 January 2011, Richard Hawkins ("Mr. Hawkins") woke up to take a pill. However, upon swallowing it, he lost consciousness and fell to the floor, hitting his head on the way down. Mr. Hawkins' wife called the Cove City Rescue Squad. The paramedics noticed a laceration on the back of Mr. Hawkins' head that was one inch long and one-half an inch wide. Mr. Hawkins was transported by ambulance to the Emergency Department ("ED") at CarolinaEast Medical Center at approximately 2:36 a.m.

Dr. Gary Lavine ("Dr. Lavine") was the emergency physician on duty. Upon arrival, Dr. Lavine examined Mr. Hawkins. Mr. Hawkins stated that on a scale of one to ten, the pain in his head was a five, and he felt nauseated. Dr. Lavine ordered an echocardiogram (EKG), which revealed an improper heart rhythm known as atrial fibrillation, or atrial flutter. The danger from atrial fibrillation is a stroke. Dr. Lavine also ordered a CT scan of Mr. Hawkins' brain, which was interpreted by the radiologist on duty as normal, showing no active intracranial bleed or acute abnormalities.

Dr. Lavine consulted with Dr. William H. Bobbitt, III, the hospitalist on call, and arrangements were made to admit Mr. Hawkins to the medical center for monitoring and treatment of his atrial fibrillation. Out of concern for Mr. Hawkins' atrial fibrillation, Dr. Lavine ordered one dose of the anticoagulation medication Lovenox, which was administered to Mr. Hawkins in the ED at 6:21 a.m. on 15 January 2011. The purpose of

Lovenox is to prevent the formation of blood clots. According to the testimony in this case, Lovenox is a fast-acting, but not long lasting, anticoagulation with a half-life of approximately four and a half hours. Therefore, the single dose ordered by Dr. Lavine normally would have lost its effectiveness by 6:30 p.m.—approximately twelve hours after it was administered.

Mr. Hawkins was admitted to the hospital at approximately 6:30 a.m. that same day. Because Dr. Lavine was employed by the hospital as an emergency physician only, he did not have privileges to practice inside the hospital. Therefore, Dr. Lavine was not responsible for Mr. Hawkins' medical care after Mr. Hawkins was admitted. Dr. Lavine's four-day shift ended on the morning of 15 January, and he did not return to the ED for another four days.

During Mr. Hawkins' stay in the medical center, subsequent treating physicians ordered additional doses of anticoagulation medications, including Coumadin and aspirin. In addition, Dr. Bobbit ordered a dose of Lovenox every twelve hours. In total, Mr. Hawkins received four doses of Lovenox while he was admitted, plus the one dose he received in the ED.

Mr. Hawkins was scheduled to be discharged from CarolinaEast on 17 January 2011, after undergoing a cardioversion procedure that was intended to treat his atrial fibrillation. However, after the procedure was performed on the morning of 17 January, physicians had difficulty waking Mr. Hawkins from the anesthesia. Doctors ordered an MRI of Mr. Hawkins' brain, which showed that Mr. Hawkins had suffered an intracranial brain hemorrhage. In an attempt to best treat this condition, Mr. Hawkins was transferred to the University of North Carolina hospital, where he died from complications due to the intracranial hemorrhage on 20 January 2011.

On 2 September 2011, plaintiff filed suit against CarolinaEast Health System, Emergency Medicine Physicians of Craven County, PLLC; Dr. Gary H. Lavine; Eagle Hospitalist Connections, LLC; Dr. William H. Bobbit, III; Dr. Anubhi Goel; The Heart Center of Eastern Carolina, PLLC; and Dr. John A. Williams, III. On or about 18 November 2013, Dr. Lavine and Emergency Medical Physicians of Craven County, PLLC (collectively "defendants") moved for summary judgment on grounds that plaintiff failed to forecast sufficient evidence on the issue of causation. On 2 April 2014, Judge W. Allen Cobb, Jr., entered an order granting defendants' motion for summary judgment. Plaintiff appeals the summary judgment order entered in defendants' favor.

II. Interlocutory Order

[1] First, we must consider whether this appeal is properly before this Court. In the case *sub judice*, summary judgment was granted as to one but not all of the defendants and the trial court did not certify that there was "no just reason for delay" as required by N.C. Gen. Stat. § 1A–1, Rule 54(b) (2013). However, N.C. Gen. Stat. § 1–277 (2013) and N.C. Gen. Stat. § 7A–27(b)(3)(a) and (b) (2013) allow this Court to consider an interlocutory appeal where the grant of summary judgment affects a substantial right. *Id.*

> Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is 'the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries. This Court has created a two-part test to show that a substantial right is affected, requiring a party to show "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Camp v. Leonard, 133 N.C. App. 554, 557–58, 515 S.E.2d 909, 912 (1999) (citations and internal quotations omitted).

This case involves multiple defendants but the same factual issues. Therefore, "different proceedings may bring about inconsistent verdicts on those issues." *Burgess v. Campbell*, 182 N.C. App. 480, 483, 642 S.E.2d 478, 481 (2007). Because plaintiff's suit alleges several overlapping acts of medical malpractice resulting in harm, we hold that it is best that one jury hears the case. *Id.* As such, we conclude that the trial court's grant of summary judgment affects a substantial right, and this Court will hear the merits of plaintiff's appeal.

III. Standard of Review

Plaintiff appeals from the order granting summary judgment in favor of defendants.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56(c) (2013). "On appeal, an order allowing summary

judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Our Supreme Court has "emphasized that summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case[.]" *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (internal citation omitted). Upon a motion for summary judgment, "[t]he moving party carries the burden of establishing the lack of any triable issue . . . and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent[.]" *Lord v. Beerman*, 191 N.C. App. 290, 293, 664 S.E.2d 331, 334 (2008) (internal quotations and citations omitted). If met, the burden shifts to the nonmovant to produce a forecast of specific evidence of its ability to make a *prima facie* case, *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), "which requires medical malpractice plaintiffs to prove, in part, that the treatment caused the injury. Not only must it meet our courts' definition of proximate cause, but evidence connecting medical negligence to injury also must be probable, not merely a remote possibility." *Cousart v. Charlotte-Mecklenburg Hosp. Auth.*, 209 N.C. App. 299, 302, 704 S.E.2d 540, 543 (2011) (quotation and citation omitted).

IV. Analysis

[2] Plaintiff contends that the trial court erred when it allowed defendants' motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. Specifically, plaintiff argues that a genuine issue of fact exists as to whether Dr. Lavine's negligence was the proximate cause of Mr. Hawkins' death. We disagree.

A plaintiff asserting medical negligence must offer evidence that establishes the following essential elements: "(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (internal quotation marks and citation omitted). Proximate cause is defined as:

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such

> a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Williamson v. Liptzin, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

A medical negligence plaintiff must rely on expert opinion testimony to establish proximate causation of the injury in a medical malpractice action. *Cousart*, 209 N.C. App. at 303, 704 S.E.2d at 543; *see also Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E.2d 286, 289 (1981) (noting that expert testimony is generally necessary "when the standard of care and proximate cause are matters involving highly specialized knowledge beyond the ken of laymen"). "[A]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

Plaintiffs are required to make a *prima facie* case of medical negligence during a summary judgment hearing, "which includes articulating proximate cause with specific facts couched in terms of probabilities." *Cousart*, 209 N.C. App. at 303-04, 704 S.E.2d at 543. Importantly, "a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony." *Pinczkowski v. Norfolk S. Ry. Co.*, 153 N.C. App. 435, 440, 571 S.E.2d 4, 7 (2002); *see also Carter v. West Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) ("[A] non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony.").

A. Admissibility of Affidavits

Plaintiff contends that the affidavits of expert witnesses Dr. John Meredith, Dr. Harry Shaw Strothers, and Dr. Robert Stark were sufficient to survive summary judgment on the issue of proximate cause. Further, assuming arguendo that the affidavits were inadmissible, plaintiff argues that the collective deposition testimony of the expert witnesses was sufficient to establish that Dr. Lavine's negligence was a proximate cause of Mr. Hawkins' death.

To the contrary, defendants argue that the trial court erred in admitting the affidavits executed by Drs. Meredith, Stark, and Strothers because the experts' prior deposition testimony contradicted the statements made in their affidavits. Further, without the admission of the

affidavits, defendants argue that plaintiff failed to establish the proximate cause necessary to survive summary judgment.

After careful review, we agree with defendants in that the expert opinions offered by plaintiff regarding causation—set forth in three affidavits—cannot be relied upon to establish proximate cause. In addition, we hold that without these affidavits, plaintiff has failed to put forth the requisite evidence to survive summary judgment on the issue of causation.

The record indicates that between February and May 2013, discovery depositions were taken by defense counsel, and the following testimony was elicited:

> **Dr. Meredith:**
>
> Q. [W]ould you tell me how you believe Dr. Lavine breached the standard of care in his treatment of [Mr. Hawkins], please?
>
> A. It's my professional opinion the standard of care was breached by Dr. Lavine when he provided anticoagulation to a patient—to this patient who had suffered a closed-head injury.
>
> . . .
>
> Q. Let me ask you this. Will you have any opinions on the issue of causation? Are you familiar with that term?
>
> A. I am familiar with that term, and my response to that is no.
>
> **Dr. Strothers:**
>
> [Q. Was there a violation in the standard of care?]
>
> A. [M]y understanding is that Dr. Bobbitt wrote the admission orders. So Dr. Lavine wouldn't have been responsible for the care afterwards, except that he placed him on the Lovenox. . . . I think since there had only been one dose of Lovenox, that [Mr. Hawkins'] odds would have improved, because he would have had what's thought to be a lesssant [sic] for anticoagulative dose of Lovenox. But I can't say what the change in those odds would have been.

> **Dr. Stark:**
>
> Q. [I]f I understand what you're saying, is that your opinions will focus on how the care that was rendered by Dr. Williams caused or contributed to the death of [Mr. Hawkins]?
>
> A. Yes.

However, approximately one week before the calendared summary judgment hearing, Dr. Meredith, Dr. Strothers, and Dr. Stark executed separate affidavits in which each independently provided:

> [I]n my opinion, starting this patient (Mr. Hawkins) on a course of Lovenox by Dr. Lavine was unquestionably a direct cause of his ultimate demise.

During the depositions, these expert witnesses did not opine on the issue of causation. Specifically, none suggested that Dr. Lavine's conduct did cause or *probably* caused Mr. Hawkins' death. In fact, when asked if he had an opinion on causation, Dr. Meredith expressly responded "no," he did not have an opinion on the issue of causation. Despite this clear testimony, Dr. Meredith nevertheless testified in his affidavit that Dr. Lavine's conduct "was unquestionably a direct cause of [Mr. Hawkins] ultimate demise."

This statement plainly contradicted Dr. Meredith's deposition testimony. Dr. Strothers opined that Mr. Hawkins' odds would have "improved" had he only received one dose of Lovenox—a statement in stark contrast to his affidavit testimony. Dr. Stark would not opine on Dr. Lavine's conduct; he addressed only the alleged negligence of Dr. Williams in the deposition. Yet, in his affidavit, he too provided that Dr. Lavine's conduct "was unquestionably a direct cause of [Mr. Hawkins'] ultimate demise."

The experts' affidavit testimony clearly contradicts the experts' deposition testimony. In *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 974 (4th Cir. 1990), a Fourth Circuit case cited by this Court in *Cousart*, an expert witness testified during a deposition concerning the possible ways by which the DTP vaccine might have caused neurological damage to the plaintiff, but the expert declined to state that the defendant's DTP vaccine actually caused the plaintiff's specific injuries. The Fourth Circuit noted that summary judgment would have been "unproblematic" if limited to the deposition testimony. *Id.* at 974. However, attached to the plaintiff's motion for summary judgment was an affidavit wherein the expert stated: "It is my opinion that [defendant's] DPT vaccine

administered to [the plaintiff] . . . caused the neurological injuries from which she has suffered and continues to suffer." *Id.* at 974-75. The Fourth Circuit recognized that "[t]his statement alone would appear to defeat defendant's motion for summary judgment," except that the expert's affidavit was "in such conflict with his earlier deposition testimony that the affidavit should be disregarded as a sham issue of fact." *Id.* at 975. The Fourth Circuit reasoned that "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the [expert's] testimony is correct." *Id.* (citation and quotation omitted). Therefore the expert's affidavit testimony was excluded from the summary judgment evidence given that the expert avoided making a statement during the deposition that defendant's vaccine caused the injury.

Similarly, in *Cousart*, expert witness Dr. Allen did not opine during his deposition testimony that a causal link existed between the defendants' particular act or omission and the plaintiff's injuries. *Cousart*, 209 N.C. App. at 308, 704 S.E. 2d at 546. However, when faced with the defendants' motion for summary judgment, Dr. Allen stated by way of affidavit that "it was and always has been my opinion that the inappropriate prenatal care and management of labor and delivery by the Defendants more likely than not caused or contributed to the permanent brachial plexus injury[.]" *Id.* This Court opined that the "conflicts between Dr. Allen's deposition and affidavits . . . leave the trial court with only a credibility issue, not a genuine issue of material fact." *Id.* at 309, 704 S.E.2d at 547. As such, this Court held that it would be "improper" to consider the affidavit testimony given the contrary nature of the deposition testimony and the affidavit testimony. *Id.*

Here, it appears that in an effort to survive summary judgment, plaintiff filed the experts' affidavits shortly before the summary judgment hearing in an attempt to create a genuine issue of material fact. However, the conflict between the experts' deposition testimony and their affidavits has created a credibility issue, not a genuine issue of material fact. *See id.* As such, it is improper for this Court to consider the affidavit testimony of the expert witnesses in determining whether plaintiff raised a genuine issue of material fact on the issue of proximate cause. We must now discern whether plaintiff submitted other proximate cause evidence to create a genuine issue of material fact.

B. Proximate Causation

Plaintiff argues that she presented sufficient evidence to raise a genuine issue of material fact on causation even without the experts' affidavit testimony. We disagree.

Proximate causation is a cause "which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all of the facts then existing." *Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968). There is a two-pronged formula for proximate cause, which consists of a cause-in-fact and reasonable foreseeability. If a plaintiff is unable to show a cause-in-fact nexus between the defendant's conduct and any harm, our courts need not consider the separate proximate cause issue of foreseeability.

In arguing that she presented sufficient evidence of direct causation to raise a genuine issue of material fact concerning proximate cause, plaintiff directs this Court's attention to the deposition testimony of Dr. Meredith, Dr. Kenneth Fischer, and Dr. Strothers. Specifically, plaintiff argues that these experts "testified in their discovery depositions that the Lovenox ordered by Dr. Lavine was a cause of Mr. Hawkins' death."

In his deposition, Dr. Meredith testified that "the starting of the anticoagulation is inappropriate in an elderly patient who has sustained a closed-head injury or a traumatic brain injury. . . . The risks greatly outweighed the benefit of starting anticoagulation." When asked if the Lovenox ordered by Dr. Lavine and administered to Mr. Hawkins actually caused Mr. Hawkin's death, Dr. Meredith responded, "Lovenox contributed significantly." However, when asked, "[w]ill you have any opinions on the issue of causation? Are you familiar with that term?" Dr. Meredith answered, "I am familiar with that term, and my response to that is no." In addition, when asked whether the dose of Lovenox ordered by Dr. Lavine in the ED caused Mr. Hawkins' bleed which led to his death, Dr. Meredith stated, "I can't answer that."

Dr. Fischer testified that "certainly most importantly the four doses of Lovenox would have had a substantial effect on [Mr. Hawkins'] bleeding times and the progression of the bleeding in the interval." Dr. Fischer also opined that "the Lovenox was the principal causative agent for the bleeding."

When asked whether Dr. Lavine violated the standard of care, Dr. Strothers testified that "my understanding is that Dr. Bobbitt wrote the admission orders. So Dr. Lavine wouldn't have been responsible for the care afterwards, except that he placed him on the Lovenox. . . . I think since there had only been one dose of Lovenox, that [Mr. Hawkins'] odds would have improved, because he would have had what's thought to be a lesssant [sic] for anticoagulative dose of Lovenox. But I can't say what the change in those odds would have been."

Again, a medical negligence plaintiff must rely on expert opinion testimony to establish proximate causation of the injury in a medical malpractice action. *Cousart*, *supra*. Although plaintiff argues that this testimony was sufficient to survive summary judgment on the issue of proximate cause, we disagree. None of the experts opined that the dose of Lovenox ordered by Dr. Lavine in the ED was a reasonably probable cause of Mr. Hawkins' death. Dr. Meredith specifically testified that he had no opinion on the issue of causation. In reviewing Dr. Fischer's testimony within the context of the deposition, Dr. Fischer's mention of the "four doses" of Lovenox appears to be in reference to the four doses administered to Mr. Hawkins once he was admitted, which is not inclusive of the dose Dr. Lavine ordered. Dr. Fischer never specified that Dr. Lavine probably caused Mr. Hawkins' death because he was responsible for starting him on Lovenox. Dr. Strothers' testimony suggested that Dr. Lavine did not cause Mr. Hawkins's death because, had Mr. Hawkins only received one dose of the drug, Mr. Hawkins' chances of survival would have "improved." Thus, none of the experts testified that Mr. Hawkins would not have or *probably* would not have died had Dr. Lavine not administered the dose of Lovenox to Mr. Hawkins in the ED. *Cf. Lord*, 191 N.C. App. at 300, 664 S.E.2d at 338 (finding insufficient evidence of proximate cause where neither of the plaintiff's expert witnesses were able to testify that the plaintiff's vision would *probably* be better today had the defendants initiated steroid treatment sooner).

In addition, and contrary to plaintiff's argument, plaintiff failed to show that Dr. Lavine's single order of Lovenox caused Mr. Hawkins' death because it induced the subsequent treating physicians to continue prescribing the drug. Unlike the plaintiff in *Burgess v. Campbell*, 182 N.C. App. 480, 642 S.E.2d 478 (2007), a case on which plaintiff relies, plaintiff in this case is unable to direct this Court to any testimony to show that Dr. Lavine's diagnosis misled the subsequent treating physicians or caused them to engage in a plan of treatment that caused Mr. Hawkins' death. In *Burgess*, Dr. Rosen, the physician who initially diagnosed the patient, misread the ultrasound films and failed to detect an intrauterine pregnancy. *Id.* at 484, 642 S.E.2d at 481. As such, there was a genuine issue of material fact as to whether the subsequent treating physicians may have relied in part on Dr. Rosen's misdiagnosis in proceeding with the patient's treatment. In the instant case, there is no evidence that Dr. Lavine misdiagnosed the patient or misread the MRI. The radiologist clearly interpreted Mr. Hawkins' MRI as showing no intracranial bleed, and Dr. Lavine likely relied on the radiologist's correct read of the MRI when ordering a single dose of Lovenox.

Moreover, the record evidence suggests that the subsequent treating physicians were at liberty to continue or cancel Dr. Lavine's order of Lovenox after completing an independent evaluation of Mr. Hawkins. When asked, "[a]re you telling me that Dr. Lavine only intended this patient to have one dose?", Dr. Stephen Colucciello responded, "[w]ell, that's all he had control over. In the ED you give the dose and then additional anticoagulation is given by the admitting team." Dr. Colucciello further explained that the subsequent physicians may have taken into account the fact that Dr. Lavine ordered Lovenox; however, he noted that physicians "usually make their own determination for in-hospital treatment."

Plaintiff is unable to direct this court to any testimony that suggests Dr. Lavine implemented a plan of care that he believed the subsequent treating physicians were likely to follow after Mr. Hawkins was admitted to the hospital. After careful review of the record, we conclude that plaintiff failed to establish the first prong of the proximate cause analysis—that Dr. Lavine's conduct directly caused Mr. Hawkins' death. As such, we need not address plaintiff's arguments regarding foreseeability. Plaintiff has failed to show that she presented a genuine issue of material fact on the issue of causation against Dr. Lavine such that it was inappropriate for the trial court to grant summary judgment in favor of these defendants.

V. Conclusion

In sum, we conclude that plaintiff's evidence was insufficient to establish the requisite causal connection between Dr. Lavine's alleged negligence and Mr. Hawkins' death. The trial court did not err in granting summary judgment in favor of these defendants. Accordingly, we affirm the trial court's entry of summary judgment.

Affirmed.

Judges DAVIS and TYSON concur.

HIGH POINT BANK AND TRUST COMPANY, PLAINTIFF
v.
ROBERT L. FOWLER, DELORES J. FOWLER, THOMAS P. BAKER, AND PAMELA P. BAKER, DEFENDANTS

No. COA14-787

Filed 7 April 2015

Appeal and Error—appealability—appellate rules—failure to timely comply—dismissal of appeal

Defendant's appeal from a trial court order dismissing their appeal was dismissed. Defendants failed to timely comply with the provisions of N.C. R. App. P. Rule 3 and plaintiff had taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the notice of appeal.

Appeal by defendants from order entered 4 February 2014 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 3 December 2014.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell, Christopher C. Finan, and Matthew A.L. Anderson, for plaintiff-appellee.

Katherine Freeman, PLLC, by Katherine Freeman, for defendant-appellants Robert P. Fowler and Delores J. Fowler.

BRYANT, Judge.

Because defendants' appeal from a trial court order dismissing their appeal is improper, we dismiss this appeal.

On 17 April 2013, in Guilford County Superior Court, plaintiff High Point Bank and Trust Company filed suit against defendants Armadillo Holdings, LLC; Robert L. Fowler; Delores J. Fowler; Thomas P. Baker; and Pamela P. Baker. Plaintiff alleged that Armadillo Holdings, LLC, executed a promissory note for the principal amount of $1,080,000.00 on 31 January 2006. Also on 31 January 2006, defendants Robert L. Fowler, Delores J. Fowler, Thomas P. Baker, and Pamela P. Baker individually executed a Commercial Guaranty for the debt. At the time of the complaint, under the terms and conditions of the promissory note, Armadillo Holdings, LLC, was in default, and was indebted to plaintiff for the sum

of $651,251.00 plus interest. Plaintiff sought recovery against defendants jointly and severally.

On 27 June 2013, Robert Fowler and Delores Fowler filed an answer to the complaint. Armadillo Holdings, LLC, filed an answer to the complaint. Thomas P. Baker filed an answer to the complaint. The record does not reflect that Pamela Baker filed an answer to the complaint. On 10 July 2013, default was entered as to defendant Pamela Baker. Also, on 10 July 2013, plaintiff filed a notice of voluntary dismissal as to defendant Armadillo Holdings, LLC.

On 16 September 2013, plaintiff moved for summary judgment. On 27 September, Robert Fowler and Delores Fowler moved to amend their answer to the complaint. They sought to amend their answer to assert the defense that the commercial guaranties were void due to illegality: specifically, that plaintiff's pre-condition of a commercial guarantee prior to making a loan was an act of discrimination in violation of 15 U.S.C. 1691 *et seq*. and 12 C.F.R. 202.7(d).

On 22 October 2013, following a 7 October hearing before the Honorable Susan E. Bray, Judge presiding, the trial court entered an Order and Judgment granting plaintiff's motion for summary judgment and denying the Fowlers' motion to amend their answer. In its order, the court noted that a petition for relief had been filed on behalf of defendant Thomas Baker in the Middle District of North Carolina pursuant to Chapter 7 of the United States Bankruptcy Code. Accordingly, pursuant to the stay provisions of 11 U.S.C. 362, the civil action against defendant Thomas Baker was stayed. Default, pursuant to Rule 55 of the Rules of Civil Procedure, had already been entered against defendant Pamela Baker. The court also noted that having considered the Fowlers' motion to amend and plaintiff's materials in opposition, the court in its discretion would deny the motion. The court stated that "the allowance of an amendment to the pleadings would cause undue prejudice to [] Plaintiff, undue delay in the prosecution of this action and, even if allowed, the additional matters raised in the proposed amendment are futile[.]" The trial court went on to determine that there were no genuine issues of material fact and plaintiff was entitled to judgment as a matter of law.

On 20 November 2013, Robert Fowler and Delores Fowler (hereinafter defendants) filed notice of appeal from the 22 October 2013 judgment entered by Judge Bray.

On 5 December 2013, plaintiff filed a motion to dismiss defendants' appeal. In support of its motion, plaintiff contended that defendants

failed to file and serve their notice of appeal within 30 days after the entry of the judgment pursuant to Rule 3 of the Rules of Appellate Procedure. According to plaintiff, defendants were required to file and serve their notice of appeal no later than 21 November 2013; however, even though the certificate of service attached to the notice of appeal was dated 20 November 2013, the envelope contained a postmark of 22 November 2013. Therefore, plaintiff asserted, defendants' appeal should be dismissed because "[t]he clear failure of the Defendants in this cause to timely act in accordance with the North Carolina Rules of Appellate Procedure constitutes a jurisdictional failure."

A hearing on plaintiff's motion to dismiss defendants' appeal was held on 6 January 2014 before the Honorable Edgar B. Gregory, Judge presiding, in Guilford County Superior Court. Plaintiff's motion to dismiss was granted. In its order of 4 February 2014, the trial court found that defendants failed to timely comply with the provisions of Rule 3 of the North Carolina Rules of Appellate Procedure and plaintiff "ha[d] taken no action that would constitute a waiver of any of the requirements of North Carolina Rules of Appellate Procedure, including, without limitation, any action that could be construed as a waiver of the requirement of timely service of the Notice of Appeal." The court concluded that "[t]he failure to give timely notice of appeal in compliance with Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional and an untimely attempt to appeal mandates dismissal." Defendants appeal Judge Gregory's 4 February 2014 order granting plaintiff's motion to dismiss defendants' appeal.

On appeal, defendants argue that the trial court erred in determining that defendants' late service of a timely filed notice of appeal, without more, amounts to a jurisdictional default mandating dismissal of the appeal. However, as we note herein, defendants' appeal is not properly before this Court and, therefore, subject to dismissal.

Defendants cite *Hale v. Afro-American Arts Int'l*, 335 N.C. 231, 436 S.E.2d 588, *rev'g* 110 N.C. App. 621, 430 S.E.2d 457 (1993), where our Supreme Court reversed the disposition of the Court of Appeals for the reasons stated in the dissenting opinion. "[W]hile the timely filing of the Notice is necessary to grant this Court subject matter jurisdiction over the appeal, the service of the Notice may be waived by the appellee without depriving this Court of subject matter jurisdiction." *Hale*, 110 N.C. App. at 625, 430 S.E.2d at 460 (Wynn, J., dissenting).

While we acknowledge this precedent established by our Supreme Court, we must also note that "[n]o appeal lies from an order of the trial court dismissing an appeal for failure to perfect it within apt time, the proper remedy to obtain review in such case being by petition for writ of certiorari." *State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980) (citations omitted), quoted in *Mullis v. Se. Renal Assocs.*, No. COA10-763, 2011 N.C. App. LEXIS 609, at *1 (N.C. App. April 5, 2011), and *Carolina Tailors, Inc. v. Wagner*, No. COA07-776, 2008 N.C. App. LEXIS 361, at *2 (N.C. App. March 4, 2008). Therefore, as the trial court dismissed defendants' appeal for failure to comply with the Rules of Appellate Procedure resulting in a failure to properly perfect the appeal, no appeal can lie to this Court, and defendants' appeal is dismissed.

Even if we were to consider defendants' brief as a petition for a writ of certiorari to reach the merits of defendants' argument that the trial court erred in dismissing their appeal, *see* N.C. R. App. P. 21(a) (2014) ("[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ."), it is unlikely we would rule in defendants' favor.

Despite the language in the trial court's order that dismissal of defendants' appeal was mandated by the failure to timely serve plaintiff, the court also cited *Hale*, 335 N.C. 231, 436 S.E.2d 588. In its findings of fact, the trial court stated that plaintiff "ha[d] taken no action that would constitute a waiver of any of the requirements of the North Carolina Rules of Appellate Procedure, including, without limitation any action that could be construed as a waiver of the requirement of timely service of the Notice of Appeal." Therefore, it would appear the trial court had sufficient basis to grant plaintiff's motion to dismiss defendants' appeal.

For the foregoing reasons, we dismiss defendants' appeal.

DISMISSED.

Judges DILLON and DIETZ concur.

IN RE N.B.

[240 N.C. App. 353 (2015)]

IN THE MATTER OF N.B. & L.B.

No. COA14-1254

Filed 7 April 2015

1. Jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—facially valid order from another state

The trial court had jurisdiction to adjudicate the children neglected and dependent even though they were the subject of a prior custody order in New York. Nothing in the Uniform Child Custody Jurisdiction and Enforcement Act required North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C.G.S. § 50A-203(1). The New York Court's order was sufficient.

2. Child Abuse, Dependency, and Neglect—findings of fact—sufficiency of evidence

Although respondent mother challenged several of the district court's findings of fact as unsupported by the evidence in a child abuse, dependency, and neglect case regarding the mother's substance abuse problem; the paternal grandparents' ability to provide care; and the Mecklenburg County Department of Social Services, Youth and Family Services' reasonable efforts; there was competent evidence to support the pertinent findings.

3. Child Abuse, Dependency, and Neglect—guardianship awarded to paternal grandparents—verification of adequate resources—cessation of reunification efforts—findings of fact

The trial court did not err in a child abuse, dependency, and neglect case by awarding guardianship to the paternal grandparents allegedly without properly verifying that they would have adequate resources to care appropriately for the juveniles as required by N.C.G.S. § 7B-906.1(j). The findings exhibited that the trial court considered this factor. Further, the trial court ceased reunification efforts after making the necessary findings under N.C.G.S. § 7B-906.1(d)(3).

4. Child Visitation—minimum requirements—frequency—length of time—supervision

The trial court's visitation order met the minimum requirements for visitation. The trial court accounted for the minimum frequency

and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist. The trial court left it to respondent mother to coordinate with the family therapist regarding these visits.

Appeal by respondent-mother ("Mother") from order entered 11 August 2014 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 16 March 2015.

Kathleen M. Arundell for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

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

DILLON, Judge.

Mother appeals from the district court's "Permanency Planning Review and Guardianship Order" which (1) changed the permanent plan for her children N.B. ("Noah") and L.B. ("Lindsay")[1] from "guardianship, with a concurrent goal of reunification with a parent" to one of guardianship; (2) awarded guardianship of the children to their paternal grandparents ("Mr. and Ms. Smith"); and (3) granted Mother one hour per month of supervised visitation. For the following reasons, we affirm the trial court's order.

I. Background

In March 2006, the Jefferson County, New York, Department of Social Services filed a petition alleging that Mother had neglected Noah and Lindsay. The Jefferson County Family Court (the "New York Court") subsequently entered an order concluding that Mother had neglected the children by her misuse of drugs while caring for the children and by her failure to address her long history of alcohol and substance abuse. The New York Court placed the children in the custody of respondent-father ("Father") and ordered Mother to, *inter alia*, get treatment.

In March 2010, Father moved with the children to North Carolina. In October 2010, the New York Court entered an order "relinquishing jurisdiction to the State of North Carolina."

1. We use pseudonyms throughout this opinion to protect the juveniles' privacy.

In February 2013, the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") obtained non-secure custody of the children and filed a juvenile petition alleging that they were abused, neglected, and dependent, based in part on Mother's abuse of alcohol and "reports of domestic violence between the mother and men that visit the home, in the presence of the children."

In June 2013, the children were diagnosed with posttraumatic stress disorder ("PTSD") from witnessing incidents of domestic violence involving their Mother.

In July 2013, the Mecklenburg County District Court adjudicated Noah and Lindsay neglected and dependent and ordered them to "remain in YFS custody with placement with [the paternal grandparents, Mr. and Ms. Smith]." The court found that Mother was drinking "excessively" and abusing drugs in front of her children and was involved in "frequent arguments" and "physical altercations" with her live-in boyfriend. The district court ordered Mother to have a psychological evaluation that included a substance abuse assessment as well as a domestic violence assessment.

In August 2013, the parents' visitation was involuntarily suspended.

In September 2013, the district court entered a review order establishing a permanent plan of reunification "with a concurrent goal of guardianship." It noted that Mother had yet to obtain her court-ordered evaluation and assessments. The court also found that Mother had not grasped the seriousness of her issues but had "minimized her substance abuse issues and her domestic violence issues with [her boyfriend.]"

In January 2014, the district court entered another review order, finding that neither parent had made progress toward reunification. The court found that although both children continued to exhibit PTSD symptoms, their symptoms had diminished since their parents' visitation was suspended. The court ordered Mother to obtain a psychological evaluation and substance abuse and domestic violence assessments.

In February 2014, the district court changed Noah and Lindsay's permanent plan to "guardianship; with a concurrent goal of reunification." The court again noted the parents' failure to obtain their court-ordered evaluations and described Father as having "all but 'checked out.' " While "commend[ing] [M]other for the work she is doing[,]" the court identified the following issues as barriers to reunification: "domestic violence, substance abuse and mental health needs[,] the children's mental health needs[, and] understanding the impact of the past on the children."

Subsequently, Mother obtained a psychological evaluation and substance abuse assessment from Nicole L. Cantley, Ph.D., resulting in Axis I diagnoses of attention deficit hyperactivity disorder; adjustment disorder with mixed anxiety and depressed mood; alcohol abuse, early full remission; and opioid dependence, sustained partial remission. Dr. Cantley reported that Mother "admits to a history of prescription drug addiction (i.e. barbiturates, benzodiazepines, opiates)[,]" but that Mother "still denies that such use caused problems[,]" and that despite a history of child neglect resulting from her abuse of drugs and alcohol, Mother "continues to externalize blame" and to display a "lack of insight that [treatment] is even medically necessary[.]" Dr. Cantley stated that Mother's "willingness or ability to apply what she is learning may be short-lived outside the treatment program" unless Mother acknowledged a problem and accepted responsibility for her actions and specifically cautioned against Mother's continued use of the prescription narcotic tramadol, which was "ill-advised" given her "history of narcotic and opiate addiction[.]"

In April 2014, a YFS social worker submitted a report informing the district court that she had discussed Dr. Cantley's evaluation with Mother, and that Mother understood "that she was not to take [t]ramadol any longer as this was a controlled and addictive substance."

In June 2014, the court entered an order, finding that Mother was "making progress" but ordered her to comply with her case plan and with Dr. Cantley's recommendations.

In July 2014, the district court held a review hearing, speaking with Noah and Lindsay in chambers and hearing testimony from the social worker, Mr. and Ms. Smith, and Mother, and receiving into evidence a "Court Summary" and "Reasonable Efforts Report" prepared by YFS. The court also received a urinalysis showing Mother's positive test for tramadol on 23 April 2014.

In August 2014, the court entered an order changing Noah and Lindsay's permanent plan to guardianship and appointed Mr. and Ms. Smith as their guardians, based on the evidence and the recommendations of YFS and the guardian *ad litem*. Mother gave timely notice of appeal from this order.

II. Subject Matter Jurisdiction

[1] Mother first challenges the district court's subject matter jurisdiction, claiming that the children were under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), and that North Carolina

courts lacked "jurisdiction to adjudicate the children neglected and dependent when they were the subject of a custody order in New York."

"The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal[,]" *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006), and is a question of law subject to *de novo* review. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

The parties agree that the New York Court entered the "initial child-custody determination" for purposes of the UCCJEA. N.C. Gen. Stat. § 50A-201(a) (2013); *see also* N.C. Gen. Stat. § 50A-102(8) (2013) (" 'Initial determination' means the first child-custody determination concerning a particular child."). "Accordingly, any change to that [New York] order qualifies as a modification under the UCCJEA." *In re N.R.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004); *see also* N.C. Gen. Stat. § 50A-102(11) (2013).

The jurisdictional requirements for a modification under the UCCJEA are as follows:

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

N.C. Gen. Stat. § 50A-203 (2013) (emphasis added). Under the UCCJEA, North Carolina courts have jurisdiction to make an initial determination under the UCCJEA if North Carolina is the "home state of the child on the date of the commencement of the proceeding[.]" N.C. Gen. Stat. § 50A-201(a)(1). A child's "home state" is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2013).

In this case, the record shows that North Carolina has been the children's home state since March 2010, when they moved here with Father, as reflected in various court filings. Therefore, the first jurisdictional requirement for a modification under the UCCJEA is satisfied. *In re J.C.*, __ N.C. App. __, __, 760 S.E.2d 778, 780 (2014).

The remaining jurisdictional requirement for a modification under the UCCJEA is satisfied by the New York Court's order "relinquishing jurisdiction to the State of North Carolina." *See* N.C. Gen. Stat. 50A-203(1). Indeed, the "Initial (7-Day) Order" entered in March 2013 by the district court in Mecklenburg County contains a finding that the New York Court "exercised jurisdiction during a custody hearing in August 2010; the NY court found no one resided in NY and relinquished jurisdiction to NC[.]"

We are unpersuaded by Mother's suggestion that the New York Court's order is insufficient to relinquish jurisdiction because that court's order lacks findings of fact to indicate the specific statutory basis under New York law for relinquishment. *See* N.Y. Dom. Rel. Law §§ 76-a, 76-f (2014). However, under the UCCJEA, "the original decree State is the sole determinant of whether jurisdiction continues." *In re N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202official cmt.). Nothing in the UCCJEA requires North Carolina's district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1). The New York Court's order is sufficient. *See Williams v. Walker*, 185 N.C. App. 393, 403, 648 S.E.2d 536, 543 (2007). Accordingly, this argument is overruled.

III. Evidentiary Support for Findings

[2] Mother challenges several of the district court's findings of fact as unsupported by the evidence.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004).

As in all dispositional proceedings, "[t]he court may consider any evidence, including hearsay evidence . . . or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate

disposition." N.C. Gen. Stat. § 7B-906.1(c) (2013). It is the province of the fact-finder to "weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted).

A. Mother's Drug Abuse

Mother first objects to any suggestion in findings 11, 12, 13 and 28 that it was probable or likely that she would again abuse prescription pain medications. However, in her report, which the court incorporated by reference into its order, Dr. Cantley opined that "[a]lthough *relapse is common and symptomatic of drug and alcohol dependency*, *she is at greater risk* given that she quit for secondary gains (to comply with [YFS] recommendations and for reunification." (Emphasis added.) Further she opined that there were "barriers to [Mother's] progress in drug and alcohol treatment" which included "[Mother's] lack of insight that it is even medically necessary, and her admittance that she is simply following the orders of YFS" and that "[Mother's] willingness or ability to apply what she is learning may be short-lived outside of the treatment program." Dr. Cantley's report pointed to Mother's proclivity "to externalize blame" as a barrier to progress.

Mother continued to exhibit these traits at the July 2014 review hearing. She testified that Noah and Lindsay "didn't come into [YFS] custody because of something I did[,]" faulted YFS and the social worker for refusing to work with her, and accused Ms. Smith of "trying to sabotage" her relationship with the children. Mother claimed she had successfully completed substance abuse treatment and had done "[e]verything that [she] could do" to satisfy YFS. Disputing the YFS social worker's testimony, Mother insisted she had "passed every drug screen." As previously noted, however, a urinalysis confirmed Mother's continued use of tramadol, contrary to Dr. Cantley's recommendation and her own representations to YFS. We must conclude that there was competent evidence to support the trial court's finding of a likelihood of future substance abuse by Mother.

Mother next takes issue with the reference in the order to her "admitted failure to[]reveal her addiction history to the prescribing doctors/professionals" in finding 12. However, her own testimony supports this finding. Specifically, she acknowledged taking hydrocodone for "more than a year" during these proceedings by obtaining prescriptions from her "family doctor" and then "a different doctor." When asked whether she had made these prescribing doctors "aware of [her] substance

abuse history[,]" Mother testified, "No. I didn't abuse my medication." Dr. Cantley reported that Mother was prescribed both hydrocodone and tramadol for pain, raising the possibility of another prescribing physician. This argument is overruled.

B. Grandparents' Ability To Provide Care

Mother challenges the trial court's finding that Noah and Lindsay "have blossomed under [Mr. and Ms. Smith's] care." However, there is competent evidence to support this finding. Specifically, Ms. Smith testified that the children were "doing pretty good" and are "progressing well under the circumstances." She described Lindsay as "a normal teenager who seems happy and well adjusted" and who is "utilizing her skills for stress management" learned in therapy. She testified that Noah "is playing in a basketball league" and also "opening up to his therapist." Ms. Smith informed the court that she and her husband had obtained "two lottery positions in a charter school" for the children. This exception is overruled.

Mother further objects to the finding that the Noah and Lindsay "feel safe and comfortable in the grandparents' home." She hinges this claim on the fact that the YFS court summary describes Noah as saying he felt "safe and comfortable" in his grandparents' home but describes Lindsay as merely saying "that she felt 'fine' and 'safe[.]' " We point out that the district court also spoke in chambers with Noah and Lindsay about "how things were going at their grandparents' house[,]" at which time they voiced their "agreement with the guardianship recommendation[.]" Regardless of whether Lindsay actually used the term "comfortable" with the social worker or the court, we find Mother's argument to be unconvincing. Any imprecision by the court in paraphrasing Lindsay's feelings is harmless.

C. YFS' Reasonable Efforts

Mother also challenges the court's finding that "YFS has made reasonable efforts to . . . eliminate the children's need for . . . [an] out of home placement." *See* N.C. Gen. Stat. § 7B-906.1(e)(5) (2013). However, this finding is supported by the evidence. Specifically, the YFS social worker testified regarding her interactions with Mother and received into evidence a "Reasonable Efforts Report." The report details the social worker's contact with Mother since the previous review hearing in April 2014 showing that the social worker was extensively involved in the scheduling and supervision of visits between Mother and the children in April and May 2014, that she contacted Mother to inform her of medical issues with the children, and that she coordinated

Mother's therapeutic visitation with the children's therapist. The court incorporated the "Reasonable Efforts Report" by reference into its order. Accordingly, Mother's argument is overruled.

IV. Sufficiency of Findings Under N.C. Gen. Stat. § 7B-906.1

[3] Mother claims that the district court's order lacks certain findings of fact required by the permanency planning statute, N.C. Gen. Stat. § 7B-906.1 (2013).

A. Guardians' Financial Resources

Mother first contends the court awarded guardianship to Mr. and Ms. Smith without properly verifying that they "will have adequate resources to care appropriately for the juvenile[s]" as required by N.C. Gen. Stat. § 7B-906.1(j) (2013). *See also* N.C. Gen. Stat. § 7B-600(c) (2013). The order includes the following pertinent findings:

> 42. This Court questioned [Mr. and Ms. Smith] pursuant to NCGS §7B-600.
>
> 43 [Mr. and Ms. Smith] understand the legal and financial obligations of guardians.
>
> 44. [Mr. and Ms. Smith] are fit and proper people to have the care, custody, and control of [Noah] and [Lindsay] through a guardianship arrangement.
>
> 45. [Mr. and Ms. Smith] are ready, willing, and able to . . . fulfill the duties and responsibilities of legal guardians.

Mother argues that these findings and the evidence they are based on are not sufficient to meet the requirements of N.C. Gen. Stat. 7B-906.1(j). We disagree.

This Court has previously held "that the Juvenile Code does not 'require that the court make any specific findings in order to make the verification" prescribed by N.C. Gen. Stat. § 7B-906.1(j). *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007).[2] It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship. *Id.* Here, the court made explicit findings of Mr. and Ms. Smith's understanding of and ability to fulfill their

2. *In re J.E.* was decided under a previous version of the statute, N.C. Gen. Stat. § 7B-907(f), but the applicable language in that version is almost identical to the applicable language in N.C. Gen. Stat. § 7B-906.1(j). *See* 2013 N.C. Sess. Laws 129, sects. 25, 26; 2003 N.C. Sess. Laws 140, sect. 9(d).

financial responsibilities as guardians. Both Mr. and Ms. Smith affirmed to the court their willingness to "be responsible for the children's physical, emotional and educational and mental well-being up until the time they turn 18." The YFS court summary also states that Mr. and Ms. Smith "are willing and able to provide a long term home for the children through guardianship." Having "spoken in depth" with Mr. and Ms. Smith "about meeting the requirements and responsibilities" of guardianship, the social worker affirmed her belief that they had "the means to support the children[.]" Such evidence more than suffices to support a verification under N.C. Gen. Stat. § 7B-906.1(j). *See In re J.E.*, 182 N.C. App. at 616-17, 643 S.E.2d at 73. Mother's argument is overruled.

B. Ceasing Reunification Efforts

Mother also claims that the district court improperly ceased reunification efforts without making the necessary findings under N.C. Gen. Stat. § 7B-906.1(d)(3) (2013), requiring the court to consider "[w]hether efforts to reunite the juvenile[s] with either parent would be futile or inconsistent with the juvenile[s'] safety and need for a safe, permanent home within a reasonable period of time." *Id.*

We agree with Mother that the order effectively ceases reunification efforts by (1) eliminating reunification as a goal of Noah and Lindsay's permanent plan, (2) establishing a permanent plan of guardianship with Mr. and Ms. Smith, and (3) transferring custody of the children from YFS to their legal guardians.[3] *Cf. In re A.E.C.*, 2015 N.C. App. LEXIS 14, *11 (N.C. Ct. App. Jan. 20, 2015) (noting "the order need not explicitly cease reunification efforts"); *In re A.P.W.*, __ N.C. App. __, __, 741 S.E.2d 388, 391 (2013) (finding an implicit ceasing of reunification efforts where the court changed the permanent plan to adoption and ordered DSS to seek termination of parental rights). However, we also believe and, therefore, hold that the findings exhibit that the trial court considered the factor.

In addressing the equivalent statutory requirement for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b)(1), our Supreme Court has explained that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re A.E.C.*, 2015 N.C. App. LEXIS 14 at *11 (*quoting In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013)). In other words, the findings must " 'make clear that the trial court considered the evidence in light of

3. Because the order removed Noah and Lindsay from "the custody or placement responsibility" of YFS, the provisions of N.C. Gen. Stat. § 7B-507(b) (2013) do not apply.

whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.' " *Id.*

Here, the trial court's findings refer to Mother's persistent "failure to comply with recommendations concerning her use of prescription pain pills[;]" her dishonesty about her continued contact with her live-in boyfriend and failure to appreciate the risk domestic violence "poses to herself and her children[;]" and her refusal to accept responsibility for her actions or acknowledge a problem with substance abuse, despite "a history of court involvement [that] includes at least 6 child custody cases which date back to the 1990s and span multiple counties and states." The order also includes several findings directly pertaining to the prospects for reunification:

> 27. [Mother] is either unwilling or unable to apply the information, skills, and strategies she has learned through various services to her daily life and interactions with her children. . . .
>
> . . . .
>
> 49. [Mother] is not a fit and proper person to have the care, custody, and control of the children.
>
> . . . .
>
> 51. The children cannot be reunified with [Mother] within six months or in the foreseeable future.
>
> 52. It is contrary to the children's best interest and contrary to their need for a safe and permanent home to be reunified with either parent.

At minimum, these findings "embrace[] the substance" of the statutory provisions in N.C. Gen. Stat. § 7B-906.1(d)(3). *In re L.M.T.*, 367 N.C. at 169, 752 S.E.2d at 456. Accordingly, Mother's argument is overruled.

V. Visitation Order

[4] In her final argument, Mother challenges the visitation schedule ordered by the district court as "too vague and ill-defined." The court scheduled a review hearing and awarded Mother visitation pending the hearing as follows:

- [Mother's] visitation shall be supervised by the family therapist, Dr. Tracy Masiello, in a therapeutic setting.

- [Mother] is entitled to at least one visitation session per month for a minimum of one hour.
- Sessions may be longer and/or more frequent if the therapist recommends.
- [Mother] is responsible for contacting the family therapist at least once per month to participate in scheduling visitation appointments.
- [Mother] shall respond to messages from the therapist within 48 hours (2 days).

The order also declares the court's intention to "enter a detailed visitation plan for each parent" following the 10 September 2014 review hearing.

Mother argues that the visitation order fails to designate the time and place of the visits and thus does not provide the "minimum outline of visitation" required by *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005) and its progeny. Our decision in *In re E.C.* relied on a version of N.C. Gen. Stat. § 7B-905(c) that required an "appropriate visitation plan . . . expressly approved by the court." In *In re E.C.*, we determined that this statutory language meant "[a]n appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." 174 N.C. App. at 523, 621 S.E.2d at 652.

However, since our decision in *In re E.C.*, G.S. 7B-905(c) was amended (in 2013) to remove the language requiring that the plan be "expressly approved by the court[,]" and a new statute governing visitation in dispositional orders was enacted, G.S. 7B-905.1(b),(c), which only requires the order to account for "the minimum frequency and length of visits and whether the visits shall be supervised." *See* 2013 N.C. Sess. Laws 129, Sects. 23, 24 (June 19, 2013). These changes became effective 1 October 2013 *before* the trial court's August 2014 order and are applicable to the present case. By enacting G.S. 7B-905.1 and by not including the language that was in former G.S. 7B-905(c), we believe that the General Assembly intended to eliminate any requirement that the trial court include in its order the particular time or place for such visitations but only require the trial court to provide a framework for such visitations. Therefore, *In re E.C.* has been abrogated by the statutory amendment to the extent that it holds that a trial court *must* provide for the time, place, and conditions of visitation in an order allowing visitation.

Here, the trial court accounted for the minimum frequency and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist (Dr. Masiello). The trial court left it to Mother to coordinate with Dr. Masiello regarding these visits. We hold that the trial court's order meets these minimum requirements for visitation, and this argument is overruled.

VI. Conclusion

For the foregoing reasons, we affirmed the trial court's "Permanency Planning Review and Guardianship Order[.]"

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

TONY HAROLD POPE, ADMINISTRATOR OF THE ESTATE OF SUSAN LANIER FRIES, PLAINTIFF
v.
BRIDGE BROOM, INC., DEFENDANT

No. COA14-221

Filed 7 April 2015

1. Evidence—accident reconstruction—expert opinion—reliability

The trial court did not err in a negligence case by admitting an expert's accident reconstruction testimony under N.C.G.S. 8C-1, Rule 702 that in his expert opinion, decedent's husband was "the cause of this accident." Plaintiff failed to show that the expert's testimony was unreliable. Also, plaintiff did not further challenge the admissibility of the expert's testimony.

2. Negligence—jury instructions—intervening negligence—superseding negligence

The trial court did not err in a negligence case by instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial was also rejected.

3. Negligence—jury instructions—negligence per se—Manual for Uniform Traffic Control Devices

The trial court did not err by denying plaintiff's request for a jury instruction on negligence per se or by denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se. Even assuming, without deciding, that defendant had a duty to comply with the Manual for Uniform Traffic Control Devices (MUTCD), the portions of the MUTCD that plaintiff suggested were violated did not create specific duties sufficient to be the basis for a claim of negligence per se. Further, because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed. While noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se.

Appeal by plaintiff from judgment entered 19 August 2013 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 2014.

DeVore Acton & Stafford, PA, by Derek P. Adler and Fred W. DeVore, III, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Colin E. Scott, for defendant-appellee.

GEER, Judge.

Plaintiff Tony Harold Pope, as administrator of decedent Susan Lanier Fries' estate, appeals from a judgment entered on a jury verdict in defendant's favor, finding defendant was not liable in negligence. Mrs. Fries, who was riding on a motorcycle with her husband, was thrown from the motorcycle and died after her husband tried to avoid one of defendant's trucks that was at the rear of a street-sweeping operation. On appeal, plaintiff primarily argues that the trial court erred in denying his motion for a directed verdict against defendant on the grounds that the evidence was undisputed that defendant's negligence was at least a proximate cause of Mrs. Fries' death. However, defendant presented evidence materially indistinguishable from the undisputed facts of *Pintacuda v. Zuckeberg*, 159 N.C. App. 617, 624-26, 583 S.E.2d 348, 353-54 (2003) (Timmons-Goodson, J., dissenting), *rev'd for reasons stated in dissent*, 358 N.C. 211, 598 S.E.2d 776 (2004), in which our Supreme Court upheld entry of a directed verdict in *the defendant's favor* because the evidence

established intervening negligence by the plaintiff motorcycle driver. Since the undisputed evidence in *Pintacuda* was sufficient to establish intervening negligence as a matter of law, defendant's evidence in this case, if believed by the jury, was sufficient to allow the jury to find that the negligence of Mrs. Fries' husband constituted intervening negligence warranting a verdict in defendant's favor. Consequently, the trial court, in this case, properly denied plaintiff's motion for a directed verdict.

Facts

This case arose out of an accident on Independence Boulevard in Charlotte, North Carolina. In the area around where the accident occurred, there are three northbound lanes and three southbound lanes that are divided by a median. Traveling southbound, the highway curves to the southwest, and there are trees abutting the right shoulder of the highway. The speed limit is 55 m.p.h., and lanes are about 12 feet wide.

On the evening of 10 September 2011, defendant was performing a street sweeping operation that involved four of defendant's vehicles traveling southbound on the left hand side of Independence Boulevard. Michael Marshall, then employed by defendant, was at the tail of the operation, driving a pickup truck designed to absorb substantial rear end impact. Mounted on the bed of Mr. Marshall's truck was a tall advanced warning sign bearing a large flashing arrow or message indicating to drivers approaching from behind the street sweeping operation that they would have to move over one lane to the right. About 150 feet in front of Mr. Marshall, there was another attenuator truck with a similar mounted sign ("the front attenuator truck"), and in front of that second truck was a sweeping and vacuuming vehicle. There was also a vehicle in front of the sweeping vehicle that was picking up larger debris.

The weather was clear that evening, and sometime after 9:30 p.m. the sweeping operation had crested a hill on Independence Boulevard just south of a bridge over Pecan Avenue, and was moving between five and 20 m.p.h. Mr. Marshall's truck was either partially or completely in the left lane of travel, even though the left shoulder was wide enough for Mr. Marshall to be traveling completely on the shoulder. The other Bridge Broom vehicles were traveling either on the left shoulder or in the left lane.

Yawo Sedjro was also traveling in his car, a green van, southbound in the left lane. As he came up the hill just after the Pecan Avenue bridge, Mr. Sedjro came quickly upon Mr. Marshall's vehicle obstructing the left lane of travel and slammed on his brakes. Mr. Sedjro first slowed to about 20 to 25 m.p.h. and then came to a complete stop, becoming

trapped behind Mr. Marshall's truck. He signaled and waited for an opportunity to safely move over to the center lane. Samuel Flores was traveling southbound in his vehicle when he came upon Mr. Sedjro and defendant's sweeping operation. Mr. Flores also slammed on his brakes to let Mr. Sedjro move over and in case Mr. Flores needed to move over into the right lane.

Darrell Fries was also driving southbound on Independence Boulevard on his motorcycle with Mrs. Fries riding on the back. Mr. and Mrs. Fries were traveling in the left lane when Mr. Fries saw brake lights up ahead and the flashing sign from one of the attenuator trucks. Mr. Fries "wasn't sure what was happening in the left lane," but he believed he "had to move over" and "started making adjustments." After moving over to the center lane, he began to brake, but his motorcycle started sliding. The motorcycle skidded for 195 feet before it fell over. Mrs. Fries was thrown about 30 feet from where the motorcycle fell over, she slammed into the back of Mr. Flores' car, and she died. Mr. Fries suffered serious injury. There were no other injuries or accidents.

At trial, plaintiff offered testimony from, among others, Daren Marceau, who testified as an expert in "traffic engineering and crash investigation, motorcycle operations and human factors with respect to driving in motorway environments." Mr. Marceau testified that "the mobile sweeping operation being conducted by Bridge Broom's employees at the time of the crash was in violation of state and federal standards" as promulgated in the Manual for Uniform Traffic Control Devices ("MUTCD"), primarily because "Mr. Marshall failed to properly position his truck on the shoulder[,] . . . [the driver of the front attenuator truck] failed to properly space the two [attenuator] trucks along the roadway[, and] . . . Bridge Broom failed to place advanced warning signs or changeable message signs before the work zone." He concluded that "the failure of Bridge Broom to do the[se] things . . . was at least a cause of the crash that killed Susan Fries." Plaintiff introduced into evidence relevant portions of the MUTCD. However, plaintiff did not offer the testimony of an accident reconstruction expert.

Plaintiff filed a motion in limine to exclude the testimony of defendant's expert in accident reconstruction, Timothy Cheek. The trial court denied the motion and allowed Mr. Cheek to testify regarding his analysis of the accident. Mr. Cheek did not disagree with Mr. Marceau's opinions regarding the location of defendant's vehicles at the time of the accident. However, Mr. Cheek testified that in his opinion, based in large part upon his measurements and calculations at the location of the accident, that the reason for Mrs. Fries' death was Mr. Fries' inadequate

braking of the motorcycle. Plaintiff cross-examined Mr. Cheek about the accuracy of these measurements and calculations.

At the close of all the evidence, plaintiff made a motion for a directed verdict in his favor. The trial court denied the directed verdict motion and also denied a request by plaintiff for a jury instruction on negligence per se. However, the trial court granted defendant's request for an instruction on intervening negligence.

The trial court submitted two issues to the jury: (1) "Was the negligence of Bridge Broom a proximate cause of the death of Susan Fries?" and (2) if so, "What amount of damages is the Estate of Susan Fries entitled to recovery [sic] for her wrongful death?" The jury answered the first question in the negative. After the verdict was read, plaintiff made a motion for judgment notwithstanding the verdict ("JNOV") on the grounds that the "overwhelming weight of the evidence" supported the conclusions (1) that defendant should be liable based on negligence per se and (2) that Mr. Fries' actions were reasonably foreseeable. After the trial court denied the JNOV motion, plaintiff moved the trial court for "essentially a mistrial" on the same bases as the JNOV. The trial court also denied that motion. Plaintiff timely appealed to this Court.

I

[1] Plaintiff first challenges the trial court's admission of Mr. Cheek's accident reconstruction testimony, arguing that his opinions were inadmissible under Rule 702 of the Rules of Evidence. Mr. Cheek testified that, in his expert opinion, Mr. Fries was "the cause of this accident." According to Mr. Cheek, the accident occurred, and Mrs. Fries was killed, because Mr. Fries only used his rear brake -- if he had used both his front and rear brakes, Mr. Fries would have been able to safely stop.

We review a trial court's ruling regarding the admission of expert testimony for abuse of discretion. *State v. McGrady*, ___ N.C. App. ___, ___, 753 S.E.2d 361, 365, *disc. review allowed*, 367 N.C. 505, 758 S.E.2d 864 (2014). A trial court abuses its discretion if its decision is " 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* at ___, 753 S.E.2d at 365 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The legislature's 2011 amendment to Rule 702(a) of the Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

> by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Our Rule 702 was amended to mirror the Federal Rule 702, which itself " 'was amended . . . to conform to the standard outlined in *Daubert* [*v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)].' " *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367 (quoting Committee Counsel Bill Patterson, 2011-2012 General Assembly, *House Bill 542: Tort Reform for Citizens and Business* 2-3 n.3 (8 June 2011)).

In light of our legislature's amendment, this Court recognized that "it is clear that amended Rule 702 should be applied pursuant to the federal standard as articulated in *Daubert*." *Id.* at ___, 753 S.E.2d at 367. *Daubert* explained that the touchstone for admissibility is reliability, and " ' "scientific knowledge" establishes a standard of evidentiary reliability.' " *Id.* at ___, 753 S.E.2d at 367 (quoting *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795). For cases commenced after the effective date of the Rule 702 amendment, this generally means a departure from the analysis set forth under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004), which was based on the existing law that, under the prior version of Rule 702, "North Carolina [was] not . . . a *Daubert* jurisdiction."[1]

Consistent with the application of Federal Rule 702 in federal courts, under North Carolina's amended Rule 702, trial courts must conduct a three-part inquiry concerning the admissibility of expert testimony:

> Parsing the language of the Rule, it is evident that a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Second, the testimony must be relevant,

1. The amended Rule 702 applies here because the complaint was filed about a month after the effective date of the amendment. *See* 2011 Sess. Laws ch. 283, ss. 1.3, 4.2.

> meaning that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Third, the testimony must be reliable. *Id.*

In re Scrap Metal Antitrust Litig., 527 F.3d 517, 528-29 (6th Cir. 2008). "While there is inevitably some overlap among the basic requirements . . . they remain distinct concepts and the courts must take care not to conflate them." *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

In this appeal, plaintiff does not make any challenge to Mr. Cheek's testimony under the first or second prongs of the Rule 702 inquiry, but instead focuses exclusively on whether Mr. Cheek's opinions were reliable. With respect to that part of the Rule 702 inquiry,

> Rule 702 guides the trial court by providing general standards to assess reliability: whether the testimony is based upon "sufficient facts or data," whether the testimony is the "product of reliable principles and methods," and whether the expert "has applied the principles and methods reliably to the facts of the case." [Fed. R. Evid. 702.] In addition, *Daubert* provide[s] a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. . . . The test of reliability is "flexible," and the *Daubert* factors do not constitute a "definitive checklist or test," but may be tailored to the facts of a particular case. *Kumho* [*Tire Co. v. Carmichael*], 526 U.S. [137,] 150, [143 L. Ed. 2d 238, 251], 119 S. Ct. 1167[, 1175 (1999)].

In re Scrap Metal Antitrust Litig., 527 F.3d at 529.

Daubert's five non-exclusive factors for trial courts to use in assessing the reliability of scientific testimony include the following:

> 1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community.

United States v. Beverly, 369 F.3d 516, 528 (6th Cir. 2004). Additionally, in applying *Daubert*, federal courts have recognized other factors relevant to determining the reliability of expert testimony, including whether the

expert proposes to testify about matters growing naturally and directly out of research the expert has conducted independent of the litigation, or, conversely, whether the expert has developed opinions expressly for purposes of testifying; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has adequately accounted for obvious alternative explanations; whether the expert is as careful in his testimony as he would be outside the context of his paid litigation consulting; and whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments (citing cases in support of factors).

Although this case is only the second time our appellate courts have discussed the application of the *Daubert* standard adopted by our amended Rule 702, federal and other state courts, of course, have been applying the *Daubert* analysis for more than two decades. Nevertheless, although plaintiff challenges Mr. Cheek's testimony on the basis that it failed to meet the requirements of each of Rule 702's subsections, the only authority plaintiff cites in support of his contentions is Rule 702 and the standard of review. "As defendant fails to cite any legal authority in support of [this] argument, that argument may be deemed abandoned." *State v. Locklear*, 180 N.C. App. 115, 119, 636 S.E.2d 284, 287 (2006); N.C.R. App. P. 28(a). Nonetheless, even considering plaintiff's bare assertions, we hold he has failed to show that the trial court abused its discretion.

At trial, Mr. Cheek testified that the facts and data he used to form his opinion came from (1) the police file, which included statements, reports, and photographs from the scene; (2) physical evidence from and observations of the scene; and (3) the depositions of the witnesses at the scene, including those of Mr. Marshall, Mr. Sedjro, Mr. Chavez, and Mr. Fries. These sources provided Mr. Cheek with the following facts about the case: (1) at the time of the accident, Mr. Marshall's truck was not completely on the left shoulder; (2) the height of the sign on Mr. Marshall's truck was 13 feet; (3) the speed of Mr. Marshall's truck was less than 10 m.p.h.; (4) Mr. Fries' motorcycle was a 2003 Harley Davidson; (5) Mr. Fries "was in the left-hand lane when he came around the curve and saw the arrow board" on Mr. Marshall's truck and moved over to the center lane; and (6) other cars were able to stop without wrecking or leaving skid marks. His review of the information available prior to trial also provided him with an understanding of the geography of the area of the accident; the start and end points of the skid marks from Mr. Fries'

motorcycle; the point where the motorcycle was laid down and came to a rest; and the positions of Mr. Sedjro's and Mr. Chavez' vehicles.

Mr. Cheek's opinion was primarily based on a comparison of Mr. Fries' sight distance and the distance in which Mr. Fries could have safely braked. Mr. Cheek took two measurements to determine Mr. Fries' sight distance, which Mr. Cheek testified was "more than 660 feet[.]" With one measurement, relying on Mr. Fries' deposition testimony that he saw Mr. Marshall's truck while in the left lane, Mr. Cheek placed his car on the left shoulder of Independence Boulevard at the stipulated location of the accident and walked back on that shoulder to the farthest point where he could still see his car, and he measured a driving distance of 800 feet within which Mr. Fries could "see and react" to any danger posed by Mr. Marshall's truck. As part of the measurement, Mr. Cheek stooped down to mimic Mr. Fries' height while driving the motorcycle. Mr. Cheek explained, given that the sign on the rear of Mr. Marshall's truck was 13 feet, much taller than Mr. Cheek's car which only came up to his chest, this 800 foot estimate was conservative. For the other sight distance measurement, which relied on physical evidence suggesting that Mr. Fries was closer to the right lane when he reacted to Mr. Marshall's vehicle, Mr. Cheek used Google's Street View software and determined that if Mr. Fries were traveling in the far right lane, he could have seen Mr. Marshall's truck from at least 580 feet away. Mr. Cheek explained that this estimate was "very conservative."

Mr. Cheek also determined that Mr. Fries' skid marks were caused by Mr. Fries locking his rear brake and failing to apply his front brake. Assuming Mr. Fries was traveling 55 m.p.h., and taking into account Mr. Fries' motorcycle's braking capacity, Mr. Cheek calculated that the distance in which Mr. Fries could have stopped had he used both brakes was 133 feet. Mr. Cheek also testified that the fact that no other automobiles were involved in a wreck supported the conclusion that Mr. Fries could have safely reacted to any danger posed by Mr. Marshall's vehicle and come to a complete stop if he had applied his front brake.

Plaintiff cross-examined Mr. Cheek about the possible hazards posed by Mr. Marshall's truck, his sight distance calculations, his calculation of Mr. Fries' motorcycle's braking capabilities, and proper motorcycle braking technique. In response to a question whether "[a]s a general principle [it is] true that . . . automobiles stop more quickly than motorcycles," Mr. Cheek explained that Mr. Fries' motorcycle can safely brake quicker than the average automobile.

Plaintiff first contends, under Rule 702(a), that the testimony that plaintiff had "800 feet of driving space to see and react" was not based on sufficient facts or data, because the points that Mr. Cheek used to measure that distance -- from one point on the left shoulder to another point on the left shoulder -- were different from the locations of Mr. Fries' motorcycle and Mr. Marshall's truck prior to the accident. Plaintiff argues that Mr. Fries was actually in the middle lane, while Mr. Marshall was straddling the shoulder and left lane. Plaintiff also contends the measurement was deficient in facts or data because it failed to account for when Mr. Fries "could decipher that the attenuator truck was actually within the left lane" and recognize that it posed a hazard.

Subsection (a)(1) of Rule 702 "calls for a quantitative rather than qualitative analysis." *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. That is, the "requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology.' " *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) (quoting *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 766 (7th Cir. 2013)). *See also United States v. Crabbe*, 556 F. Supp. 2d 1217, 1223 (D. Col. 2008) ("[T]he inquiry examines only whether the witness obtained the amount of data that the methodology itself demands.").

Consequently, " '[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility.' " *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 934 (W.D. Wis. 2007) (quoting *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104, 1119 (N.D. Ill. 2005)). "In other words, th[is] Court does not examine whether the facts obtained by the witness are themselves reliable -- whether the facts used are qualitatively reliable is a question of the *weight* to be given the opinion by the factfinder, not the *admissibility* of the opinion." *Crabbe*, 556 F. Supp. 2d at 1223.

Additionally, "experts may rely on data and other information supplied by third parties. . . even if the data were prepared for litigation by an interested party. Unless the expert's opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others." *Southwire Co.*, 528 F. Supp. 2d at 934 (internal citation omitted). An expert may rely on deposition statements made by other witnesses in developing the factual basis of his opinion. *See Figueroa v. Boston Scientific Corp.*, 254 F. Supp. 2d 361, 367 (S.D. N.Y.

2003) (holding expert's opinion sufficiently reliable in part where expert "reviewed witness depositions, medical records, and scientific literature in forming his expert opinion in this case").

Here, Mr. Cheek relied on Mr. Fries' deposition in which Mr. Fries testified that he was in the left lane when he saw the arrow board on Mr. Marshall's truck, which was not completely on the left shoulder. Mr. Cheek also relied on the heights of the sign on Mr. Marshall's truck and of Mr. Fries' motorcycle, which are undisputed. There is no dispute that these facts were sufficient for Mr. Cheek to calculate a sight distance measurement of 800 feet. Any dispute concerning whether Mr. Cheek used the correct data points goes to the quality and therefore the credibility of the measurement and not its admissibility. *See Intellectual Ventures I LLC v. Canon Inc.*, 36 F. Supp. 3d 449, 466 n.11 (D. Del. 2014) ("Using his own selected references, Dr. Fossum disputes the references selected and calculations performed by Dr. Afromowitz, concluding that Dr. Afromowitz's analysis is . . . not based on sufficient facts or data. The court will not weigh the credibility of the parties' experts[.]"); *Crabbe*, 556 F. Supp. 2d at 1223 ("The witness' testimony that he or she obtained a measurement of that distance is sufficient to satisfy the 'facts and data' element of Rule 702 for that component of the methodology."). *See also Glass v. Anne Arundel Cnty.*, 38 F. Supp. 3d 705, 715-16 (D. Md. 2014) ("Because all these facts are supported by the record, the data on which [the expert] relied in writing portions of [his] report based on these three facts are relevant to the case. [The plaintiff's] objections to [the expert's] conclusions from his calculations -- and to [the expert's] failure to take other data into account -- go to the weight of the report, not its admissibility[.]").

Further, the 800 feet of driving space "to see and react" to any perceived danger posed by Mr. Marshall's truck does, in fact, take into account the point at which Mr. Fries could decipher that danger, as it takes into account the point when Mr. Fries reacted to Mr. Marshall's truck. Mr. Cheek testified in his deposition that his calculations considered "the time it takes to recognize that a vehicle is completely stopped" which is "about a second." Mr. Cheek also relied upon the fact that Mr. Fries testified he moved over to the center lane when he saw Mr. Marshall's arrow board, which was partially in the left lane.

Plaintiff next argues that Mr. Cheek's 800 foot measurement was the product of unreliable principles and methodology, contrary to Rule 702(a)(2), because Mr. Cheek used Google Earth to measure the sight

distance. Plaintiff points to an image generated by Google Earth's line of sight estimator[2] showing that, from the center lane on the Pecan Avenue bridge to the stipulated point where the accident occurred, the line of sight is obstructed by trees. Plaintiff did not introduce this image at trial.

The requirement that expert testimony must be based on " 'scientific knowledge,' " *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367 (quoting *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795), means that the principles and methods used to form that testimony must be grounded in the scientific method, *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795. In other words, the principles and methods must be capable of generating " 'testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication.' " *Perry v. Novartis Pharms. Corp.*, 564 F. Supp. 2d 452, 459 (E.D. Pa. 2008) (quoting *Caraker v. Sandoz Pharm. Corp.*, 188 F. Supp. 2d 1026, 1030 (S.D. Ill. 2001)).

We note that plaintiff conceded at trial that the measurement of 800 feet from the left shoulder was accurate, using Google Earth, and on appeal contends that "the approximation does not take into account Google Earth's additional evidence that the line of sight from the center lane . . . is obstructed." It appears that the specific contention that Mr. Cheek used unreliable principles and methods to determine the 800 foot sight distance measurement is based on the fact that, had Mr. Cheek measured the sight distance from the center lane on the Pecan Avenue bridge, his conclusion would have been different.

Plaintiff, however, does not suggest that the technique Mr. Cheek used to arrive at the 800 foot measurement is itself the product of unscientific methodology, and given that Mr. Cheek used Google Earth to calculate the distance he could see from the left shoulder, plaintiff rightfully concedes that this measurement is reliable. *See Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (taking judicial notice of online distance calculation relying on Google Maps data). Rather, the only reason plaintiff gives that Mr. Cheek's 800-foot sight distance measurement is unreliable is essentially that qualitatively unreliable data points were used, an attempt to take plaintiff's prior contention concerning insufficient facts and data and recast it in terms of principles and methods. Because we have concluded that the

2. Plaintiff apparently showed this image to the trial court during the hearing on the admissibility of Mr. Cheek's testimony.

trial court did not err in admitting Mr. Cheek's testimony on the basis of insufficient facts or data, we likewise overrule this contention.[3]

Plaintiff additionally contends that Mr. Cheek's opinion is based on unreliable principles or methods because, according to plaintiff, at his deposition "[Mr.] Cheek admitted that reaction time was NOT factored into his analysis." Although Mr. Cheek stated at his deposition that "reaction time isn't really discussed in here [in my report]," he also explained at his deposition and at trial that, assuming Mr. Fries was traveling 55 m.p.h. when he first saw Mr. Marshall's truck, and assuming he saw the truck at a distance of 800 feet out, he would have had "an available time of [at least] 10 seconds to do something."

At trial, Mr. Cheek testified that "Mr. Fries, as he approached the collision area . . . responded at a certain point in time." Mr. Cheek was able to use skid marks left by Mr. Fries' motorcycle (as measured by the police) to determine the precise point at which Mr. Fries reacted to the vehicles ahead. Mr. Cheek then used that point to determine whether, had Mr. Fries used both his front and his back brakes, he could have avoided the collision. Consequently, even assuming, as plaintiff suggests, that reaction time is an essential part of an accident reconstruction expert's testimony, it was reasonable for the trial court to conclude that Mr. Cheek accounted for Mr. Fries' reaction time when reaching his opinion that Mr. Fries could have avoided the accident by proper braking. *See Dugle ex rel. Dugle v. Norfolk S. Ry. Co.*, 683 F.3d 263, 270 (6th Cir. 2012) ("The district court found the record devoid of evidence that [the defendant's] train crew could have avoided the collision [with the plaintiff-officer's vehicle] after the crew first spotted [the plaintiff's] cruiser. But . . . a reasonable inference arises from both [the investigating officer's] accident report and the testimony of [the defendant's] own experts . . . that [the plaintiff] could have braked in time to avoid the collision if he had been warned when his cruiser first became visible to the train crew.").

Plaintiff also contends that Mr. Cheek's opinion that Mr. Fries was the only direct cause of the accident uses unreliable principles and methods because his opinion was based on the fact that "no other vehicles crashed." In his deposition, Mr. Cheek testified that "you can eliminate [Bridge Broom] as a direct cause of the crash because nobody else had

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3. We note that had plaintiff introduced into evidence the Google Earth image showing an obstructed view from the center lane, then the jury could have resolved any discrepancy between the obstructed view that image conveyed and Mr. Cheek's sight distance conclusions.

a crash[.]" At trial, however, Mr. Cheek explained that the fact that other vehicles "were able to stop . . . without leaving any skid marks" was important "in terms of the available sight distance [drivers] had, and the available distance that they had to respond to the work zone being out there." He further testified that "there's lots of research that shows that motorcycles can actually stop better than cars." The fact that no other cars wrecked at the scene does not, therefore, itself represent a separate principle or methodology that Mr. Cheek employed to come to his conclusion, but other data or facts that corroborated his measurements and calculations. Plaintiff has, therefore, failed to show that the principles and methods Mr. Cheek used were unreliable under Rule 702(a)(2).

Lastly, plaintiff's argument under Rule 702(a)(3) -- that Mr. Cheek did not reliably apply the principles and methods to the facts of this case -- reiterates plaintiff's argument under Rule 702(a)(2) that Mr. Cheek improperly based his conclusion that Mr. Fries had enough notice to react to any perceived danger on the fact that there were no other wrecks. This argument is not sufficient to demonstrate that the trial court erred in concluding that Mr. Cheek's opinion did not violate Rule 702(a)(3).

In sum, plaintiff has failed to show that Mr. Cheek's testimony was unreliable. Because plaintiff does not further challenge the admissibility of Mr. Cheek's testimony, we hold that the trial court did not abuse its discretion in admitting the testimony.

II

[2] Plaintiff next argues that the trial court erred in instructing the jury on intervening or superseding negligence. When instructing a jury in a civil case,

> "the trial court has the duty to explain the law and apply it to the evidence on the substantial issues of the action." The trial court is permitted to instruct a jury on a claim or defense only "if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense."

Estate of Hendrickson v. Genesis Health Venture, Inc., 151 N.C. App. 139, 151-52, 565 S.E.2d 254, 262 (2002) (quoting *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994)). Plaintiff contends that defendant presented insufficient evidence of intervening or superseding negligence. We disagree.

A negligent act is the proximate cause of injury if the injury is caused by an event which is not "merely possible" but which rather is "reasonably foreseeable" on the part of the negligent actor. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984). "[I]ntervening negligence[is] also referred to in our case law as superseding or insulating negligence[and] is an elaboration of a phase of proximate cause." *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998). " 'An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.' " *Hairston*, 310 N.C. at 236, 311 S.E.2d at 566 (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462, 54 S.E.2d 299, 301 (1906)). "Insulating negligence means something more than a concurrent and contributing cause." *Id.*

Our Supreme Court has explained:

> The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. Put another way, in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.

Adams v. Mills, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (internal citations omitted).

Initially, we note that plaintiff cites *Adams* for the proposition that the type of accident here -- which plaintiff likens to a chain-reaction collision -- is inherently foreseeable. *Adams* explained that "[i]t is well settled that there may be more than one proximate cause of an injury. Where [a] second actor does not become apprised of the existence of a potential danger created by the negligence of an original tort-feasor until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident." *Id.*, 322 S.E.2d at 172 (internal citation omitted).

Although the Court in *Adams* concluded that, in a series of wrecks, the second negligent actor in that case did not insulate the original tort-feasor from liability, that case also limited its holding: "Under the facts of this case, it cannot be said as a matter of law that defendant's conduct

in continuing to drive in a westerly direction down the two-lane paved road while blinded by the bright setting sun was reasonably unforeseeable to one in plaintiff's position. The risk of the intervention of this or other similar wrongful conduct is the very risk created by violation of the regulations governing stopping on the highway." *Id.* at 195, 322 S.E.2d at 173.

Here, on the other hand, Mr. Cheek's opinion that Mr. Fries caused the accident by failing to use his front brake, if believed by the jury, makes the facts of this case substantially the same as those in *Pintacuda*, in which the Supreme Court ultimately concluded that, as a matter of law, the negligent defendant was insulated from liability.[4] In *Pintacuda*, it was undisputed that the plaintiff was riding his motorcycle under the speed limit in the left lane on the highway at least three car lengths behind the defendant's car when the plaintiff "saw the hood of defendant's car fly up." 159 N.C. App. at 618, 583 S.E.2d at 349-50. Afraid that he would "crash into defendant's car and either be thrown over that car or be impaled on the back of the car[,]" the plaintiff made a "split-second" decision to move over to another lane which he knew was clear. *Id.* at 619, 583 S.E.2d at 350. However, as he was attempting to avoid the defendant's car, "his motorcycle began to skid for unknown reasons and came down in the right-hand lane"; the plaintiff was thrown from his motorcycle and seriously injured. *Id.*

After the plaintiff in *Pintacuda* filed his complaint, the trial court granted summary judgment in favor of the defendant. On appeal, the issue was whether summary judgment was proper on the grounds that (1) the plaintiff was contributorily negligent or, in the alternative, (2) his actions constituted an unforeseeable cause that insulated defendant from liability. *Id.* at 622, 623, 583 S.E.2d at 351-52. A majority of the panel in *Pintacuda* reversed the summary judgment order after concluding that the evidence gave rise to genuine issues of material fact as to both intervening negligence and contributory negligence.

Then-Judge Timmons-Goodson dissented on the basis that the undisputed facts of that case were indistinguishable from those of *McNair v. Boyette*, 15 N.C. App. 69, 189 S.E.2d 590, *aff'd*, 282 N.C. 230, 192 S.E.2d 457 (1972).

> This Court has previously stated that when a plaintiff has become aware that potential dangers have been created

4. We note that although *Pintacuda* is obviously pertinent to the issues raised in this case, neither party cited it.

> by the negligence of another, and then "by an independent act of negligence, brings about an accident," the defendant is relieved of liability, "because the condition created by [the defendant] was merely a circumstance of the accident and not its proximate cause." *McNair* . . . , 15 N.C. App. [at] 73, 189 S.E.2d [at] 593 . . . . I believe that defendant's act of stopping his vehicle was merely a circumstance of the accident and not the proximate cause of plaintiff's injuries.
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> . . . .
>
> . . . A review of plaintiff's testimony clearly places responsibility for the accident on him either "skidding on something" or hitting a lane reflector. Moreover, plaintiff's testimony reveals that he was aware of the potential danger created by defendant's accident, had sufficient time to apply his breaks [sic], safely merge into a different lane, and in an independent act, failed to maintain control of his motorcycle. Therefore, it is clear that there was an independent cause, apart from defendant's collision, which resulted in plaintiff sustaining injuries.

Pintacuda, 159 N.C. App. at 624, 626, 583 S.E.2d at 353, 354 (Timmons-Goodson, J., dissenting). The Supreme Court reversed *Pintacuda* based on Judge Timmons-Goodson's dissent. 358 N.C. at 211, 598 S.E.2d at 776.

Here, similar to the undisputed facts in *Pintacuda*, Mr. Cheek's testimony, if found credible and entitled to weight, would permit the jury to find that Mr. Fries had the time, distance, and capability to safely brake and that the accident was due to Mr. Fries' failure to use his front brake. Although plaintiff contends that defendant conceded the positioning of Mr. Marshall's truck "created a foreseeable risk of a rear-end collision" for traffic approaching from behind the truck, such a concession merely provided sufficient facts to support a finding that Mr. Marshall's truck created a foreseeable risk for some type of accident. It was not a concession that the particular accident here could not have been the result of some superseding cause.[5]

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5. Plaintiff asserts that "[f]or Mr. Fries' actions to supersede the negligence of the Defendant, this Court must rule as a matter of law that a highway driver's failure to properly stop and/or avoid an improperly warned hazard is negligence such that it breaks the causal chain[.]" This assertion, however, mistakes this Court's task on appeal, which is to determine whether there was sufficient evidence for the jury to decide whether any negligence on the part of defendant was insulated by a superseding cause.

The trial court, therefore, did not err in instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, we also reject plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial.

III

[3] Plaintiff further argues that the trial court erred in rejecting his contention that Mr. Marshall violated the requirements of the MUTCD and that such violations constituted negligence per se. Specifically, plaintiff argues that the trial court erred in denying his request for a jury instruction on negligence per se and in denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se.

The standard of review for motions for a directed verdict and JNOV is well established:

> "The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine 'whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the nonmovant, the evidence is sufficient to be submitted to the jury.' " *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (internal citation omitted) (quoting *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009).
>
> "A motion for either a directed verdict or JNOV 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' " *Id.* (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003)). "A 'scintilla of evidence' is defined as 'very slight evidence.' " *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 149, 683 S.E.2d 728, 735 (2009) (quoting *Scarborough v. Dillard's Inc.*, 188 N.C. App. 430, 434, 655 S.E.2d 875, 878 (2008), *rev'd on other grounds*, 363 N.C. 715, 693 S.E.2d 640 (2009)).

Springs v. City of Charlotte, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011). Further, where a trial court's decision pertaining to a

motion for a new trial involves a question of law or a legal inference, the standard of review is de novo. *Bodie Island Beach Club Ass'n v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 77 (2011).

"[T]he general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence *per se*. A public safety statute is one impos[ing] upon [the defendant] a specific duty for the protection of others." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (internal citation and quotation marks omitted). "The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances." *Cowan v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964).

Defendant suggests that any violation of the MUTCD by defendant could not be negligence per se because "Bridge Broom is a private actor, and North Carolina cases have only recognized a claim against the NCDOT, a government actor." Although this Court has held that the North Carolina Department of Transportation can be held liable under a theory of negligence per se for violating the MUTCD, *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 218-19, 588 S.E.2d 42, 48 (2003), our appellate courts have not yet addressed whether a private actor's non-compliance with the MUTCD can support a claim of negligence per se. However, even assuming, without deciding, that defendant had a duty to comply with the MUTCD, the portions of the MUTCD that plaintiff suggests were violated did not create specific duties sufficient to be the basis for a claim of negligence per se.

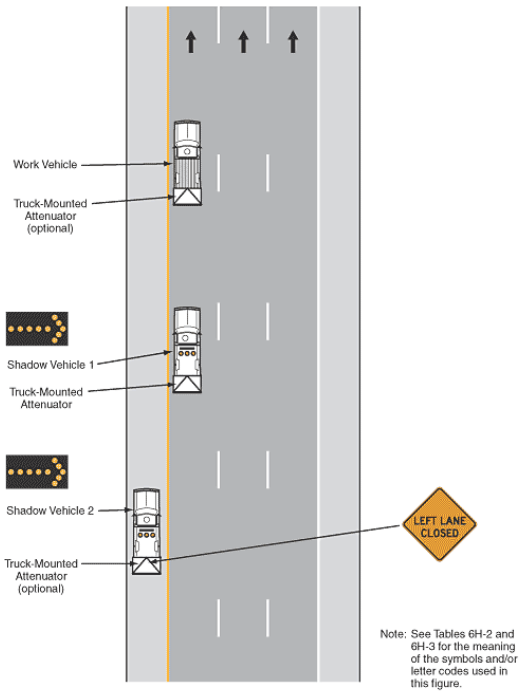
In the version of the MUTCD applicable here, the information regarding use of traffic control devices is categorized into "Standards," "Guidance," "Option," or "Support." MUTCD § 1A.13. While a "Standard" is "a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device" for which "[t]he verb 'shall' is typically used[,]" "Guidance" is "a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate" for which "[t]he verb 'should' is typically used." *Id.*

Chapter 6 of the MUTCD provides information for setting up temporary traffic control ("TTC") activities. *Id.* at § 6A.01. TTC activities include "tapering" -- diverting traffic from or back into its normal path -- to shield workers in mobile work zones from approaching drivers. *Id.* at § 6C.08. An example of tapering is shifting traffic one lane over from its normal route. Part H of Chapter 6 contains "typical applications for a

variety of situations commonly encountered." *Id.* at § 6H.01. "Except for the notes (which are clearly classified using headings as being Standard, Guidance, Option, or Support), the information presented in the typical applications can generally be regarded as Guidance." *Id.*

Plaintiff contends that the typical application depicted in Figure 6H-35 in the MUTCD, reproduced below, required Mr. Marshall's truck to be completely on the left shoulder, as portrayed by "Shadow Vehicle 2." The undisputed evidence is that Mr. Marshall was not traveling completely on the left shoulder, and Mr. Marceau testified that this was "a violation of the MUTCD."

Figure 6H-35. Mobile Operation on Multi-lane Road (TA-35)



Typical Application 35

Plaintiff also contends that Mr. Marshall violated the MUTCD by failing to maintain a proper tapering length -- the distance given

approaching drivers to adjust to a diverted traffic pattern -- as provided by Table 6H-4. Mr. Marceau testified that according to Table 6H-4, which Figure 6H-35 uses to determine tapering lengths, MUTCD § 6H.01, Mr. Marshall's truck should have been traveling 660 feet behind the front attenuator truck. However, the undisputed evidence is that the tapering length was only 150 feet.

Other jurisdictions have recognized that the MUTCD's non-mandatory provisions do not provide specific duties the violation of which constitute negligence per se. For example, in *Esterbrook v. State*, 124 Idaho 680, 682, 683, 863 P.2d 349, 351, 352 (1993), the Idaho Supreme Court held that noncompliance with non-mandatory provisions of the MUTCD could not be the basis for a determination of negligence per se because non-mandatory provisions of the MUTCD were "optional provisions" and did not "clearly define the required standard of conduct." That same Court later held in *Lawton v. City of Pocatello*, 126 Idaho 454, 461, 886 P.2d 330, 337 (1994), that certain provisions in the MUTCD are non-mandatory provisions since the MUTCD describes them as " 'recommended but not mandatory' " and as " 'advisory condition[s].' " As non-mandatory provisions, "they did not define any required standard of conduct." *Id.* at 462, 886 P.2d at 338.

We find the reasoning of *Esterbrook* and *Lawton* persuasive. Because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed and, therefore, while noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se.

Although Mr. Marceau testified that Mr. Marshall's truck not being completely on the shoulder was "a violation of the MUTCD," there is no indication in Figure 6H-35 or its notes or Table 6H-4 that they provide anything more than "Guidance" for the location of Mr. Marshall's truck or the taper length. Therefore, assuming that Mr. Marshall's truck location and the taper length did not comply with Figure 6H-35 or Table 6H-4, that evidence is not sufficient to support a claim of negligence per se. Because plaintiff has failed to point to any evidence that defendant violated mandatory provisions of the MUTCD, we conclude that the trial court did not err in denying plaintiff's request for a negligence per se instruction or in denying his motions for directed verdict, JNOV, and new trial on the basis of negligence per se.

NO ERROR.

Judges BRYANT and CALABRIA concur.

ROBBINS v. ROBBINS

[240 N.C. App. 386 (2015)]

CHARLES DANIEL ROBBINS, PLAINTIFF
v.
KAREN THOMAS ROBBINS, DEFENDANT

No. COA14-742

Filed 7 April 2015

1. Divorce—equitable distribution—insurance proceeds after tornado—not marital properly

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court erred by concluding that the proceeds were marital property that should be divided by the court. The parties' homeowner's insurance policy lapsed subsequent to their separation, and defendant took out a new homeowner's insurance policy on the marital residence in her sole name. Because the premiums on the policy were paid with defendant's assets, the proceeds from the homeowner's insurance policy were the separate property of defendant.

2. Divorce—equitable distribution—insurance proceeds after tornado—defendant's accounting—truthfulness

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's findings concerning defendant's truthfulness in her accounting for the proceeds both were and were not supported by the evidence. Her testimony supported the first finding regarding a payment to a particular individual, but there was no competent evidence in the record that defendant paid money from the insurance proceeds to four individuals who were not listed in her accounting to the court.

3. Divorce—equitable distribution—insurance proceeds after tornado—amounts paid for materials

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, there was competent record evidence to support the trial court's findings regarding amounts paid by defendant for materials.

4. Divorce—equitable distribution—insurance proceeds after tornado—value of marital home

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after

a tornado, there was competent evidence in the record to support some portions of the trial court's finding regarding the marital property, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. One particularly salient portion of this finding was not supported by the evidence: there was no evidence regarding the current value of the marital home. The sole appraisal in evidence addressed *only* the date of separation value of the home, and based on both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then.

5. Divorce—equitable distribution—insurance proceeds after tornado—kind of repairs performed—separate property

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, a finding of fact that that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof was supported by competent record evidence. On remand, the trial court should consider these repairs as defendant's use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds.

6. Divorce—equitable distribution—insurance proceeds after tornado—findings—partial replacement of roof

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court's finding that defendant made the unilateral decision not to replace the entire roof of the structure, which was the primary purpose of the insurance proceeds, was supported by the testimony of defendant herself.

7. Divorce—equitable distribution—insurance proceeds after tornado—unequal distribution

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, remanded on another issue, defendant argued that the trial court erred in making an unequal distribution in favor of plaintiff, but the insurance proceeds were defendant's separate property which was not subject to interim distribution or equitable distribution by the trial court. On remand the trial court must reconsider the distributional factors in light of the fact that the insurance proceeds were defendant's separate property.

8. Divorce—equitable distribution—insurance proceeds after tornado—failure to provide accounting

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, an unequal distribution in favor of plaintiff was reversed where the trial court put substantial weight on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence. The findings were based on the erroneous classification of the insurance proceeds as marital property when they were actually defendant's separate property. On remand, the trial court was instructed to make findings of fact upon all of the distributional factors upon which evidence was presented and reconsider the distributional factors.

9. Divorce—equitable distribution—insurance proceeds after tornado—considerations on remand

In an equitable distribution action involving the use of insurance proceeds issued for the repair of the marital residence after a tornado, the trial court was instructed on remand to reconsider the entire distribution scheme, with a new date of distribution and, if requested by either party, consider additional evidence and arguments regarding changes in the condition or value of the marital home as well as distributional factors since the date of the last trial. However, the parties should not be permitted a "second bite at the apple" with new evidence or arguments as to the classification or valuation of marital or divisible property or debts up to the final day of the equitable distribution trial.

Appeal by defendant from order entered 8 January 2014 by Judge Tim Finan in Greene County District Court. Heard in the Court of Appeals 18 November 2014.

Garrens, Foster & Sargeant, P.A., by Jonathon L. Sargeant, for plaintiff.

W. Gregory Duke for defendant.

McCULLOUGH, Judge.

Defendant appeals from an equitable distribution order entered 8 January 2014. Based on the reasons stated herein, we affirm in part, and reverse and remand in part, the order of the trial court.

I. Background

On 31 May 2011, plaintiff Charles Daniel Robbins filed a complaint against defendant Karen Thomas Robbins for equitable distribution and interim equitable distribution. Plaintiff and defendant were married on 1 June 1987 and separated on or about 5 February 2011. Plaintiff argued that it would be equitable for plaintiff to receive more than fifty percent of the marital property. Plaintiff alleged that after the parties' separation, the parties' marital residence had been damaged by recent storms in Greene County. Plaintiff further alleged that defendant had filed claims with the parties' insurance carrier for said damage and "is not using said insurance proceeds to repair the marital property of the parties and is spending said funds for her personal gain." Plaintiff argued that the trial court should require defendant to provide an accounting for insurance proceeds received and spent by plaintiff.

On 8 August 2011, defendant filed an answer and counterclaims for post-separation support and alimony, equitable distribution, and attorneys' fees.

Following a hearing held on 5 July 2011, the trial court entered an order for interim equitable distribution on 6 September 2011. The trial court found that defendant was in sole possession of the marital residence, that storms had damaged the marital residence, and that defendant had filed claims with the insurance carrier for the damages. Based upon the foregoing, the trial court ordered the following:

> 1. That within sixty (60) days from today, July 5, 2011, the defendant, Karen Thomas Robbins, shall provide a written accounting to counsel for plaintiff with documents showing the following:
>
> a. All insurance claims of any kind made with regard to the marital residence or any personal property of either party from January 1, 2011 to the present;
>
> b. All insurance proceeds received by the defendant, including the amount and date received;
>
> c. All insurance proceeds dispersed [sic] or spent for any reason prior to July 5, 2011 including a specific list of items or services purchased; and
>
> d. The current balance of all insurance proceeds which are being held by the defendant pursuant to this order.

> 2. That effective July 5, 2011, the defendant, Karen Thomas Robbins, be and the same is hereby restrained and enjoined from trading, spending or otherwise transferring any insurance proceeds in her possession or control until further order of the Court.

On 13 August 2012, plaintiff filed a motion for contempt against defendant arguing that although defendant had the ability to comply with the 6 September 2011 order for interim equitable distribution, she had wrongfully, willfully, and intentionally failed and refused to do so. Plaintiff asserted that:

> a. The defendant failed to produce any documents or records by the court ordered deadline of September 3, 2011;
>
> b. On or about February 14, 2012, the defendant produced several documents to counsel for plaintiff which included statements handwritten by various persons which were dated in November of 2011. Said documents failed to comply with the Order of the Court in that the documents:
>
> 1. Did not include any documents showing the amount of insurance proceeds received;
>
> 2. Did not include the dates insurance proceeds were received;
>
> 3. Did not include the dates any insurance proceeds were dispersed [sic];
>
> 4. Did not include any detailed itemization of the items or services purchased with the insurance money; and
>
> 5. Did not include any contact information which would allow counsel for plaintiff to verify any of the information provided.
>
> c. In open court on June 12, 2012, the defendant produced an additional insurance document.

Plaintiff also prayed that the court order defendant to pay plaintiff's attorneys' fees.

On 7 September 2012, the trial court entered a civil contempt order against defendant. The trial court found that defendant had failed to produce any documents or records by the court ordered deadline of

3 September 2011 and that the information produced by defendant was incomplete, late, and not in compliance with the trial court's 6 September 2011 order. The trial court also found that defendant suffered from severe anxiety, clinical depression, multiple seizures, and short-term memory loss. After considering defendant's medical condition and current medications, the trial court concluded that defendant should be given a means to purge herself of contempt and ordered that she could purge herself by fully complying with the 6 September 2011 order on or before 14 September 2012 by filing the required information with the Clerk of Court of Greene County and serving a copy on plaintiff's counsel; coming to the office of the Clerk of Court of Greene County on 7 September 2012 to be served with the civil contempt order by acceptance or by a sheriff's deputy; and, paying plaintiff's attorneys' fees in the amount of $1,25.00 by 1 December 2012.

Following hearings held during the 9 January 2013 and 6 February 2013 terms of Greene County District Civil Court, the trial court entered an equitable distribution order on 25 February 2013. The trial court noted that although defendant was present at the 9 January 2013 hearing, she was not present and not represented by counsel at the 6 February 2013 hearing. Nevertheless, the trial court completed the equitable distribution hearing and found that an equal distribution of the net marital estate was not equitable in the parties' case based on defendant's neglect of the marital residence. Plaintiff was awarded more than one-half of the net marital estate. The marital residence was awarded to plaintiff and defendant was ordered to vacate the marital residence within thirty days of the filing of the order.

On 8 March 2013, defendant filed a motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Defendant argued that she missed the 6 February 2013 equitable distribution hearing based on a medical illness.

On 8 May 2013, the trial court entered an order setting aside the 25 February 2013 equitable distribution order and allowing defendant an opportunity to complete the presentation of her evidence. The equitable distribution hearing was completed on 18 November 2013.

On 8 January 2014, the trial court entered an equitable distribution order making the following pertinent findings of fact:

> 15. Following the parties' separation, the house was damaged by a tornado on April 16, 2011. Homeowners insurance was in effect on April 16, 2011, paid for by the defendant, when a tornado damaged the marital residence

of the parties. This insurance coverage was paid for by the Defendant and the proceeds checks were made payable to the Defendant. As a result of the tornado, the homeowners' insurance company, Nationwide Insurance Company, paid the Defendant several claim installments which totaled $16,572.00.

. . . .

17. With regard to the Insurance Proceeds, the court finds that said insurance proceeds were paid for damages to a marital asset that being the marital residence located at 571 Central Drive in Snow Hill, North Carolina. The parties purchased and owned this asset jointly during the marriage, and both parties have an equitable interest in the insurance proceeds from the damage to this asset. As such, the court finds that the Insurance Proceeds received by the defendant for the damages to the marital residence are classified as marital property and should be divided by the court in Equitable Distribution.

. . . .

19. In her testimony to this court on November 18, 2013 and November 19, 2013, the defendant admitted under oath that she had violated the July 5, 2011 Order of the Court as follows:

a. The defendant was not truthful in her previous accounting to the court in that the defendant paid $900.00 to Henry Manning from the insurance proceeds which was not listed in her accounting to the court;

b. The defendant was not truthful in her previous accounting to the court in that the defendant paid money from the insurance proceeds to four (4) other individuals who were not listed in her accounting to the court;

c. The defendant was not truthful in her previous accounting to the court in that the defendant calculated the total cost of materials which were allegedly purchased with the insurance proceeds by simply deducting the cost of labor from the total amount of the insurance proceeds and assuming that the remaining amount was spent entirely for materials;

d. The defendant spent and dispersed [sic] insurance proceeds after July 5, 2011 when she was under the Order of this court not to spend or disperse [sic] insurance proceeds. The defendant presented multiple receipts for materials into evidence which are dated after July 5, 2011, and the defendant specifically testified that she paid multiple individuals for labor and repairs to the marital residence with insurance money after July 5, 2011 and without the permission of the court.

. . . .

21. The failure of the defendant to comply with the July 5, 2011 Order of the Court has created an [sic] number of problems for the court in attempting to determine which repairs to the marital residence were made with the insurance proceeds. In addition, due to the defendant's failure to comply with the July 5, 2011 court order, the plaintiff was not involved in any decision making with regard to the repairs to the marital residence and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.

. . . .

23. Mr. Outlaw [(qualified appraiser)] visited the property on April 3, 2012 and found the property to be in need of a roof replacement, floor covering, drywall repair, as well as subfloor and ceiling repair from water damage.

24. All these issues were observed by Mr. Outlaw on April 3, 2012 after the defendant had supposedly already used the insurance proceeds to make repairs to the residence.

. . . .

28. With regard to the marital residence located at 571 Central Drive in Snow Hill, North Carolina, the Court finds that while the defendant has made cosmetic repairs to the marital residence – new Pergo flooring, painting walls and ceilings, new carpet, new bathtub, new toilet and changing locks, the only structural repairs to the property were made to repair certain floors and only to patch, and not replace, a hole in the roof.

29. The defendant made the unilateral decision not to replace the entire roof of the structure which was the primary purpose of the insurance proceeds.

30. The decisions of the defendant as to what repairs to make to the property were further complicated by the defendant's total and complete lack of maintaining any records of the work conducted and the fact that the defendant extensively co-mingled the insurance proceeds with her personal funds.

31. Even after the court's order of July 5, 2011, the defendant continued to pay all expenses in cash and maintained no records to be reviewed by the Court.

. . . .

37. In determining whether an equal division by using the net value of all marital property would be equitable in this case, the plaintiff presented several factors which the Court finds to be as follows:

a. Under section 50-20(c)(9), the liquid or non-liquid character of the marital estate, the Court finds that the major asset in this matter, the marital residence is non-liquid in nature and due to its present condition can not be sold or liquidated without substantial work and improvements;

b. Under section 50-20(c)(11a), acts of either party to maintain or preserve marital property, the Court finds that the plaintiff paid marital debts to Spring Leaf Financial, North Carolina Department of Revenue and Greene County Property Taxes which preserved the marital residence during the period of separation.

c. Under section 50-20(c)(11a), acts of either party to waste, neglect or devalue marital property, the Court finds that the defendant failed to provide a complete and detailed accounting for all insurance proceeds received on the marital residence as ordered by the Court multiple times, and during the separation of the parties the defendant failed to properly maintain and repair the marital residence of the parties at 571 Central Drive in Snow Hill, North Carolina such that

> the value of the marital residence has decreased substantially from the date of separation to the date of trial. The Court finds that the defendant has not provided sufficient evidence to find that the insurance proceeds issued for storm damage to the marital residence were actually spent on the marital residence. The defendant has neglected the maintenance of the marital residence during the period of separation to the detriment of the plaintiff and the marital estate. . . .
>
> 38. In considering the distributional factors set forth above, the Court puts substantial weight on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence and finds that an equal distribution of the net marital estate is not equitable in this case, and that it would be equitable for the plaintiff to receive more than one-half of the net marital estate.

In making an unequal distribution, the trial court awarded plaintiff, among other things, the marital residence. Defendant appeals.

II. Standard of Review

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citations omitted). "Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations and quotation marks omitted).

III. Discussion

On appeal, defendant argues that the trial court erred by (A) entering findings of fact numbers 17, 19, 21, 28, and 29; (B) making an unequal distribution of the parties' marital property, marital debt, and divisible

property in favor of plaintiff; and, (C) distributing the marital residence to plaintiff.

A. Findings of Fact

1. Classification of Insurance Proceeds

[1] In her first issue on appeal, defendant argues that the trial court erred by entering findings of fact numbers 17, 19, 21, 28, and 29, where there was no competent evidence in the record to support these findings.

Finding of fact number 17 provides as follows:

> With regard to the Insurance Proceeds, the court finds that said insurance proceeds were paid for damages to a marital asset that being the marital residence located at 571 Central Drive in Snow Hill, North Carolina. The parties purchased and owned this asset jointly during the marriage, and both parties have an equitable interest in the insurance proceeds from the damage to this asset. As such, the court finds that the Insurance Proceeds received by the defendant for the damages to the marital residence are classified as marital property and should be divided by the court in Equitable Distribution.

In conducting an equitable distribution hearing, the trial court goes through a three-step process: "(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Dalgewicz v. Dalgewicz*, 167 N.C. App. 412, 421, 606 S.E.2d 164, 170 (2004) (citation omitted). "Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law." *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993).

N.C. Gen. Stat. § 50-20 defines "marital property" as

> all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection.

N.C. Gen. Stat. § 50-20(b)(1) (2014). "Separate property" is defined as "all real and personal property acquired by a spouse before marriage or

acquired by a spouse by devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(b)(2) (2014). Our Courts have stated that "[v]esting is crucial in distinguishing between marital and separate property under N.C.G.S. §§ 50-20(b)(1) and (2)." *Boger v. Boger*, 103 N.C. App. 340, 344, 405 S.E.2d 591, 593 (1991).

Plaintiff relies on our holdings in *Locklear v. Locklear*, 92 N.C. App. 299, 374 S.E.2d 406 (1988), and *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), for his contention that the trial court was correct in its determination that the homeowner's insurance proceeds received by defendant qualify as marital property.

In *Locklear*, the parties moved into a house owned by the husband's parents after they married. The parties did not sign a lease nor did they pay rent. Nonetheless, the parties made substantial improvements to the home while they lived there. All improvements were made prior to separation, using marital funds. *Locklear*, 92 N.C. App. at 302-303, 374 S.E.2d at 408. Two homeowners' insurance policies covered the house and improvements. After the parties separated, a fire completely destroyed the house. *Id.* at 303, 374 S.E.2d at 408. The issue before our Court was whether the trial court properly classified the portion of the insurance proceeds, representing the home improvements, as marital property. *Id.* The husband argued that since his mother was the owner of the house, the insurance belonged solely to her and could not be classified as marital property. Our Court disagreed. *Id.* at 304, 374 S.E.2d at 409. Our Court noted that the parties had expended marital funds in making the home improvements, and that each time the parties improved the property, the marital estate was depleted. Therefore, the insurance proceeds represented "an economic loss to the marital estate – the value of the improvements made to the marital residence." *Id.* Our Court held that the home improvements were an asset acquired by the parties during their marriage and that the wife was entitled to her equitable share of that asset. *Id.* at 305, 374 S.E.2d at 409.

In *Johnson*, the husband was involved in a serious motorcycle accident during the parties' marriage. *Johnson*, 317 N.C. at 440, 346 S.E.2d at 432. After the parties separated, the husband received a settlement for his personal injury claim in the amount of $95,000. *Id.* The trial court concluded that the settlement was the husband's separate property and the wife appealed. *Id.* Our Court adopted the "analytic" approach to the resolution of this case, which "asks what the award was intended to replace." *Id.* at 446, 346 S.E.2d at 435.

> Those courts which employ the analytic approach consistently hold that the portion of an award representing compensation for non-economic loss – i.e. personal suffering and disability – is the separate property of the injured spouse; the portion of an award representing compensation for economic loss – i.e. lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds – is marital property.

Id. at 447-48, 346 S.E.2d at 436. Our Court held that because the record was devoid of any evidence as to what elements of recovery were represented by the $95,000 settlement, we remanded the matter to the trial court for further proceedings in order to determine what components were represented by the settlement. *Id.* at 453, 346 S.E.2d at 439.

After thoughtful review, we find the facts of the present case distinguishable from the circumstances found in both *Locklear* and *Johnson*. The *Locklear* case dealt with equitable distribution of active appreciation of non-owned real property during the parties' marriage, while in the case *sub judice*, we are dealing with insurance proceeds representing damage to the parties' marital asset, their marital residence. Unlike in *Locklear*, the parties' homeowner's insurance policy of the present case ended after the date of separation. Thereafter, defendant procured a new homeowner's insurance policy on the marital residence in her sole name and with her separate funds. In regards to the *Johnson* case, the husband's motorcycle accident occurred during the parties' marriage while the tornado that occurred in the present case took place after the parties had separated.

Rather, we find our holding in *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988), to be instructive. In *Foster*, the parties had two children during the marriage. The husband purchased insurance policies on the life of each child and paid the premiums on the policies from his earnings. After the parties separated, their son died and $20,000 in proceeds from the insurance policy were paid and held in a trust account. The trial court held that the $20,000 in death benefits were the separate property of the husband and the wife appealed. Our Court noted that pursuant to N.C. Gen. Stat. § 50-20(b)(1), "in order for property to be considered marital property it must be 'acquired' before the date of separation and must be 'owned' at the date of separation." *Id.* at 267, 368 S.E.2d at 27.

> [A]t the time of [the parties'] separation there were no vested rights under the insurance policy on the life of [the parties' son]. The rights only vested at the death

> of [the parties' son], and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with For more, see page 14 plaintiff's assets, and therefore the proceeds from the insurance policy were separate property of plaintiff.

Id. at 268, 368 S.E.2d at 28.

Similarly, in the present case, there were no vested rights under the homeowner's insurance policy on the marital residence. The parties' homeowner's insurance policy lapsed subsequent to their separation. Defendant took out a new homeowner's insurance policy on the marital residence in her sole name. It was only after separation that the rights under the homeowner's insurance policy vested after a tornado damaged the marital residence. There was no evidence that defendant used marital funds to pay the insurance premiums. Because the premiums on the policy were paid with defendant's assets, the proceeds from the homeowner's insurance policy were the separate property of defendant. Based on the foregoing, we hold that the trial court erred by concluding that the insurance proceeds received by defendant for damage to the marital residence were marital property and concluding that it should be divided by the court in equitable distribution. Accordingly, we reverse and remand this case to the trial court with instructions to properly classify the proceeds of the homeowner's insurance on the marital residence as the separate property of defendant and to enter a new equitable distribution order reflecting this classification. We also note that the insurance proceeds were defendant's separate property which has now been invested in the marital residence which was distributed to plaintiff. The trial court must also consider on remand that if the marital home is ultimately distributed to plaintiff, he must also be required to reimburse defendant for this separate property.

Although we remand to the trial court to enter a new equitable distribution order, we also address defendant's other issues which are relevant to the trial court's consideration on remand.

2. Use of Insurance Proceeds

[2] Next, defendant argues that there was no competent evidence in the record to support finding of fact number 19, which provides as follows:

19. In her testimony to this court on November 18, 2013 and November 19, 2013, the defendant admitted under oath that she had violated the July 5, 2011 Order of the Court as follows:

a. The defendant was not truthful in her previous accounting to the court in that the defendant paid $900.00 to Henry Manning from the insurance proceeds which was not listed in her accounting to the court;

b. The defendant was not truthful in her previous accounting to the court in that the defendant paid money from the insurance proceeds to four (4) other individuals who were not listed in her accounting to the court;

c. The defendant was not truthful in her previous accounting to the court in that the defendant calculated the total cost of materials which were allegedly purchased with the insurance proceeds by simply deducting the cost of labor from the total amount of the insurance proceeds and assuming that the remaining amount was spent entirely for materials;

d. The defendant spent and dispersed [sic] insurance proceeds after July 5, 2011 when she was under the Order of this court not to spend or disperse [sic] insurance proceeds. The defendant presented multiple receipts for materials into evidence which are dated after July 5, 2011, and the defendant specifically testified that she paid multiple individuals for labor and repairs to the marital residence with insurance money after July 5, 2011 and without the permission of the court.

In regards to subsection (a) and (b) of finding of fact number 19, on 14 February 2012, defendant submitted an accounting to the trial court of how and to whom the homeowner's insurance proceeds were paid. At trial, however, defendant testified that she paid several individuals that were not listed in her accounting to the court. Defendant testified that she paid Henry Manning $900.00 and paid "Cecil" $125.00. Further, defendant testified that she paid "Jason," who was listed in her accounting, an "extra $150[.00]." Based on the foregoing, we hold that subsection (a) was supported by competent evidence, while subsection (b) was not. There was no competent evidence in the record that defendant paid

money from the insurance proceeds to four individuals who were not listed in her accounting to the court.

[3] Concerning subsection (c), we find competent record evidence to support the trial court's finding. Defendant testified to the following:

> Q. And you listed on your accounting for insurance proceeds $2,726 worth of materials?
>
> A. That's I believe about -- I mean I didn't keep up with it. My main thing was to get that house livable.
>
> Q. Well, how did you come up with that figure $2,726?
>
> A. Because of what I had to give -- what I had give [sic] Henry roughly. It was a rough estimate.
>
> . . . .
>
> Q. Isn't it true, ma'am, that when you did this, you added up the numbers of what you paid these other people and then you just subtracted that from the total and put down the difference as what you must have spent on materials?
>
> A. Yeah, probably.

In regards to subsection (d), defendant admitted paying multiple individuals after the 5 July 2011 Order by the trial court. Defendant also submitted multiple receipts for materials in defendant's exhibit number 30 which are dated after 5 July 2011. Thus, we find subsection (d) to be supported by competent evidence.

[4] Next, defendant challenges finding of fact number 21, which provides as follows:

> 21. The failure of the defendant to comply with the July 5, 2011 Order of the Court has created an [sic] number of problems for the court in attempting to determine which repairs to the marital residence were made with the insurance proceeds. In addition, due to the defendant's failure to comply with the July 5, 2011 court order, the plaintiff was not involved in any decision making with regard to the repairs to the marital residence and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property.

There is competent evidence in the record to support some portions of this finding, although the trial court on remand may reconsider its conclusions based upon this finding in light of the fact that the insurance proceeds were defendant's separate property. All of the conclusions of the order on appeal were premised upon the mistaken determination that the insurance proceeds were marital property, when in fact they were defendant's separate property. For example, the trial court might consider defendant's failure to consult plaintiff regarding repair decisions differently, despite the interim distribution order, since she was both residing in the home and spending her separate funds on the repairs.

It is true that at least some of the evidence in the record reveals that the insurance company paid the defendant's insurance claim primarily to repair the damage to the roof and exterior of the house. Instead, defendant testified that she "used the money to try to fix things like the hot water heater, the rotten floors." Defendant also testified as follows:

> Q. So, the bottom line here is they paid you to replace the roof but you chose to use it for other items, isn't that right? Interior items that were not covered by the insurance.
>
> A. Yes, because I was scared if they walked in the door, that it would be -- they would condemn the home. And the roof was fixed at that point and then the money was used to fix the other items.
>
> Q. The insurance company didn't give you any money to replace your rotten floors, did they?
>
> A. No, but they gave me the check and I chose to use it in the best manner that I knew how and in the best manner for [sic] to save the home.
>
> Q. And the insurance company didn't pay you to replace your hot water heater, did they?
>
> A. No, they didn't.

Both defendant and plaintiff testified that defendant did not consult with plaintiff on how to spend the insurance proceeds.

But one particularly salient portion of this finding is not supported by the evidence because there was no evidence regarding the current value of the marital home. Specifically, the trial court found that defendant's actions had a "substantial impact on the date of separation and current value of the property." Yet the sole appraisal in evidence addressed *only* the date of separation value of the home, and based on

both the appraisal and the plaintiff's own testimony, the home was in dilapidated condition even then. For example, plaintiff admitted that when he moved out of the home, there was already substantial water damage to several areas of the floor in several rooms; the refrigerator had been moved because of water damage to the floor under the refrigerator; the HVAC was not working; the carpet was in bad shape; and that the hot water heater had been nonoperational for about a year before he left. In fact, he admitted that they had to boil water on the stove to get hot water for a bath. He also testified that he had removed the toilet from the master bathroom about a year before he left because it overflowed and "completely soaked" the floors in the bedroom and bathroom with over an inch of water. He did not ever replace the master bath toilet. He had not repaired these things when he was living there because he had been unemployed for about two years before he left. The appraiser never saw the home until 3 April 2012, about a year after the date of separation, and based his appraisal upon the condition of the home as reported to him, and he noted that the home was in poor condition even before the storm damage.

Mr. Herbert Outlaw, an appraiser, inspected the marital residence on 3 April 2012. Mr. Outlaw concluded in his appraisal report that

> The subject is in poor condition and in need of repair in order to be habitable or marketable. . . . These needed repairs include: roof repair or replacement, floor covering, drywall repair, interior painting, hvac system replacement, subfloor and ceiling repair from water damage, replacement of fixtures, vinyl repair, etc. This list is meant to provide an example of needed repairs, not to be an exhaustive list. . . . Given the condition of the property, there are two feasible methods to estimate value. First, one could locate properties that were in a similar condition. This might include foreclosure properties, which would be in disrepair. . . . The other is to take similar properties in repaired condition, deduct the cost of repair and the expected profit of the investor.
>
> . . . .
>
> These methods combined show an adjusted value range from approximately $49,000 to 70,000.

Based upon the trial court's findings, it appears that the court found that the value of the house was the same on the date of separation as on the date of distribution, but that it might have been increased if

defendant had used the insurance proceeds in a different way. Actually, there was no evidence of the value of the home on any date other than the date of separation. The trial court also made "conclusions of law" regarding the value of the marital home as follows:

> 8. The Court finds that Mr. Outlaw's appraised fair market value of $60,000 as of the date of separation is fair and accurate in this matter.
>
> 9. These decisions by the defendant resulted in the marital residence having numerous cosmetic changes which have not substantially *increased* the value of the property.
>
> . . . .
>
> 12. The defendant by her own intentional or grossly negligent actions has made it impossible for the court to review and determine whether the insurance proceeds were, in fact, used to improve the marital home and whether the improvements themselves ever *added* any value to the marital home.

(emphasis added).

The trial court specifically did not find any actual diminution in value, nor was there evidence of a decreased value of the home after the date of separation or as of the date of trial. Apparently, the trial court assumed that the house could have increased in value after the date of separation if defendant had made different repairs to the home, but there was no evidence and no findings of fact as to how particular repairs would have changed the value of the property. In any event, it is undisputed that the home was not in marketable, and barely livable, condition as of the date of separation, even considering only the lack of operational heating or air conditioning, a water heater, and a missing toilet in the master bathroom. Nor was there any evidence of the value of the home on any date except the date of separation.

Based on the abovementioned evidence, we reverse the final portion of the trial court's finding of fact number 21 which states that "and the Court finds that the decisions of the defendant as to what repairs to make to the marital residence have had a substantial impact on the date of separation and current value of the property." The rest of finding of fact number 21 is supported by the record, although the relevance of the finding may be questionable.

[5] Defendant also challenges finding of fact number 28, which states the following:

> 28. With regard to the marital residence located at 571 Central Drive in Snow Hill, North Carolina, the Court finds that while the defendant has made cosmetic repairs to the marital residence – new Pergo flooring, painting walls and ceilings, new carpet, new bathtub, new toilet and changing locks, the only structural repairs to the property were made to repair certain floors and only to patch, and not replace, a hole in the roof.

We find that this finding of fact is supported by competent record evidence. First, the record demonstrates that defendant made the following cosmetic repairs to the residence: yard clean up; carpet removal and replacement; Pergo flooring for the dining room and hallway; painting walls and ceilings; replacing the toilet; replacing the bathtub; changing locks. In addition, defendant testified at trial that she used the insurance proceeds to fix the "rotten floors." Defendant did not replace the roof, but repaired the roof by getting new shingles in the places where a tree broke through the roof of the marital residence. Thus, we uphold the trial court's finding that the only structural repairs defendant made to the marital residence consisted of repairing certain floors and patching the roof. But again, on remand, the trial court should consider these repairs as defendant's use of her separate property to make repairs to the marital home and not as a misappropriation of marital funds.

[6] Lastly, defendant challenges finding of fact number 29 which provides that "defendant made the unilateral decision not to replace the entire roof of the structure which was the primary purpose of the insurance proceeds." This finding of fact is supported by the testimony of defendant herself. Defendant testified that although the purpose of the insurance proceeds was to replace the roof, she made the decision to use the proceeds for other purposes without consulting with plaintiff.

In conclusion, while we affirm portions of the trial court's findings of fact numbers 19(a), (c), (d) and 21, 28, and 29, we find no competent evidence in the record to support finding of fact 19(b). We also hold that the trial court erred by concluding, in finding of fact number 17, that the homeowner's insurance proceeds were marital property, rather than the separate property of defendant, and dividing it in equitable distribution. Therefore, we reverse and remand this case to the trial court to enter a new equitable distribution order consistent with this opinion.

B. Distributional Factors

[7] Defendant next argues that "the trial court erred in making an unequal distribution of the parties' marital property, marital debt, and divisible property in favor of plaintiff." Defendant contends that

> the trial court's basis for making an unequal distribution, in essence, boils down to its findings that Defendant didn't properly spend, or account for, the insurance proceeds derived from the tornado which damaged the house in April of 2011, that Defendant neglected the residence, and that the residence was worth less on the date of the hearing than when the parties separated in February 2011.

As noted above, the trial court made a number of findings regarding the defendant's failure to comply with the court's 6 September 2011 order for interim distribution requiring defendant to account for her use of the insurance proceeds, which treated these proceeds as marital property, thus subject to interim distribution. Defendant has not appealed from the interim distribution order, nor from the later order holding her in contempt of that order, so we cannot review these on appeal, and they have no direct effect on the order of equitable distribution. However, the trial court made numerous findings of fact regarding defendant's failure to account for her use of these funds and concluded that:

> 16. In considering the distributional factors set forth above, the Court puts *substantial weight* on the defendant's failure to provide an accounting for the insurance proceeds and on the neglect of the marital residence and finds that an equal distribution of the net marital estate is not equitable in this case, and that it would be equitable for the plaintiff to receive more than one-half of the net marital estate.

(emphasis added).

But the insurance proceeds were defendant's separate property which was not subject to interim distribution or equitable distribution by the trial court, so on remand the trial court must reconsider the distributional factors, in light of the fact that the insurance proceeds were defendant's separate property. The fact that she did use the funds for repairs may actually be a distributional factor in her favor.

[8] Although the trial court considered several distributional factors, as discussed above, finding of fact number 38 notes that the trial court "put[] *substantial weight* on the defendant's failure to provide an

accounting for the insurance proceeds and on the neglect of the marital residence." (emphasis added). We have already determined that this and related findings were based upon the erroneous classification of the insurance proceeds as marital property when it was actually defendant's separate property. We must therefore reverse the unequal distribution in favor of plaintiff. We also note that

> [t]he trial court must . . . make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50–20(c) (2001) on which the parties offered evidence." *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003) (citing *Rosario v. Rosario*, 139 N.C. App. 258, 260–61, 533 S.E.2d 274, 275–76 (2000)). A blanket statement that the trial court considered or gave "due regard" to the distributional factors listed in N.C. Gen. Stat. § 50-20(c) is insufficient as a matter of law. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

Peltzer v. Peltzer, __ N.C. App __, __, 732 S.E.2d 357, 360 (2012).

Although the weight given to any factor is in the trial court's discretion, it is apparent that the trial court did not make findings on all of the distributional factors upon which evidence was presented. One example is the evidence of defendant's medical problems. In fact, in the contempt order, the trial court earlier found that defendant suffered from "severe anxiety, clinical depression, multiple seizures and short-term memory loss[,]" and evidence was presented about these issues at the equitable distribution trial also, but the trial court did not make any findings of fact regarding the distributional factor of the "physical and mental health of both parties." N.C. Gen. Stat. § 50-20(c)(3). On remand, the trial court should make findings of fact upon all of the distributional factors upon which evidence was presented and shall reconsider the distributional factors in a manner consistent with this opinion.

C. Distribution of Marital Residence

[9] Defendant's third argument is that the trial court erred in distributing the parties' former marital residence to plaintiff. Based upon the disposition of issues (A) and (B), we need not discuss this in detail, as on remand the trial court must reconsider the entire distributional scheme. But since a new distribution order must be entered, there will be a new date of distribution. In addition, plaintiff has presumably been residing in the home based upon the trial court's order, and the condition of the home may have changed. On remand the trial court shall, if requested by either party, consider additional evidence and arguments regarding

changes in the condition or value of the marital home since the date of the last trial and distributional factors since the date of the last trial or evidence relevant to the issues to be considered on remand arising after the last trial. However, the parties should not be permitted a "second bite at the apple" by presenting new evidence or argument as to the classification or valuation of marital or divisible property or debts up to 19 November 2013, the final day of the equitable distribution trial; the trial court should rely on the existing record to make its findings and conclusions on remand consistent with this opinion except as to evidence arising after 19 November 2013.

Affirmed in part; reversed and remanded in part.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
MARQUICE ALEXANDER ANTONE

No. COA14-1011

Filed 7 April 2015

Sentencing—life imprisonment without parole—minor—first-degree murder—mitigating circumstances—findings

A sentence of life imprisonment without parole for a minor convicted of first –degree murder was remanded where the conviction was not based solely on felony murder and the trial court's order made cursory, but adequate findings as to the mitigating circumstances set forth in N.C.G.S. § 15A-1340.19B(c)(1), (4), (5), and (6) but did not address factors (2), (3), (7), or (8). Factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor in the determination of whether the sentence of life imprisonment should be with or without parole Also, portions of the trial court's findings of fact were more recitations of testimony rather than evidentiary or ultimate findings of fact. Finally, if there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

STATE v. ANTONE

[240 N.C. App. 408 (2015)]

Appeal by defendant from judgment entered 25 March 2014 by Judge Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 4 February 2015.

Roy Cooper, Attorney General, by Peter Regulski, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, and David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

Where the trial court failed to follow the statutory mandate to make findings on the absence or presence of any mitigating factors before sentencing a minor convicted of first degree murder not based upon the theory of felony murder, that sentence is vacated and this case is remanded for resentencing.

I. Factual and Procedural Background

In April 2012, Marquice Antone (defendant) was 16 years old and a ninth grade student at East Columbus High School in Columbus County. On 12 April 2012, defendant, with Kenneth Williams and Terrance Hazel, went to the home of defendant's uncle, Keith Gachett, in Hallsboro, to steal guns, jewelry, and pills. When defendant, Williams, and Hazel arrived at the home, defendant and Williams entered, while Hazel remained in the car. Gachett and his wife were both initially present, but Gachett's wife subsequently left. Defendant persuaded Gachett to let him shoot some of Gachett's guns. After spending some time with Gachett, defendant, Williams, and Hazel left, and planned to return and break into the house the following day.

On 13 April 2012, defendant, Williams, and Hazel returned to Gachett's house. Gachett answered the door and admitted them. Defendant pulled out a revolver and accidentally fired it. Gachett insisted that defendant, Williams, and Hazel leave. Williams testified that as they were leaving he heard a second shot. He then saw that defendant was holding the revolver and that Gachett was on the floor. In a police interview, defendant stated that he was outside when Gachett was shot, and that when he went back inside, Hazel was holding the gun.

Defendant, Williams, and Hazel took three rifles and two handguns from the house; Hazel also took a pink bag containing pills and jewelry. They later abandoned the handguns and two of the rifles.

Defendant was charged with robbery with a dangerous weapon and first degree murder. On 24 March 2014, a jury found defendant guilty of both offenses. The jury found defendant guilty of first degree murder based upon both felony murder and malice, premeditation and deliberation. Based upon the theory of malice, premeditation and deliberation, the trial court was required to decide whether defendant was to be sentenced to life imprisonment without parole, or life imprisonment with parole pursuant to Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes. The trial court entered an order and subsequently a judgment sentencing defendant to life imprisonment without parole. Judgment was arrested on the robbery with a dangerous weapon conviction.

Defendant appeals.

II. Sentence of Life Imprisonment Without Parole

In his first argument, defendant contends that the trial court erred by imposing a sentence of life imprisonment without the possibility of parole where it failed to identify any mitigating factors present in the case. We agree.

A. Standard of Review

"The standard of review for application of mitigating factors is an abuse of discretion." *State v. Hull*, ___ N.C. App. ___, ___, 762 S.E.2d 915, 920 (2014).

B. Analysis

When sentencing a minor who has been convicted of first degree murder that was not solely based on the theory of felony murder,

> The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order.

N.C. Gen. Stat. § 15A-1340.19C(a) (2013). This Court has held that "use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re Eades*,

143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citations omitted). Our Supreme Court has further held that mere recitations of evidence "cannot substitute for findings of fact resolving material conflicts." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983).

The mitigating circumstances a defendant may submit to the trial court pursuant to N.C. Gen. Stat. § 15A-1340.19B(c) are:

(1) Age at the time of the offense.

(2) Immaturity.

(3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.

(5) Prior record.

(6) Mental health.

(7) Familial or peer pressure exerted upon the defendant.

(8) Likelihood that the defendant would benefit from rehabilitation in confinement.

(9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2013).

In the instant case, the trial court entered a one-page order containing the following findings of fact:

> That at the time of the death of Keith Gachett, the defendant in this case had just turned 16 years old. That he was a ninth-grade student at East Columbus High School. That he was a good student, making As and Bs, and he participated in three sports at the high school. That his plans were to go to college and hopefully play sports. He attended church. That he had no prior record.
>
> He lived with his mom. He was small in size. His father was in prison, and he didn't meet his dad until he was about ten years old. That his parents thought he was easily led by others. That he was not a member of a gang but that one of his friends was a gang member, and that was one of the three that went into the Gachett house. That he didn't have guns but his friends, at least one of the friends in this group, did have a gun. That he did play video games

> that involved guns. That he had started using marijuana when he was about age 15. That there were no mental health issues. That there was no question about his intellectual capacity. That he has shown today that he's shown remorse to the family of the deceased.
>
> The Court finds there's insufficient mitigating factors to find life with parole, so the Court is giving the defendant life without parole. The order of my sentence is life without parole.

We hold that the trial court's findings of fact and order fail to comply with the mandate set forth in N.C. Gen. Stat. § 15A-1340.19C that requires the court to "include findings on the absence or presence of any mitigating factors[.]" The trial court's order makes cursory, but adequate findings as to the mitigating circumstances set forth in N.C. Gen. Stat. § 15A-1340.19B(c)(1), (4), (5), and (6). The order does not address factors (2), (3), (7), or (8). In the determination of whether the sentence of life imprisonment should be with or without parole, factor (8), the likelihood of whether a defendant would benefit from rehabilitation in confinement, is a significant factor.

We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors as set forth in N.C. Gen. Stat. § 15A-1340.19B(c). *See Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951); *see also State v. Escobar*, 187 N.C. App. 267, 268, 652 S.E.2d 694, 696 (2007) (holding that "[a] trial court is not required to recite evidentiary facts in its findings of fact, but is required to make 'specific findings on the ultimate facts established by the evidence' "). If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered.

We vacate the order and judgment of the trial court, and remand the case to the trial court for a new sentencing hearing on whether defendant should receive a sentence of life imprisonment without parole, or life imprisonment with parole.

III. Evidence

In his second argument, defendant contends that the trial court abused its discretion by imposing a sentence of life imprisonment

without parole, where the evidence supported a sentence of life with the possibility of parole. Because we have vacated the trial court's order and judgment, we do not reach this argument.

VACATED AND REMANDED.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
DELANDRE' BALDWIN, DEFENDANT

No. COA14-878

Filed 7 April 2015

1. Constitutional Law—double jeopardy—attempted first-degree murder—assault with a deadly weapon with intent to kill and inflicting serious injury

The trial court did not err by denying defendant's motion to require the State to elect the offense upon which it would proceed at trial. Under *State v. Tirado*, 358 N.C. 551 (2004), convictions for attempted first-degree murder and assault with a deadly weapon with the intent to kill and inflicting serious injury—offenses that arose from the same conduct—did not subject the defendant to double jeopardy.

2. Appeal and Error—Rule of Evidence 403 objection—different Rule 403 argument on appeal

Defendant preserved his Rule 403 objection to the admission of his recorded interview with police. While he made new arguments on appeal for why the evidence was inadmissible under Rule 403, his argument remained based on Rule 403.

3. Evidence—Rule of Evidence 403—recording of interview with police

The trial court did not err under Rule 403 by admitting a recording of defendant's interview with police after his arrest for shooting a man. The Court of Appeals rejected defendant's argument that the evidence had an undue tendency to suggest decision on an improper basis. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

4. Homicide—attempted—jury instructions—imperfect self-defense—murderous intent

The trial court did not commit plain error by instructing the jury on attempted first-degree murder but failing to instruct on imperfect self-defense and attempted voluntary manslaughter. In light of the abundant evidence of defendant's murderous intent, defendant failed to show that, absent the alleged error, the jury probably would have acquitted him of the attempted first-degree murder charge.

5. Homicide—attempted—jury instructions—premeditation and deliberation—wounds inflicted after victim felled

The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled to determine whether defendant acted with premeditation and deliberation. The instructions at issue explained that the jury "may" find premeditation and deliberation from certain circumstances "such as" wounds inflicted after the victim was felled. There was no indication that the trial court believed the evidence supported the circumstances listed.

6. Appeal and Error—constitutional issue—raised for first time on appeal

Defendant failed to preserve the issue of whether the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both assault with a deadly weapon with the intent to kill and inflicting serious injury and assault inflicting serious bodily injury. Defendant did not raise the issue at trial, and a defendant may not raise a constitutional issue for the first time on appeal.

7. Constitutional Law—double jeopardy—assault with a deadly weapon with the intent to kill and inflicting serious injury—assault inflicting serious bodily injury

Exercising its discretionary power under Rule 2 of the Rules of Appellate Procedure, the Court of Appeals held that the trial court violated defendant's right to be free from double jeopardy by sentencing him for both assault with a deadly weapon with the intent to kill and inflicting serious injury (AWDWIKISI) and assault inflicting serious bodily injury (AISBI). N.C.G.S. § 14-32.4(a) states that a person may be convicted of AISBI "[u]nless the conduct is covered under some other provision of law providing greater punishment." Defendant's AISBI conviction was vacated, and the case was remanded for resentencing on his AWDWIKISI conviction.

STATE v. BALDWIN

[240 N.C. App. 413 (2015)]

Appeal by defendant from judgments entered 10 December 2013 by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 6 January 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph L. Hyde, for the State.

Amanda S. Zimmer, for defendant-appellant.

STROUD, Judge.

Delandre' Baldwin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of attempted first-degree murder, assault with a deadly weapon with the intent to kill and inflicting serious injury ("AWDWIKISI"), and assault inflicting serious bodily injury ("AISBI"). Defendant contends that the trial court erred in (1) denying his motion to require the State to elect the offense upon which it would proceed at trial; (2) admitting defendant's recorded interview with a police detective; (3) failing to instruct the jury on imperfect self-defense; (4) instructing the jury on wounds inflicted after the victim was felled; and (5) sentencing him for both the AWDWIKISI and AISBI offenses. We find no error in part, vacate in part, and remand for resentencing.

I. Background

On 23 September 2011, Lee Richardson and some of his family members were drinking alcohol together in a vacant lot adjacent to Richardson's mother's house. Around 2:00 p.m., defendant drove to the lot. Defendant bought Richardson a shot and a beer from a man selling alcohol out of his truck.

Shortly thereafter, defendant and Richardson began a fistfight. According to Richardson, the fight began because defendant insulted Richardson for grieving over the recent loss of his father. According to defendant, the fight began because Richardson demanded that defendant buy him another shot and another beer. The fight ended after about five minutes when others were able to separate the two men. After the fight, defendant told his cousin to drive him to his house so that he could get his gun to kill Richardson.

Defendant and his cousin drove away from the lot, and defendant returned about a minute and a half later. Defendant jumped out of his car while Richardson was walking to his mother's house. Richardson's mother told defendant that he should not shoot Richardson. Defendant responded that he was going to kill Richardson. Defendant walked up to

Richardson and shot him in the abdomen with a handgun. Richardson fell to the ground, and defendant kicked him in the head. Defendant then drove away from the lot. After several days of treatment in the hospital, Richardson recovered from his injuries.

On or about 4 June 2012, a grand jury indicted defendant for attempted-first degree murder. *See* N.C. Gen. Stat. § 14-17 (2011). On or about 8 April 2013, a grand jury indicted defendant for AWDWIKISI and AISBI. *See* N.C. Gen. Stat. §§ 14-32(a), -32.4(a) (2011). On 9 August 2013, defendant moved to require the State to elect the offense upon which it would proceed at trial. At a hearing on or about 20 September 2013, the trial court orally denied this motion.

At trial, defendant testified that he never threatened to kill Richardson. Defendant testified that he returned to the lot after the fist-fight to deliver marijuana to another man there. Defendant further testified that he did not pick up a gun from his house; rather, he kept a gun under the driver's seat of his car. Defendant further testified that, in their final confrontation, Richardson approached him and threatened him. Defendant testified that he was afraid that another fight would aggravate a preexisting injury. Defendant also testified that he intended to shoot Richardson in the leg "to slow him down" and denied that he had any intent to kill Richardson.

On or about 10 December 2013, a jury found defendant guilty of all charges. The trial court sentenced defendant to 180 to 225 months' imprisonment for the attempted first-degree murder conviction. The trial court consolidated the AWDWIKISI and AISBI convictions and sentenced defendant to 67 to 90 months' imprisonment for those convictions. The trial court ordered that defendant serve these sentences consecutively. Defendant gave timely notice of appeal in open court.

II. Motion to Require the State to Elect

A. Standard of Review

We review double jeopardy issues *de novo*. *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418 (2009).

B. Analysis

[1] Defendant contends that the trial court erred in denying his motion to require the State to elect the offense upon which it would proceed at trial. Defendant asserts that allowing the State to proceed on the attempted first-degree murder offense and the AWDWIKISI offense subjected him to double jeopardy.

The Fifth Amendment of the U.S. Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The right to be free from double jeopardy is also rooted in article 1, section 19 of the North Carolina Constitution as "the law of the land" and in our common law. *State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003); *see also* N.C. Const. art. 1, § 19. The double jeopardy clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682.

In *State v. Tirado*, the North Carolina Supreme Court held that the trial court had not subjected the defendants to double jeopardy when it convicted them of attempted first-degree murder and AWDWIKISI, offenses arising from the same conduct. 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied*, *Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Following *Tirado*, we hold that the trial court did not subject defendant to double jeopardy when it denied his motion to require the State to elect between the attempted first-degree offense and the AWDWIKISI offense. *See id.*, 599 S.E.2d at 534.

III. Admission of Evidence

A. Preservation of Error

[2] Defendant contends that the trial court abused its discretion in admitting defendant's recorded interview with a police detective, because many statements in the interview were inadmissible under North Carolina Rule of Evidence 403. See N.C. Gen. Stat. § 8C-1, Rule 403 (2013). At the trial court, defendant made a timely objection to the interview's admission pursuant to Rule 403. The trial court admitted the interview and instructed the jury not to consider any questions or statements made by the detective for the truth of the matter asserted.

Relying on *State v. Howard*, the State contends that defendant failed to preserve this issue, because he makes new arguments on appeal for why the interview is inadmissible under Rule 403. *See* ___ N.C. App. ___, ___, 742 S.E.2d 858, 860 (2013), *aff'd per curiam*, 367 N.C. 320, 754 S.E.2d 417 (2014). But *Howard* is distinguishable. There, the defendant objected under Rule 403 at trial but argued under Rule 404(b) on appeal. *Id.* at ___, 742 S.E.2d at 860. In contrast, here, defendant has not changed the specific ground for his objection. Accordingly, we hold that defendant has preserved this issue. *See* N.C.R. App. P. 10(a)(1).

B. Standard of Review

We review a trial court's Rule 403 determination for an abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012); *see also* N.C. Gen. Stat. § 8C-1, Rule 403. "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (quotation marks omitted).

C. Analysis

[3] Defendant contends that the trial court abused its discretion in admitting defendant's recorded interview with the detective, in contravention of Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, [on] an emotional one." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008).

Defendant argues that the recorded interview contained statements that had an undue tendency to suggest decision on an improper basis, specifically defendant's "own assessment of his actions and belief that he deserved to go to jail." But this basis for decision is not improper, and the fact that this evidence is prejudicial to defendant does not make it unfairly so. *See State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (holding that the defendant's admission of guilt was highly probative and not unfairly prejudicial); *Cunningham*, 188 N.C. App. at 836, 656 S.E.2d at 700. We hold that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that the trial court did not violate Rule 403 in admitting this evidence.

III. Jury Instruction on Imperfect Self-Defense

A. Standard of Review

[4] Defendant next contends that the trial court committed plain error in instructing the jury on attempted first-degree murder but failing to instruct the jury on imperfect self-defense and the lesser-included offense of attempted voluntary manslaughter. "For an appellate court to find plain error, it must first be convinced that, absent the error, the jury

would have reached a different verdict. The defendant has the burden of showing that the error constituted plain error." *State v. Wade*, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011), *disc. rev. denied*, 366 N.C. 228, 726 S.E.2d 181 (2012) (citations and quotation marks omitted). Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and next "that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). "So, if defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made." *State v. Larkin*, ___ N.C. App. ___, ___, 764 S.E.2d 681, 685 (2014).

B. Analysis

> [I]f defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

An imperfect right of self-defense is thus available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force. Imperfect self-defense therefore incorporates the first two requirements of perfect self-defense, but not the last two. Murderous intent means the intent to kill or inflict serious bodily harm.

> If one brings about an affray with the intent to take life or inflict serious bodily harm, he is not entitled even to the doctrine of imperfect self-defense; and if he kills during the affray he is guilty of murder. If one takes life, though in defense of his own life,

> in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.

State v. Mize, 316 N.C. 48, 52-53, 340 S.E.2d 439, 441-42 (1986) (citations and quotation marks omitted).

Here, the State introduced abundant testimony supporting a finding of defendant's murderous intent in his final confrontation with Richardson. Three witnesses testified that after the fistfight, defendant stated that he was going to kill Richardson. Five witnesses testified that, in their final confrontation, Richardson did not threaten or move toward defendant, but defendant walked up to Richardson and shot him. We hold that this evidence of defendant's murderous intent strongly weighs against the application of imperfect self-defense. *See id.* at 52-53, 340 S.E.2d at 441-42. In light of this evidence, we hold that defendant has failed to demonstrate that, had the trial court instructed the jury on imperfect self-defense, the jury probably would have acquitted defendant on the attempted first-degree murder charge. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459; *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 685. Accordingly, we hold that the trial court committed no plain error on this issue. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459; *Larkin*, ___ N.C. App. at ___, 764 S.E.2d at 685.

IV. Jury Instruction on Wounds Inflicted After Victim Was Felled

A. Standard of Review

We review *de novo* a trial court's decision regarding jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

[5] Defendant next contends that the trial court erred in instructing the jury that it could consider wounds inflicted after Richardson was felled in determining whether defendant acted with premeditation and deliberation. Defendant specifically asserts that evidence does not support a

finding that defendant inflicted wounds on Richardson after Richardson was felled. Here, the trial court gave the following jury instruction:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances by which they may be inferred such as lack of provocation by the victim; conduct of the defendant before, during, and after the attempted killing; threats and declarations of the defendant; use of grossly excessive force; or inflictions of wounds after the victim is fallen.

In *State v. Leach*, the North Carolina Supreme Court examined a similar jury instruction and held that the trial court did not err by giving the instruction, "even in the absence of evidence to support each of the circumstances listed." 340 N.C. 236, 242, 456 S.E.2d 785, 789 (1995). The Court adopted the following reasoning:

> The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances listed. The instruction does not preclude a jury from finding premeditation and deliberation from direct evidence or other circumstances; more importantly, it does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed.

Id. at 241-42, 456 S.E.2d at 789. Similarly, the jury instruction here explains that the jury "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances listed. *See id.* at 241, 456 S.E.2d at 789. The instruction does not indicate that the trial court believes that evidence supports each or any of the circumstances listed. *See id.* at 242, 456 S.E.2d at 789. Following *Leach*, we hold that the trial court did not err in submitting this jury instruction. *See id.*, 456 S.E.2d at 789.

V. Sentencing

A. Preservation of Error

[6] Defendant contends that the trial court violated his constitutional right to be free from double jeopardy when it sentenced him for both

the AWDWIKISI and AISBI offenses. Defendant did not raise this constitutional issue at the trial court.[1] Relying on *State v. Moses*, defendant argues that this issue is preserved under N.C. Gen. Stat. § 15A-1446(d)(18) (2013). *See* 205 N.C. App. 629, 638, 698 S.E.2d 688, 695 (2010). But the North Carolina Supreme Court has held that a defendant may not raise a constitutional issue, including a double jeopardy issue, for the first time on appeal. *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010); *see also State v. Kirkwood*, ___ N.C. App. ___, ___, 747 S.E.2d 730, 736, *appeal dismissed*, ___ N.C. ___, 752 S.E.2d 487 (2013) (rejecting the defendant's argument that his double jeopardy argument was preserved under N.C. Gen. Stat. § 15A-1446(d)(18)). Accordingly, we hold that defendant has failed to preserve this issue. *See Davis*, 364 N.C. at 301, 698 S.E.2d at 67.

B. North Carolina Rule of Appellate Procedure 2

[7] Defendant next requests that we apply North Carolina Rule of Appellate Procedure 2 and review this double jeopardy issue. *See* N.C.R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). "The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary." *State v. Rawlings*, ___ N.C. App. ___, ___, 762 S.E.2d 909, 915, *disc. rev. denied*, ___ N.C. ___, 766 S.E.2d 627 (2014). Rule 2 discretion should be exercised "cautiously" and only in "exceptional circumstances." *Williams*, 201 N.C. App. at 173, 689 S.E.2d at 418. In *Rawlings*, this Court determined that vacating one of the defendant's convictions would not reduce the defendant's total sentence, since the trial court had ordered that the sentences run concurrently. ___ N.C. App. at ___, 762 S.E.2d at 915. This Court declined to apply Rule 2, because granting the defendant's requested relief "would not alter the total time defendant is required to serve[.]" *Id.* at ___, 762 S.E.2d at 915.

Relying on *Rawlings*, the State argues that we should decline to invoke Rule 2, because the purported double jeopardy violation does not prejudice defendant. *See id.* at ___, 762 S.E.2d at 915. If we were to hold that the trial court subjected defendant to double jeopardy, we would vacate defendant's AISBI conviction. *See Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. The State contends that vacating defendant's AISBI conviction would not reduce his total sentence, because the trial

1. Although defendant moved to require the State to elect between the attempted first-degree murder and AWDWIKISI offenses, defendant did not raise a double jeopardy argument at trial with respect to the AWDWIKISI and AISBI offenses.

court consolidated defendant's AWDWIKISI and AISBI convictions into a single sentence. Relying on *State v. Wortham*, defendant responds that vacating his AISBI conviction may reduce his total sentence. *See* 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). In *Wortham*, the North Carolina Supreme Court held that

> [s]ince it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

Id., 351 S.E.2d at 297. Although defendant concedes that the trial court sentenced him to the to the minimum presumptive range for the AWDWIKISI offense given his prior record level, defendant argues that the purported double jeopardy violation probably influenced the trial court's decision to order that his consolidated sentence for the AWDWIKISI and AISBI convictions run consecutively, rather than concurrently, with his sentence for the attempted first-degree murder conviction. Defendant also argues that the purported double jeopardy violation probably influenced the trial court's decision to find no mitigating factors despite the fact that defendant presented evidence of mitigating factors.

In the event we vacate defendant's AISBI conviction, we must remand this case for resentencing. *See id.*, 351 S.E.2d at 297; *Williams*, 201 N.C. App. at 174, 689 S.E.2d at 419. In *Williams*, this Court invoked Rule 2 and reviewed the defendant's double jeopardy issue. *Williams*, 201 N.C. App. at 173, 689 S.E.2d at 418. After vacating the defendant's conviction for assault by strangulation, this Court followed *Wortham* and remanded the case for resentencing, because the trial court had consolidated that conviction with three other convictions into a single sentence. *Id.* at 174, 689 S.E.2d at 419. In light of *Williams*, we choose to exercise our Rule 2 discretionary power given that on remand the trial court may order that the remaining sentences run concurrently or may find mitigating factors. *See id.* at 173-74, 689 S.E.2d at 418-19.

Relying on *State v. Goldston* and *State v. Curry*, the State contends that we need not remand for resentencing in the event we vacate defendant's AISBI conviction. *See Goldston*, 343 N.C. 501, 504, 471 S.E.2d 412, 414 (1996); *Curry*, 203 N.C. App. 375, 379, 692 S.E.2d 129, 134, *appeal*

dismissed and disc. rev. denied, 364 N.C. 437, 702 S.E.2d 496 (2010). But *Goldston* and *Curry* are distinguishable. In both cases, after vacating one but not all of the convictions in a consolidated sentence, the appellate court left the consolidated sentence undisturbed, because the remaining conviction was for felony murder, which required a life sentence. *Goldston*, 343 N.C. at 504, 471 S.E.2d at 414; *Curry*, 203 N.C. App. at 379, 692 S.E.2d at 134. In contrast, here, the trial court may order that the remaining sentences run concurrently or may find mitigating factors. Accordingly, we choose to exercise our discretionary power to review defendant's sentencing issue. *See Williams*, 201 N.C. App. at 173-74, 689 S.E.2d at 418-19.

C. Standard of Review

We review double jeopardy issues *de novo*. *Id.* at 173, 689 S.E.2d at 418. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, ___ N.C. App. ___, ___, 767 S.E.2d 341, 344 (2014).

D. Analysis

The Fifth Amendment of the U.S. Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The right to be free from double jeopardy is also rooted in article 1, section 19 of the North Carolina Constitution as "the law of the land" and in our common law. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682; *see also* N.C. Const. art. 1, § 19. The double jeopardy clause prohibits (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *Ezell*, 159 N.C. App. at 106, 582 S.E.2d at 682. We are concerned here with the third category, as defendant alleges that he received multiple punishments for the same offense.

In *Blockburger v. United States*, the U.S. Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932). In *Missouri v. Hunter*, the U.S. Supreme Court clarified that the *Blockburger* test is a rule of statutory construction and should not control when there is a clear indication of contrary legislative intent. 459 U.S. 359, 367, 74 L. Ed. 2d 535, 543 (1983). In *State v. Gardner*, the North Carolina Supreme Court explained that

> the presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test.

315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986); *see also State v. Bailey*, 157 N.C. App. 80, 87, 577 S.E.2d 683, 688 (2003) (holding that the double jeopardy clause prohibited the defendant from being convicted of the separate crimes of possession of stolen goods and possession of a stolen motor vehicle, because "the [l]egislature did not intend to punish a defendant for possession of the same property twice").

In *Ezell*, this Court held that the trial court subjected the defendant to double jeopardy by convicting him for assault with a deadly weapon inflicting serious injury ("ADWISI") under N.C. Gen. Stat. § 14-32(b) and for AISBI under N.C. Gen. Stat. § 14-32.4, offenses arising from the same conduct. *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. This Court examined the statutory language of N.C. Gen. Stat. § 14-32.4, which proscribed an assault inflicting serious bodily harm "unless the conduct is covered under some other provision of law providing greater punishment." *Id.* at 110, 582 S.E.2d at 684 (quoting N.C. Gen. Stat. § 14-32.4 (2001)). This Court held that, because the defendant was convicted for ADWISI, an offense which provided greater punishment than AISBI, the trial court subjected the defendant to double jeopardy by convicting him of AISBI. *Id.* at 111, 582 S.E.2d at 685.

Here, defendant was convicted for AWDWIKISI under N.C. Gen. Stat. § 14-32(a), a Class C felony, and AISBI, under N.C. Gen. Stat. § 14-32.4(a), a Class F felony. *See* N.C. Gen. Stat. §§ 14-32(a), -32.4(a) (2011). N.C. Gen. Stat. § 14-32.4(a) proscribes an assault inflicting serious bodily harm "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" N.C. Gen. Stat. § 14-32.4(a) (2011). Adopting this Court's reasoning in *Ezell*, we hold that the double jeopardy clause prohibits defendant's AISBI conviction given this statutory language. *See id.*; *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685.

Relying on *State v. Hannah*, the State contends that the double jeopardy clause does not prohibit defendant's AISBI conviction, because AISBI is not a lesser-included offense of AWDWIKISI. 149 N.C. App. 713, 719, 563 S.E.2d 1, 5, *disc. rev. denied*, 355 N.C. 754, 566 S.E.2d 81 (2002). But the State's reliance on *Hannah* is misplaced. There, this Court held

that AISBI is not a lesser-included offense of AWDWIKISI in the context of a lesser-included jury instruction, not double jeopardy. *Id.*, 563 S.E.2d at 5. Although this holding suggests that defendant's AWDWIKISI and AISBI convictions survive the *Blockburger* test, the presumption raised by this test "may be rebutted by a clear indication of legislative intent" and "when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test." *See Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. As discussed above, we hold that the statutory language of N.C. Gen. Stat. § 14-32.4(a) evinces a clear indication of legislative intent. *See id.*, 340 S.E.2d at 709; N.C. Gen. Stat. § 14-32.4(a).

The State also relies on *State v. Fernandez* for the proposition that examining legislative intent is unnecessary when two crimes are deemed separate under the *Blockburger* test. 346 N.C. 1, 19, 484 S.E.2d 350, 361 (1997). But *Fernandez* is distinguishable. There, the North Carolina Supreme Court addressed whether the trial court had subjected the defendant to double jeopardy by convicting him of first-degree murder and first-degree kidnapping. *Id.* at 18, 484 S.E.2d at 361. After holding that the defendant had failed to preserve this issue, the Court stated, in dicta, that the crimes were separate under the *Blockburger* test and that "an analysis of legislative intent [was] not necessary in [that] case[.]" *Id.* at 19, 484 S.E.2d at 361. The first-degree murder and first-degree kidnapping statutes at issue contained no language limiting a defendant's conviction for both offenses. *See* N.C. Gen. Stat. §§ 14-17, -39 (1993). In contrast, here, N.C. Gen. Stat. § 14-32.4(a) proscribes an assault inflicting serious bodily harm "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" N.C. Gen. Stat. § 14-32.4(a); *see also Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684 (similarly distinguishing *Fernandez*).

Additionally, in *Gardner*, the North Carolina Supreme Court characterized the presumption raised by the *Blockburger* test as "an aid to determining legislative intent" and "neither binding on state courts nor conclusive" and rebuttable "by a clear indication of legislative intent[,]" which "must be respected, regardless of the outcome of the application of the *Blockburger* test." *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. Moreover, in *Davis*, the North Carolina Supreme Court recently adopted this Court's reasoning in *Ezell* and held that the trial court "was not authorized to sentence defendant for felony death by vehicle and felony serious injury by vehicle." 364 N.C. at 304-05, 698 S.E.2d at 69-70. Although the Court discussed this issue in the context of statutory authority, rather than constitutional double jeopardy, its thorough analysis of legislative intent and approval of *Ezell* support our conclusion that

the *Blockburger* test does not end our double jeopardy inquiry. *See id.*, 698 S.E.2d at 69-70; *Ezell*, 159 N.C. App. at 109, 582 S.E.2d at 684 ("[W]e are not required to start and end our inquiry with a *Blockburger* analysis of elements."). Furthermore, in *Williams*, this Court followed *Ezell* and held that the defendant's convictions violated double jeopardy despite the fact that the convictions survived the *Blockburger* test. *Williams*, 201 N.C. App. at 173-74, 689 S.E.2d at 418-19. Finally, our emphasis on legislative intent is consistent with the U.S. Supreme Court's double jeopardy jurisprudence. *See Hunter*, 459 U.S. at 366, 74 L. Ed. 2d at 542 ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.").

Accordingly, we hold that the trial court subjected defendant to double jeopardy by convicting him for both AWDWIKISI and AISBI. *See Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685.

VI. Conclusion

For the foregoing reasons, we hold that the trial court committed no error in convicting defendant for attempted first-degree murder and AWDWIKISI. But we vacate defendant's AISBI conviction. *See id.*, 582 S.E.2d at 685. We also vacate defendant's consolidated sentence for the AWDWIKISI and AISBI convictions and remand the case for resentencing on defendant's AWDWIKISI conviction. *See Wortham*, 318 N.C. at 674, 351 S.E.2d at 297.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges BRYANT and HUNTER, JR. concur.

STATE v. CLYBURN

[240 N.C. App. 428 (2015)]

STATE OF NORTH CAROLINA
v.
KENNETH E. CLYBURN, DEFENDANT

No. COA13-1445

Filed 7 April 2015

1. Appeal and Error—issue raised for first time on appeal

The Court of Appeals declined to address whether defendant's general consent to a search of his person extended to the digital contents of a GPS device because the State did not make that argument before the trial court.

2. Search and Seizure—search incident to arrest—digital contents of GPS device—not justified

In its order granting defendant's motion to suppress, the trial court properly concluded that a search of the digital contents of a GPS device found on defendant's person was not justified as a search incident to arrest. An individual's privacy interests in the digital contents of a GPS device are great, and a search of such a device does not further the government's interests in officer safety or the preservation of evidence.

3. Search and Seizure—reasonable expectation of privacy—digital contents of stolen GPS device

The Court of Appeals reversed and remanded the trial court's order granting in part defendant's motion to suppress evidence obtained from a search of the digital contents of a stolen GPS device found on his person. The trial court was instructed to make findings of fact regarding the manner in which defendant obtained the stolen device to determine whether he had a reasonable expectation of privacy in its digital contents.

Appeal by the State from order entered 11 July 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

GEER, Judge.

The State appeals from an order granting in part defendant Kenneth E. Clyburn's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on defendant's person which, as a result of the search, was determined to have been stolen. On appeal, the State argues that the trial court erred in granting the motion because defendant did not have a reasonable expectation of privacy in the GPS and, therefore, cannot show that his Fourth Amendment rights were violated. Alternatively, the State argues that even assuming that the defendant did have a privacy interest in the GPS, the search was valid because (1) defendant consented to the search and (2) the search was justified as a search incident to arrest.

Because the State did not raise the consent argument below, we decline to address it. We hold that the United States Supreme Court's recent decision in *Riley v. California*, ___ U.S. ___, 189 L. Ed. 2d 430, 134 S. Ct. 2473 (2014), applies to the search of the digital data stored on a GPS device, and affirm the trial court's conclusion that the search incident to arrest exception does not apply in this case. With respect to defendant's privacy interest in the stolen GPS, we hold that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. At the suppression hearing, defendant presented evidence that, if believed, would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. Because the trial court failed to make a factual determination regarding whether defendant innocently purchased the GPS, we reverse and remand for further findings of fact.

Facts

On 2 April 2012, police officers Aaron Skipper and Todd Watson of the Charlotte-Mecklenburg Police Department ("CMPD") were on motorcycle patrol in the residential neighborhood of Villa Heights in Charlotte, North Carolina. The officers were on the lookout for evidence of residential and auto break-ins and sales of controlled substances.

Just before 8:00 a.m., the officers saw defendant walking down the sidewalk of Umstead Street. Defendant was dirty, had numerous tears in his clothing, "unusually bulging pants pockets . . . [and] could have passed for one of the homeless common to the area." Officer Watson initially suspected that defendant "may have recently been under an abandoned house removing copper pipes for resale" due to his dirty condition.

The officers pulled up about five feet behind defendant as he was walking down the street. Defendant stopped and turned towards the officers, at which point Officer Skipper dismounted, told defendant the officers' names and why they were in the area, and asked for defendant's name and date of birth. Defendant did not have identification on him, but told the officers his name and date of birth and explained that he was walking to his mother's house around the corner. The conversation was polite, and defendant was cooperative.

The officers did not make any show of force or attempt to block defendant's path. Defendant turned and began walking away from the direction of his mother's address, at which point Officer Skipper reengaged defendant and asked him what he had in his rear pocket. Defendant stopped and removed a cell phone. Officer Skipper asked what else he had in that pocket, and defendant removed a pair of binoculars.

Officer Skipper then approached defendant and asked for consent to search his person. Defendant said "go ahead," turned his back to the officer, and raised his arms. Officer Skipper found a crack pipe in defendant's waistband and arrested defendant for possession of drug paraphernalia. Officer Skipper then searched defendant incident to the arrest, finding a box cutter, several small shards of auto glass, and a Garmin GPS with an attached car charger in defendant's pants pockets. Defendant, unprompted, claimed that the GPS was his own and that the binoculars belonged to his brother.

The officers had no knowledge of whether defendant had a car, but they thought it unusual that he was walking with a GPS and attached charger cord in his pocket. Officer Watson took the GPS and pressed the "Home" button. He did not ask for, or receive, permission from defendant to search the GPS. The GPS displayed an address in Blowing Rock, North Carolina -- approximately 90 miles from Charlotte, North Carolina. Officer Watson then scrolled through the address history of the GPS and found the closest address to their current location was several blocks away on Pecan Avenue, in the opposite direction from where defendant's mother lived.

CMPD sent a patrol car to the Pecan Avenue address and located a car in the driveway of a home with the window broken out. On the seat of the car was an owner's manual for a GPS of the same make and model as that taken from defendant. CMPD then contacted the homeowner, who was not aware of the car break-in. The homeowner identified the GPS taken from defendant as his.

Defendant was charged with felony breaking and entering a motor vehicle, misdemeanor larceny, and possession of drug paraphernalia. On 23 April 2012, defendant was indicted on those same charges in addition to being a habitual felon. Defendant moved to suppress the evidence obtained as a result of the search of his person and a hearing was held on his motion on 1 July 2013.

At the hearing, defendant testified that on the morning of 2 April 2012, he left his girlfriend's house to walk to his mother's home and on the way he purchased the GPS from a man who sold it for $10 to $15. He testified that he did not know that the GPS belonged to someone else.

In an order entered 11 July 2013, the trial court concluded that the initial encounter between the officers and defendant was consensual and that the second encounter was an investigatory stop that was based upon the officer's reasonable suspicion that defendant had been or was engaged in criminal activity. The trial court concluded that defendant consented to a search of his person and that when the officers found the crack pipe in defendant's waistband, they had probable cause to arrest him for possession of drug paraphernalia.

The trial court concluded that the search of the GPS device was not necessary to prevent defendant from using a weapon or destroying evidence and, therefore, was not justified as a search incident to arrest. The trial court concluded that the crack pipe was admissible, but that any evidence obtained as a result of the search of the digital contents of the GPS was inadmissible. The State timely appealed the order to this Court.

Discussion

The sole issue on appeal is whether the trial court erred in granting defendant's motion to suppress the evidence obtained from the officers' search of the contents of the GPS device. Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

[1] On appeal, the State argues that the trial court erred in granting in part the motion to suppress because defendant did not have a reasonable expectation of privacy in the GPS and, therefore, cannot show that his Fourth Amendment rights were violated. Alternatively, the State

argues that even assuming that the defendant did have a privacy interest in the GPS, the search was valid because (1) defendant consented to the search and (2) the search was justified as a search incident to arrest.

With respect to consent, the trial court found that defendant gave Officer Skipper consent to search his person. It additionally found, however, that the officer who searched the GPS, Officer Watson, neither asked for nor received permission to do so. The State argues that because defendant consented to the initial search of his person and did not limit the scope of the search or tell the officers not to search the GPS, his consent could reasonably be interpreted to cover a search of the GPS. The State did not, however, make this argument to the trial court. In fact, at the suppression hearing, the State asserted that the interactions between the officers and the defendant "were completely consensual *up until the point the Defendant was placed under arrest for the possession of paraphernalia*[.]" (Emphasis added.)

"This Court has long held that issues and theories of a case not raised below will not be considered on appeal[.]" *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Otherwise stated, "the law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Because the State did not argue below that defendant's general consent to search his person extended to the search of the digital contents of the GPS, we decline to address this argument on appeal.

[2] We turn now to the State's argument that the search of the digital contents of the GPS was a valid search incident to arrest. It is well established that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.' " *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485, 493, 129 S. Ct. 1710, 1716 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967)). Searches of the person and the area immediately surrounding the person incident to arrest are reasonable (1) "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," or (2) to secure "any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, 2040 (1969).

In *United States v. Robinson*, 414 U.S. 218, 235, 38 L. Ed. 2d 427, 440, 94 S. Ct. 467, 477 (1973), the Court held that a case-by-case adjudication

is not required to determine whether either rationale set forth in *Chimel* supports the search of an arrestee's person incident to their lawful arrest. Rather, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.*

The rule set forth in *Robinson* was recently narrowed by the United States Supreme Court in *Riley*, a case involving the warrantless search, incident to arrest, of data stored on the arrestee's cell phone that had been seized from the arrestee's pants pocket. Acknowledging that *Chimel* and *Robinson* were decided before modern cell phone technology had been invented, the Court began its analysis with the principle that courts "generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *Riley*, ___ U.S. at ___, 189 L. Ed. 2d at 441, 134 S. Ct. at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 143 L. Ed. 2d 408, 414, 119 S. Ct. 1297, 1300 (1999)).

Applying these considerations to the search of digital data on a cell phone, the Court held:

> [W]hile *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel* -- harm to officers and destruction of evidence -- are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

Id. at ___, 189 L. Ed. 2d at 441-42, 134 S. Ct. at 2484-85. Thus, the search of digital data on a cell phone did not further government interests in officer safety or preventing the destruction of evidence because "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape" and "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." *Id.* at ___, ___, 189 L. Ed. 2d at 442, 443, 134 S. Ct. at 2485, 2486.

In contrast, the Court considered an arrestee's privacy interests in the digital data on a cell phone to be great, due in large part to "their immense storage capacity":

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information -- an address, a note, a prescription, a bank statement, a video -- that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Id. at ___, 189 L. Ed. 2d at 447, 134 S. Ct. at 2489.

We believe that the same analysis applies to the search of the digital data on the GPS device in this case. As in *Riley*, the search of the GPS did not further any government interest in protecting officer safety or in preventing the destruction of evidence. In contrast, the individual privacy interests in the data on the GPS are great. The type of data that may be found on a GPS device was specifically mentioned by the *Riley* Court in distinguishing the digital data that can be stored on a cell phone from the type of data that is typically stored in physical records found on one's person:

> Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. *See United States v. Jones*, 565 U.S. ___, ___, 132 S. Ct. 945, 955, 181 L. Ed. 2d 911, 925 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Id. at ___, 189 L. Ed. 2d at 448, 134 S. Ct. at 2490. Although a GPS typically does not store as vast an amount of information as a modern cell phone, an individual's expectation of privacy in the digital contents of a GPS outweighs the government's interests in officer safety and the destruction of evidence.

The State, nevertheless, argues that the GPS should be viewed as a type of "digital container" and treated the same as an address book, a wallet, or a purse. The *Riley* Court, however, expressly rejected this approach because "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom." *Id.* at ___, 189 L. Ed. 2d at 446, 134 S. Ct. at 2488-89. The Court also declined to create a rule "under which officers could search cell phone data if they could have obtained the same information from a pre-digital counterpart" because such a rule would allow officers to search a much larger amount of information than previously allowed or contemplated and it would "launch courts on a difficult line-drawing expedition to determine which digital files are comparable to physical records." *Id.* at ___, 189 L. Ed. 2d at 450, 451, 134 S. Ct. at 2493. Accordingly, we find the State's arguments unpersuasive, and we hold that the trial court properly concluded that the search was not justified as a search incident to arrest.

[3] The State nonetheless contends that defendant's Fourth Amendment rights were not violated by the search of the digital contents of the GPS because defendant did not have a legitimate expectation of privacy in the GPS given that it was stolen. "[I]n order to claim the protection of

the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' " *Minnesota v. Carter*, 525 U.S. 83, 88, 142 L. Ed. 2d 373, 379, 119 S. Ct. 469, 472 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12, 58 L. Ed. 2d 387, 401 n.12, 99 S. Ct. 421, 430 n.12 (1978)). The defendant bears the burden of proving that he had a legitimate expectation of privacy in the item searched. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 65 L. Ed. 2d 633, 641, 100 S. Ct. 2556, 2561 (1980). *See also State v. Mackey*, 209 N.C. App. 116, 122, 708 S.E.2d 719, 723 (2011) ("With regard to defendant's standing to challenge the legality of a search, the burden rests with defendant to prove that he had a legitimate expectation of privacy in the item that was searched.").

The State argues that a defendant never has a reasonable expectation of privacy in a stolen item. Indeed, "[i]t is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981). Therefore, at a suppression hearing, the defendant must show that he has an "ownership or possessory interest" in the item searched before he may challenge the search of the item. *State v. Mandina*, 91 N.C. App. 686, 695, 373 S.E.2d 155, 161 (1988).

Defendant, however, points to 6 Wayne R. LaFave, *Search and Seizure* § 11.3(f) p. 290 (5th ed. 2012), which explains that a defendant can challenge the search of a stolen item by "establish[ing] that the police actually interfered with his person or with a place as to which he had a reasonable expectation of privacy." Thus, defendants have been able to challenge the search of stolen property when the search interfered with other well-established privacy concerns.

In particular, defendant cites *Arizona v. Hicks*, 480 U.S. 321, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987), in which the Supreme Court held that moving stolen stereo equipment located inside the defendant's home in order to record the serial numbers constituted an unlawful search under the Fourth Amendment. As explained by the Second Circuit, "because the Supreme Court in *Hicks* held that the search of the stereo equipment was unlawful, it necessarily also found . . . that the defendant had a legitimate expectation of privacy in that equipment, despite its having been stolen." *United States v. Haqq*, 278 F.3d 44, 50 (2d Cir. 2002). The expectation of privacy in the stolen equipment "reflects a

conclusion that exclusive custody and control of an item within one's home is sufficient to establish a reasonable expectation of privacy in that item." *Id.* at 51. Thus, "[t]he controlling factor in *Hicks* was that the stolen property was inside Hicks' apartment where he clearly had an expectation of privacy[.]" *Shaver v. Commonwealth*, 30 Va. App. 789, 799-800, 520 S.E.2d 393, 398 (1999).

Similarly, in *McFerguson v. United States*, 770 A.2d 66, 71 (D.C. 2001), the defendant challenged the search of a plastic bag defendant was carrying at the time police officers stopped him in connection with a burglary, even though the bag was found to contain items allegedly stolen during the burglary. Citing the principle that " 'a street pedestrian has a reasonable expectation of privacy in covered objects associated with his person[,]' " the court concluded that "[t]he contents of the bag were 'sufficiently physically connected with [the defendant's] person to fall properly under the umbrella of protection of personal privacy.' " *Id.* (quoting *Godfrey v. United States*, 408 A.2d 1244, 1246-47 (D.C. 1979)).

Defendant argues that, like the search in *McFerguson*, the search in this case interfered with his reasonable expectation of privacy in his person. We disagree. Although the initial search and seizure of the GPS from defendant's pocket interfered with defendant's legitimate expectation of privacy in his person, the trial court found, and defendant does not dispute, that he gave the officers consent for that search. The search that defendant seeks to challenge is not the initial search of his person, but rather the subsequent search of the digital contents of the GPS after it had been seized. That part of the search did not, in any way, interfere with his legitimate expectation of privacy in his person.

Consequently, the question remains whether defendant had a reasonable expectation of privacy with respect to the GPS. With respect to searches of stolen property that do not fall under the umbrella of a defendant's reasonable expectation of privacy in his home or person, the case law suggests that a defendant may nevertheless challenge the search if he can show at the suppression hearing that he acquired the stolen property innocently and did not know that the item was stolen. As recognized by the Maryland Court of Special Appeals, "[t]he legitimacy of one's expectation of privacy [in a stolen item] is in large measure a function of its reasonableness, and that, in turn, is determined to some extent by the elements of time, place, and circumstance. There may well be situations, for example, in which the unlawfulness of an initial acquisition can become attenuated by other factors, such as . . . an honest, though mistaken, belief that the object in question actually belongs to

[the defendant] -- that his acquisition of it was not unlawful." *Graham v. State*, 47 Md. App. 287, 294, 421 A.2d 1385, 1389 (1980).

Thus, how the defendant acquired the stolen property and whether he knew that the property was stolen are relevant considerations in determining whether his expectation of privacy in the item is reasonable. *See United States v. Tropiano*, 50 F.3d 157, 161 (2d Cir. 1995) (holding that "a defendant who *knowingly* possesses a stolen car has no legitimate expectation of privacy in the car" (emphasis added)); *United States v. Hargrove*, 647 F.2d 411, 413 (4th Cir. 1981) ("[I]n view of his burden to establish standing to contest the search [of a stolen car] at the suppression hearing, it sufficed at the very least to require him to show, if he could, that he acquired the car innocently.").

In this case, defendant does not dispute that the GPS had been stolen from its original owner, but argues that he presented evidence at the hearing from which the trial court could determine that he acquired the GPS innocently and did not know that the GPS was stolen. Defendant testified at the suppression hearing that he bought the GPS from an unidentified man at the gas station for $10 or $15 shortly before he encountered the officers. Although the trial court found that "[d]efendant claimed the GPS as his own[,]" the trial court failed to make a factual determination as to whether defendant had, in fact, purchased the GPS, and, if so, whether defendant knew or should have known that the GPS was stolen. Because these determinations were necessary to determine whether defendant had a reasonable expectation of privacy in the GPS, we reverse and remand for further findings of fact.

On remand, the trial court must determine, for purposes of the motion to suppress, whether defendant purchased the GPS as he claimed at the suppression hearing. In the event that the trial court believes that defendant purchased the GPS, it must then determine whether defendant knew or should have known that the GPS was stolen. In making this determination, we find *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986), instructive. In *Parker*, our Supreme Court recognized that, in the context of convictions for possession or receipt of stolen property, the "knowing" element of those offenses may be satisfied by evidence that there were reasonable grounds to believe that the item was stolen. *Id.* at 304, 341 S.E.2d at 560. Such evidence includes "unusual" "mechanics of the transaction," a lack of documentation of the sale, such as failure to receive a title of a vehicle, a seller's "willingness to sell the property at a mere fraction of its actual value," a buyer's purchase of "property at a fraction of its actual cost," or flight from police, which "is evidence of consciousness of guilt." *Id.* These considerations are equally relevant to

determining, for purposes of a motion to suppress, whether the defendant's expectation of privacy in stolen property is reasonable.

Here, the evidence that defendant could not identify who the seller was, did not have a receipt from the sale, and only paid $10 or $15 for the GPS tend to show that defendant knew or should have known that the GPS was stolen. On the other hand, that defendant did not flee from police and was cooperative is evidence that defendant did not have consciousness of guilt. *See id.* We also note that there was no evidence presented as to the value of the GPS or whether sales of that type were a typical transaction occurring at the location where defendant alleged he bought the GPS. These are all considerations that the trial court, and not this Court, must weigh in the first instance.

Defendant, citing *State v. Larocco*, 794 P.2d 460 (Utah 1990) and *McFerguson*, argues that he has standing to contest the legality of the search because (1) defendant claimed that he owned the GPS and (2) the question whether defendant stole the GPS, as opposed to purchasing it, was an issue for trial. In *Larocco*, the Supreme Court of Utah held that the defendant had standing to challenge the search of a vehicle that he was subsequently charged with stealing. *Id.* at 464. The court distinguished other cases in which the courts held the defendant lacked standing to challenge the search of stolen property on the grounds that in those cases, "it was clearly established and not disputed prior to the search that the defendant did not own or did not have an interest in the property searched" and held that "[w]here a defendant has not declared beforehand that he has no interest in the vehicle and where proof that the car was stolen is an issue at trial, . . . the defendant has standing to challenge the legality of the search." *Id.*

Defendant argues, relying on *McFerguson*, that the State's assertion, in seeking reversal of the denial of the motion to suppress, that the GPS was stolen "assumes the very facts that were to be proved at trial . . . . If assuming those facts as given dictates whether he could move to suppress the evidence by which the government meant to prove his guilt, that would do away with the justification for suppression hearings in a great many cases[.]" *McFerguson*, 770 A.2d at 71.

The rule stated in *Larocco* is inconsistent with prior, controlling decisions of our courts. Our appellate courts have previously held that the question whether it is established prior to the search that the defendant did not own or have an interest in the property searched is relevant only to the state of mind of the officers conducting the search. *State v. Cooke*, 54 N.C. App. 33, 43, 282 S.E.2d 800, 807 (1981), *aff'd*, 306 N.C. 132, 291

S.E.2d 618 (1982). However, " '[t]he state of mind of the searcher regarding the possession or ownership of the item searched is irrelevant to the issue of standing [to assert Fourth Amendment rights]. Rather, standing to object is predicated on the objector alleging *and, if challenged, proving* he was the victim of an invasion of privacy.' " *Id.* (emphasis added) (quoting *United States v. Canada*, 527 F.2d 1374, 1378 (9th Cir. 1975)).

Furthermore, our holding does not ask the trial court to assume the GPS was stolen, but rather, to weigh the evidence before it to determine whether the defendant has met his burden of showing that he has a legitimate expectation of privacy in the digital contents of the GPS. In this case, in deciding solely for purposes of the motion to suppress whether defendant had a legitimate expectation of privacy in the GPS, it was the trial court's duty to determine the credibility of defendant's testimony that he bought the GPS and reasonably believed it was not stolen. *See State v. Villeda*, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004) ("[T]he trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom[.]").

Indeed, in *Greenwood*, our Supreme Court addressed a case materially indistinguishable from this one. In *Greenwood*, 301 N.C. at 706, 273 S.E.2d at 439, an officer searched a car as a search incident to arrest and found a pocketbook under some jackets on the back seat of the car. The officer searched the pocketbook and discovered from its contents that it did not belong to the defendant, but rather belonged to a woman whose motor vehicle had been broken into. *Id.*, 273 S.E.2d at 439-40. The defendant was then charged with breaking and entering the victim's motor vehicle and larceny of her pocketbook. *Id.*, 273 S.E.2d at 440. The Supreme Court reversed this Court's opinion holding that the defendant's motion to suppress should have been allowed as to the contents of the pocketbook. *Id.* at 707, 273 S.E.2d at 440.

After noting that it was "apparent from the face of the record that the pocketbook in question was not the property of the defendant[,]" the Court then pointed out that "[d]efendant offered no evidence to show any legitimate property or possessory interest in the pocketbook, and we conclude that he had none." *Id.* The Court, therefore, held "that *defendant failed to show* that the seizure and search of the pocketbook infringed upon his own personal rights under the Fourth Amendment. Therefore, defendant's motion to suppress the pocketbook and its contents was properly denied by the trial court. [The d]ecision of the Court of Appeals to the contrary is erroneous and must be reversed." *Id.* at 708, 273 S.E.2d at 441 (emphasis added).

Under *Greenwood*, defendant, in this case, has the burden of showing, for purposes of the motion to suppress, that the search of the GPS infringed on his Fourth Amendment rights because he had a reasonable expectation of privacy in the digital contents of the GPS. The trial court, before granting the motion to suppress, was required to make sufficient findings of fact, based on the evidence, to establish that defendant had the necessary reasonable expectation of privacy. Because the trial court failed to do so, we reverse and remand for a factual determination whether defendant knew the GPS was stolen and whether he acquired it innocently, as he asserted at the suppression hearing.

REVERSED AND REMANDED.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
ROBERT STEVEN DOISEY

No. COA14-960

Filed 7 April 2015

1. Appeal and Error—argument abandoned—dismissed

The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-269(f) that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant abandoned his argument that the trial court erred by denying his motion for appropriate relief requesting post-conviction DNA testing, he abandoned any argument under section 15A-269(f).

2. Appeal and Error—no ruling by trial court—dismissed

The Court of Appeals dismissed defendant's argument based on N.C.G.S. § 15A-268 that the trial court erred by failing to order preparation of an inventory of biological evidence. Because defendant did not make a written request pursuant to the statute, the trial court did not rule on such a request and it was not properly before the Court of Appeals.

On *certiorari* review of an order entered 13 August 2013 by Judge Phyllis Gorham in Halifax County Superior Court. Heard in the Court of Appeals 5 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Kimberly P. Hoppin for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

Defendant Robert Steven Doisey appeals from the denial of his "Motion to Locate and Preserve Evidence" and "Motion for Post-Conviction DNA Testing." We dismiss.

In April 1997, a jury convicted Defendant of two counts of first-degree statutory sex offense, and the trial court sentenced Defendant to 339-416 months in prison. The charges against Defendant arose from his statutory rape of D.H.,[1] the then-12-year-old daughter of Defendant's girlfriend. Defendant appealed from the judgment entered upon his convictions. *See State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240, *disc. review denied*, 352 N.C. 678, 545 S.E.2d 434 (2000), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d 1015 (2001). While that appeal was pending, Defendant filed a motion for appropriate relief ("MAR") in the trial court, alleging that D.H. had recanted her trial testimony. *Id.* at 623, 532 S.E.2d at 243. This Court accordingly remanded the matter to the trial court, which held a hearing in July 1998. *Id.* At that hearing, D.H. recanted her trial testimony. *Id.* At the close of the first hearing, Judge Louis B. Meyer took the matter under advisement. *Id.* Subsequently, Judge Meyer became seriously ill and was unable to rule on Defendant's MAR. *Id.* The matter was reassigned to Judge Thomas D. Haigwood, who held a second hearing in December 1999. *Id.* At the second hearing, D.H. recanted her recantation, stating that her trial testimony had been accurate. *Id.* at 624, 532 S.E.2d at 243. The trial court denied Defendant's MAR. *Id.* Defendant appealed from the denial of his MAR, and this Court considered that ruling along with Defendant's arguments on direct appeal. *Id.* at 624-25, 532 S.E.2d at 243-44.

In its opinion, this Court found that certain evidence was improperly admitted at Defendant's trial, but the admission of that evidence did not constitute plain error. *Id.* at 627, 532 S.E.2d at 245. This Court also determined that the trial court did not abuse its discretion in concluding that it was "not well satisfied that the testimony of [D.H.] given at trial

1. We use initials to protect the identity of the juvenile victim.

was false," and thus, did not err in denying Defendant's MAR. *Id.* at 628, 532 S.E.2d at 245-46.

In 2001 and 2002, Defendant filed *pro se* MARs based on changes in the law regarding expert testimony on sexual abuse and requesting post-conviction DNA testing. Each MAR was summarily denied. In 2002, this Court denied Defendant's petitions for *certiorari* review of the denial of his MARs. Subsequent MARs in 2004 and 2006 were also denied in the trial court. The appeal now before this Court arises from *pro se* motions to locate and preserve evidence and for post-conviction DNA testing which Defendant filed on 17 September 2012. The trial court summarily denied both motions by order entered 13 August 2013. Defendant gave timely written notice of appeal and requested assignment of appellate counsel. However, Defendant did not timely perfect his appeal.

On 10 April 2014, through appointed counsel, Defendant filed a petition for writ of *certiorari* in this Court for review of the trial court's denial of "the Order Denying Post-Conviction DNA Testing entered . . . August 13, 2013."[2] By order entered 23 April 2014, this Court issued a writ of *certiorari* to review that order.

However, Defendant does not bring forward on appeal any argument that the trial court erred in denying his motion for DNA testing. Where a party makes no argument in his brief concerning a particular issue, it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Thus, Defendant has abandoned any arguments that the trial court erred in denying his request for DNA testing, and we do not consider the merits of that ruling.

Discussion

Defendant argues only that the trial court erred in failing to order preparation of an inventory of biological evidence. In support of his contention, Defendant relies on N.C. Gen. Stat. §§ 15A-268(a7) and 15A-269(f), two related, but distinct provisions of our State's DNA Database and Databank Act of 1993 ("the Act"). *See* N.C. Gen. Stat. § 15A-266 *et seq.* (2013).

On 17 November 2014, the State filed a motion to dismiss Defendant's appeal. By order filed 4 December 2014, the State's motion to dismiss

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2. Defendant's petition did not explicitly reference his motion to locate and preserve, but that document was included as an attachment. In addition, the 23 April 2014 order this Court issued allowing Defendant's petition for a writ of *certiorari* provides for "review [of] the order entered on 13 August 2013" without limiting the scope of that review to the denial of the motion for DNA testing. Accordingly, herein we address Defendant's argument regarding the trial court's denial of his motion to locate and preserve evidence.

was referred to this panel. In its motion, the State contends that Defendant has no right to appeal any issue related to his most recent *pro se* motions under either section 15A-268(a7) or 15A-269(f). We agree that Defendant's arguments must be dismissed, but for reasons other than those argued by the State.

Section 15A-269(f)

[1] We first consider Defendant's claim under section 15A-269, arguably the centerpiece of the Act, which in pertinent part states:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS[3] if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> . . . .
>
> (f) *Upon receipt of a motion for post[-] conviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as*

3. "CODIS is the acronym for the 'Combined DNA Index System' and is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. The National DNA Index System or NDIS is considered one part of CODIS, the national level, containing the DNA profiles contributed by federal, state, and local participating forensic laboratories." *See* Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited 16 March 2015).

> *well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.*
>
> . . . .

N.C. Gen. Stat. § 15A-269 (2013) (emphasis added).

The stated policy behind the Act is "to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person. . . ." N.C. Gen. Stat. § 15A-266.1 (2013). Thus, in applying the Act in any particular case, we must strive to harmonize its provisions while being mindful of this legislative intent and seeking to avoid nonsensical interpretations. *See State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E.2d 706, 718 (1972) ("In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose.") (citations omitted). Both the plain language of section 15A-269 as quoted supra, and the express intent of the Act as stated in section 15A-266.1, make absolutely clear that its ultimate focus is to help solve crimes through DNA *testing*. All provisions of the Act must be understood as facilitating that ultimate goal.

Against this backdrop, we begin by addressing the State's assertion that we should dismiss this appeal because Defendant made no request for an inventory of biological evidence under section 15A-269(f). This contention ignores the plain language of section 15A-269(f) which states that a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence: "*Upon receipt of a motion for post*[-]*conviction DNA testing, the custodial agency shall inventory the evidence* pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court." N.C. Gen. Stat. § 15A-269(f) (emphasis added). Thus, a defendant who requests DNA testing under section 15A-269 need not make any additional written request for an inventory of biological evidence.

Here, it is undisputed that Defendant moved for post-conviction DNA testing. That motion triggered a requirement to "inventory the [biological] evidence pertaining to that case and provide the inventory list . . . to the prosecution, the petitioner, and the court." *Id.* Further, the Act explicitly provides that a "defendant may appeal an order denying

the defendant's motion for DNA testing . . . ." N.C. Gen. Stat. § 15A-270.1 (2013). Therefore, had Defendant brought forward an argument on appeal that the trial court erred in denying his motion for DNA testing, we could have possibly considered, in conjunction therewith, any failure of the relevant custodial agency to conduct an inventory of biological evidence as required in section 15A-269(f).

However, as noted *supra*, despite requesting and being granted the right to *certiorari* review, Defendant has not brought forward any argument that the trial court erred in denying his motion for DNA testing.[4] Accordingly, there is no longer any request for DNA testing under section 15A-269 at issue in Defendant's case. As such, Defendant's motion for an inventory of biological evidence likewise cannot proceed under that section. Simply put, the required inventory under section 15A-269 is merely an ancillary procedure to an underlying request for DNA testing. Since Defendant has abandoned his right to appellate review of the denial of his request for DNA testing, there is no need for the inventory required by section 15A-269(f). To hold otherwise would be "useless" and not "in harmony with [the Act's] purpose." *See Harvey*, 281 N.C. at 20, 187 S.E.2d at 718. Accordingly, we dismiss Defendant's argument that the trial court erred in failing to order an inventory of biological evidence as provided for under section 15A-269.

Section 15A-268

[2] Defendant also argues that the trial court erred in failing to order preparation of an inventory of biological evidence under section 15A-268 of the Act. Section 15A-268 is entitled "Preservation of biological evidence" and requires the preservation of "any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution." N.C. Gen. Stat. § 15A-268(a1) (2013). The statute also provides that,

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4. Defendant may have elected not to make such an argument because, in order to obtain DNA testing under the Act, "[t]he burden is on [the] defendant to make the materiality showing required in N.C. Gen. Stat. § 15A-269(a)(1)." *State v. Foster*, __ N.C. App. __, __, 729 S.E.2d 116, 120 (2012). In *Foster*, the defendant made only a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the [d]efendant's defense . . . . [and] provided no other explanation of why DNA testing would be material to his defense." *Id.* This Court held that, because the "defendant failed to establish the condition precedent to the trial court's granting his motion, the trial court properly denied the motion." *Id.* Similarly, here, Defendant's motion for DNA testing alleges only that "the [r]equested DNA testing is material to" Defendant's defense.

> [u]pon *written request* by the defendant, the custodial agency shall prepare an inventory of biological evidence relevant to the defendant's case that is in the custodial agency's custody. If the evidence was destroyed through court order or other written directive, the custodial agency shall provide the defendant with a copy of the court order or written directive.

N.C. Gen. Stat. § 15A-268(a7) (emphasis added).[5]

The wording and provisions which our General Assembly chose to include in the Act reflect an important difference between sections 15A-269 and 15A-268 with regard to the preparation of an inventory of biological evidence. As noted *supra*, under the former, a request for DNA testing triggers an automatic requirement for the custodial agency to prepare an inventory, with no further request or action by a defendant needed. Under the latter, the custodial agency is always required to preserve biological evidence under the terms of the section. However, the plain language of subsection 15A-268(a7) requires that a defendant who wishes to go further and have an inventory of such evidence prepared must make that request in writing.

Here, Defendant never made any written request for an inventory of biological evidence relevant to his case. Rather, in his written motion under section 15A-268, he sought only that certain "physical evidence obtained during the investigation of his criminal case *be located and preserved*." (Emphasis added). Defendant then specified the biological evidence that he wanted to have located and preserved: "a rape kit-sexual assault kit, containing vaginal, anal, and oral swabs and smears from the alleged victim."[6] After alleging his innocence and recounting factual and procedural aspects of his case, Defendant concluded by again requesting "the court to order the location *and preservation of the above evidence* so that DNA testing can be conducted pursuant to [sections] 15A-269

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5. We note that the showing required to trigger an inventory per written request under this section of the Act is that evidence be "relevant to the defendant's case[.]" *Id.* We express no opinion as to whether this standard differs from the materiality showing required under section 15A-269 or whether either section of the Act might permit a defendant to request an inventory of biological evidence where he argues that such information is necessary for him to determine and then establish before a court its materiality so as to entitle him to DNA testing. Those issues are not before the Court in this case.

6. Defendant refers to the same evidence in identical terms in his motion for DNA testing.

and 15A-270."[7] Defendant's failure to request any inventory of biological evidence relevant to his case is not surprising as he was fully aware of the identity of the evidence the testing of which he believed was material to his claim of innocence, to wit, the sexual assault kit.

Because Defendant did not make any written request for an inventory under section 15A-268(a7), it follows that the trial court did not consider or rule on such a request. Thus, there is no ruling under section 15A-268(a7) for this Court to review. Accordingly, we agree with the State that Defendant's appellate argument under this section of the Act is not properly before this Court.

DISMISSED.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA
v.
DARIO FIZOVIC, DEFENDANT

No. COA14-723

Filed 7 April 2015

1. Search and Seizure—open container offense—search incident to citation

In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was an impermissible search incident to citation. Defendant never was issued a citation, and he was arrested for the open container offenses for which he was stopped.

2. Search and Seizure—open container offense—search incident to arrest—before arrest

In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's console should be treated as a search incident

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7. Section 15A-270 governs procedures following DNA testing under section 15A-269 and requires, as an initial step, "a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant." N.C. Gen. Stat. § 15A-270(a) (2013).

to citation because the officer only intended to give him a citation and he had not yet been arrested. At the time of the search, the officer had probable cause to arrest defendant for open container violations, which allowed the search to be justified as incident to arrest.

3. Search and Seizure—open container offense—search for additional evidence related to violations

In defendant's appeal of the trial court's order denying his motion to suppress, the Court of Appeals rejected his argument that the search of his vehicle's center console was not justified as a search incident to arrest. Even though the officer had enough evidence to prosecute defendant for open container violations, he had a reasonable belief that evidence related to the violations might be found in defendant's center console.

Appeal by defendant from order entered 22 January 2014 by Judge Susan E. Bray and judgment entered 20 March 2014 by Judge Edgar B. Gregory in Guilford County Superior Court. Heard in the Court of Appeals 6 November 2014.

Attorney General Roy Cooper, by Associate Attorney General Laura Askins, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant.

GEER, Judge.

Defendant Dario Fizovic appeals from a judgment entered on his *Alford* plea of guilty to possession of a firearm by a felon. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence seized from defendant's vehicle after he was stopped for having an open container of alcohol in his vehicle. Defendant first argues that the search amounted to a "search incident to citation" and was invalid pursuant to *Knowles v. Iowa*, 525 U.S. 113, 142 L. Ed. 2d 492, 119 S. Ct. 484 (1998), and *State v. Fisher*, 141 N.C. App. 448, 539 S.E.2d 677 (2000). However, because defendant was never issued a citation and was in fact arrested for the open container offense, *Knowles* and *Fisher* are inapplicable.

Alternatively, defendant argues that the search cannot be justified as a search incident to arrest because at the time of the search, the officer had already obtained sufficient evidence to prosecute the open container

offense. Defendant misstates the standard. An officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle. The trial court's unchallenged findings of fact (1) that it is common to find alcohol in vehicles of individuals who are stopped for alcohol violations and (2) that the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in defendant's vehicle. Accordingly, we hold that the trial court properly concluded that the search was a valid search incident to defendant's arrest, and we affirm.

Facts

The trial court made the following undisputed findings of fact in its order denying defendant's motion to suppress. On 14 March 2012, Officer Billy Wyatt of Lankford Company Police was patrolling the Davie Street Parking Deck in Greensboro, North Carolina. Around 11:50 p.m., Officer Wyatt observed defendant driving a Jeep Grand Cherokee up the ramp in his direction. Officer Wyatt saw a passenger in the front seat and observed defendant raise a can of Modelo beer to his mouth and consume alcohol. He stopped defendant's vehicle and asked defendant for his driver's license. Defendant gave Officer Wyatt a resident alien card. Officer Wyatt asked again for a driver's license. Defendant told Officer Wyatt that his license was in the center console and started to reach for it. For officer safety reasons, Officer Wyatt stopped defendant and asked him to step out of the vehicle.

By this time, Officer Neff of Lankford Company Police and Officer Shaffer of the Greensboro Police Department had arrived to provide assistance. While Officer Neff got the passenger out of the car, Officer Wyatt patted defendant down for weapons and asked him if he had any drugs or weapons in the car. Defendant replied that he did not.

Officers Wyatt and Shafer then searched the center console for defendant's driver's license and for additional alcohol or alcohol containers. When Officer Shaffer lifted up the inner console, he found a loaded .357 Taurus revolver. The officers did not find a driver's license in the outer compartment of the console or in the inner console. When Officer Wyatt asked defendant why he did not tell him there was a weapon in the vehicle, defendant replied that it was because he was a convicted felon. Officer Wyatt then arrested defendant for possession of a firearm by a felon and for the open container violation.

The following day, a magistrate determined that there was probable cause to arrest defendant for both charges, and defendant was released on bond. On 23 April 2012, the trial court dismissed the open container violation, and on 21 May 2012, defendant was indicted for possession of a firearm by a felon. On 17 January 2014, defendant filed a motion to suppress the evidence obtained as a result of the search of his vehicle and his motion was heard before Judge Susan E. Bray on 21 January 2014.

In an order entered 22 January 2014, Judge Bray concluded based on her findings of fact that "Officer Wyatt had probable cause to arrest Defendant Fizovic for driving while consuming alcohol and/or open container" at the beginning of the stop and that Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant's vehicle. Judge Bray therefore concluded that the search was a lawful search incident to defendant's arrest and denied defendant's motion to suppress.

On 10 March 2014, defendant entered an *Alford* plea of guilty to possession of a firearm by a felon. Judge Edgar B. Gregory sentenced defendant to a presumptive-range term of 12 to 24 months imprisonment, suspended the sentence, and placed defendant on supervised probation for 18 months. Defendant timely appealed to this Court.[1]

Discussion

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Unchallenged findings of fact are binding on appeal. *State v. Lupek*, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011). The trial court's conclusions of law are, however, fully reviewable and "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

1. Defendant additionally filed a petition for writ of certiorari seeking review of the suppression order in the event this Court were to determine that his notice of appeal was inadequate. Because we have determined that defendant preserved his right to appeal the order denying his motion to suppress and provided proper oral notice of appeal from the judgment entered on his *Alford* guilty plea, we dismiss defendant's petition for writ of certiorari as moot.

On appeal, defendant does not challenge the trial court's factual findings, but contends that the trial court erred in concluding that the warrantless search of defendant's vehicle was justified as a search incident to arrest. We disagree.

Generally, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, 88 S. Ct. 507, 514 (1967) (internal footnote omitted). One such exception is a search incident to a lawful arrest. Pursuant to this exception, the police may "search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*, 556 U.S. 332, 351, 173 L. Ed. 2d 485, 501, 129 S. Ct. 1710, 1723 (2009).

[1] Defendant, citing *Knowles* and *Fisher*, argues first that the search in this case was not a search incident to arrest, but rather a "search incident to citation." Pursuant to *Knowles* and *Fisher*, when a citation is issued for a traffic offense, and a search of the vehicle will not yield any additional evidence of that offense, a warrantless search of the vehicle is unconstitutional. In *Knowles*, the United States Supreme Court held that a search of the defendant's vehicle after he had been issued a citation for speeding violated the Fourth Amendment because neither of the historic rationales for a search incident to arrest -- the concern for officer safety and the destruction or loss of evidence -- was present. Specifically with respect to the loss of evidence rationale, the Court reasoned that "[n]o further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." 525 U.S. at 118, 142 L. Ed. 2d. at 499, 119 S. Ct. at 488.

In *Fisher*, the police stopped the defendant's vehicle and issued a citation for defendant's driving while his license was revoked. 141 N.C. App. at 450, 539 S.E.2d at 679. While one officer took defendant to his patrol car to issue the citation, a canine unit arrived to sniff the vehicle and "alerted" to the presence of drugs. *Id.*, 539 S.E.2d at 679-80. The officers found marijuana in the hood of the vehicle and arrested defendant on several drug charges. *Id.* at 450, 451, 539 S.E.2d at 680. On appeal, this Court determined that there was not competent evidence to support the trial court's finding that defendant had been *arrested* for the offense of driving with a revoked license. *Id.* at 454, 539 S.E.2d at 682. It then

concluded that "[b]ecause defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest. Furthermore, in accordance with *Knowles*, the officers were not justified in searching defendant's car based upon the issuance of the citation. This is true even though the officers may have had probable cause to arrest defendant." *Id.* at 456, 539 S.E.2d at 683.

Here, unlike in *Knowles* and *Fisher*, defendant was not issued a citation, but was in fact arrested for the open container violation. Defendant cites no authority, and we have found none, suggesting that *Knowles* and *Fisher* apply where no citation is issued. We, therefore, hold that *Knowles* and *Fisher* are inapplicable to this case. *See Virginia v. Moore*, 553 U.S. 164, 177, 170 L. Ed. 2d 559, 571, 128 S. Ct. 1598, 1608 (2008) (holding *Knowles* did not control where officers arrested the defendant instead of issuing him a citation).

[2] Defendant argues, nonetheless, that we should treat the search as one incident to citation because Officer Wyatt testified that he originally intended only to issue defendant a citation, and at the time of the search, defendant had not yet been arrested. However, in certain circumstances, the search incident to arrest exception may apply to a search conducted prior to arrest. As explained in *State v. Wooten*, 34 N.C. App. 85, 89-90, 237 S.E.2d 301, 305 (1977):

> [W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as "incident to the arrest" provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime. These considerations are rendered no less important by the postponement of the arrest.

Here, although defendant was not formally arrested until after the search, defendant does not challenge the trial court's determination that Officer Wyatt had probable cause to arrest defendant for driving while consuming alcohol and open container violations at the beginning of

the stop. Defendant cites no authority, and we have found none, holding that the officer's initial intent to issue a citation rather than arrest the defendant is relevant to the validity of the search. Accordingly, we hold that pursuant to *Wooten*, the search may still be justified as incident to arrest, even though the arrest occurred after the search. *See United States v. Nash*, 100 A.3d 157, 168 (D.C. 2014) (holding where officer had probable cause to believe that the defendant had committed offense of possession of open container of alcohol, search incident to arrest exception applied even though at time of search officers had not yet arrested the defendant and did not intend to do so).

[3] Defendant next contends that even if the search could be considered under the search incident to arrest doctrine, it was not justified because Officer Wyatt had already obtained all the evidence necessary to prosecute the offense for which defendant was ultimately arrested. Defendant argues that this case is similar to *State v. Johnson*, 204 N.C. App. 259, 265-66, 693 S.E.2d 711, 716 (2010), where this Court held unconstitutional the search of the defendant's vehicle after he had been arrested for driving with a revoked license.

Defendant, however, misstates the standard for determining whether a search may be justified under the discovery-of-evidence prong of the search incident to arrest exception. The question is not whether the officer has obtained the evidence minimally necessary to convict the defendant of the offense, but rather, whether it is reasonable to believe that any evidence relevant to the crime will be found in the vehicle. *Gant*, 556 U.S. at 343, 173 L. Ed. 2d at 496, 129 S. Ct. at 1719.

For example, in *State v. Foy*, 208 N.C. App. 562, 563, 703 S.E.2d 741, 741 (2010), an officer discovered a revolver in the defendant's truck, arrested the defendant for carrying a concealed weapon, and then searched the truck. The State argued that the search was a valid search incident to arrest because "the discovery of one concealed weapon gave the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt, or a gun permit, could exist in the truck. Not only would the discovery of this evidence compound the crime, such evidence would be necessary and relevant to show ownership or possession, could serve to rebut any defenses offered by defendant at trial, and would aid the State in prosecuting the crime to its full potential." *Id.* at 565-66, 703 S.E.2d at 743. This Court found the State's reasoning to be consistent with *Gant*, and upheld the search because the officers had reason to believe that evidence relating to the charge of carrying a concealed weapon could be found in the truck. *Id.* at 566, 703 S.E.2d at 743.

The offense of arrest in this case -- an open container violation -- is more similar to the offense in *Foy* than the offense in *Johnson*. In *Johnson*, the defendant was arrested for driving with a revoked license -- an offense for which it is unreasonable to expect to find any related evidence. Here, in contrast, there may exist tangible evidence of a violation of open container laws -- specifically, open containers of alcohol -- that an officer may reasonably expect to find in a suspect's vehicle. Furthermore, defendant does not dispute the trial court's findings that the center console of his vehicle was large enough to hold beer cans and that it is common to find alcohol in the vehicles of drivers that are stopped for alcohol violations. These findings support the trial court's determination that Officer Wyatt had a reasonable belief that evidence relevant to the open container violation might be found in defendant's vehicle. Consequently, the search of the console was a valid search incident to arrest.

In conclusion, we hold that there is competent evidence to support the trial court's findings of fact, and those findings support the trial court's conclusion that the search of defendant's vehicle was justified as a search incident to defendant's arrest for an open container violation. The trial court, therefore, did not err in denying defendant's motion to suppress.

AFFIRMED.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
WILLIAM HENRY JAMES

No. COA14-753

Filed 7 April 2015

1. Appeal and Error—preservation of issues—failure to argue—drugs—motion to dismiss—sampling technique—sufficiency of sample size

The trial court did not err in a drugs case by denying defendant's motion to dismiss based on the State's flawed evidence regarding an agent's alleged improper sampling technique. The agent was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss. Further, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance.

2. Appeal and Error—preservation of issues—failure to argue at trial

The Court of Appeals declined to take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols since they were never presented to the trial court.

On writ of certiorari by defendant from judgment entered 5 February 2014 by Judge Alma L. Hinton in Martin County Superior Court. Heard in the Court of Appeals 21 January 2015.

Roy Cooper, *Attorney General*, *by Scott K. Beaver*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Benjamin Dowling-Sendor*, *Assistant Appellate Defender*, *for defendant-appellant.*

STEELMAN, Judge.

Where defendant neither cross-examined the State's expert witness regarding the sufficiency of the sample size, nor made it a basis for his motion to dismiss at trial, defendant's argument is dismissed. We decline to take judicial notice of Version 4 and Version 7 of the SBI protocols, as they were never presented to the trial court.

I. Factual and Procedural Background

On 4 June 2012, narcotics officers from Martin and Washington Counties used a confidential informant to arrange a purchase of oxycodone pills from William Henry James (defendant). Defendant was in the passenger seat of a red car at the scene of the arranged purchase. When the deputies and officers arrived, the red car drove off. During the ensuing pursuit, defendant threw pills and pill bottles out of the car. This was observed by law enforcement officers. Deputy Sawyer of the Washington County Sheriff's Office retrieved two pill bottles containing a number of pills and Agent Davis, Narcotics Agent with the Martin County Sherriff's Office, retrieved four whole pills and two pill halves lying in the grass next to the road. The pills and pill bottles were then given to Deputy Wynne of the Martin County Sheriff's Office.

After returning to the Martin County Sheriff's Office, Deputy Wynne placed the pill bottles into separate evidence bags. Wynne testified that the four whole pills and two pill halves were placed into the evidence bag containing the bottle with similarly marked pills. Sixty-five pills were sent to the State Bureau of Investigation Laboratory for analysis.

Agent Alicia Matkowsky, a forensic chemist with the SBI, performed a chemical analysis on one pill from each bottle and concluded that both pills contained oxycodone, a substance containing opiates. The total weight of the two pills tested was 0.99 gram. Agent Matkowsky visually inspected the other sixty-three pills and concluded that based on the physical characteristics with respect to shape, color, and imprint, the pills were "consistent with" oxycodone. The total weight of the sixty-five pills submitted was 31.79 grams.

On 28 January 2013, defendant was indicted for trafficking in opium by possession of 28 grams or more; trafficking in opium by transportation of 28 grams or more; and possession with intent to sell or deliver opium. On 5 February 2014, a jury found defendant guilty of all three charges. Defendant was sentenced to the statutorily mandated active sentence of 225 to 279 months imprisonment and a fine of $500,000.

Defendant appeals.

II. 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). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003).

III. Motion to Dismiss

[1] In his only argument, defendant contends that the trial court erred in denying his motion to dismiss because the State's evidence was flawed in that Agent Matkowsky's sampling technique was improper. We disagree.

The facts of *State v. Dobbs*, 208 N.C. App. 272, 702 S.E.2d 349 (2010), are substantially similar to the instant case. In *Dobbs*, defendant was indicted for possession with intent to manufacture, sell, or deliver a Schedule III controlled substance; the sale and delivery of a Schedule III controlled substance; and trafficking in opium or an opium derivative by sale or delivery. *Id.* at 273, 702 S.E.2d at 350. A jury found defendant guilty of all charges. *Id.* at 274, 792 S.E.2d at 350. At trial, Special Agent Amanda Aharon, a chemist for the SBI, testified as an expert witness regarding eight tablets that she received from the Brunswick County Sheriff's Department. *Id.* at 275, 702 S.E.2d at 351. The total weight of the tablets was 8.5 grams. *Id.* Agent Aharon testified that her visual observation of the tablets' coloration and markings, when compared to the pharmaceutical database, indicated the tablets were a combination of hydrocodone and acetaminophen. *Id.* Agent Aharon then conducted a chemical analysis of one tablet which tested positive for hydrocodone, an opium derivative. *Id.* On appeal, defendant argued that the trial court erred in denying his motion to dismiss because the chemical analysis of one tablet was insufficient evidence that he trafficked by sale or delivery of more than four grams and less than fourteen grams of Dihydrocodeinone. *Id.* at 274, 702 S.E.2d at 351. Because Agent Aharon

was not cross-examined by defense counsel regarding the sufficiency of the sample size, nor was the sufficiency of the sample size a basis for defendant's motion to dismiss, this Court dismissed defendant's argument. *Id.* at 276, 702 S.E.2d at 352.

In the instant case, Agent Matkowsky testified as an expert witness and was accepted by the trial court as an expert witness, without objection from defendant. Defendant did not cross-examine Agent Matkowsky regarding the sufficiency of the sample size and did not make the sufficiency of the sample size a basis for his motion to dismiss. The issue of whether the two chemically analyzed pills established a sufficient basis to show that there were 28 grams or more under N.C. Gen. Stat. § 90-95(h)(4) is not properly before this Court.

Defendant's argument is dismissed.

Even assuming *arguendo* that the issue was properly preserved for appeal, "[a] chemical analysis is required . . . , but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *State v. Ward*, 364 N.C. 133, 148, 694 S.E.2d 738, 747 (2010). Every pill need not be chemically analyzed, however. *Id.* In *State v. Meyer*s, 61 N.C. App. 554, 556, 301 S.E.2d 401, 402 (1983), *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984), it was held that a chemical analysis of twenty tablets selected at random, "coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone." *Dobbs*, 208 N.C. App. at 276, 702 S.E.2d at 352.

In the instant case, one pill, physically consistent with the other pills, was chosen at random from each exhibit and tested positive for oxycodone. Agent Matkowsky testified that she visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" those pills that tested positive for oxycodone. The total weight of the pills was 31.79 grams, exceeding the 28 gram requirement for trafficking. As a result, the State presented sufficient evidence to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance. *See* N.C. Gen. Stat. § 90-90 (2013).

IV. Judicial Notice

[2] Defendant requests that this Court take judicial notice of both Version 4 and Version 7 of the SBI Laboratory testing protocols. We decline to do so.

In *State v. Williams*, 207 N.C. App. 499, 505 700 S.E.2d 774, 778 (2010), defendant requested that judicial notice be taken of the North Carolina Department of Correction Policies—Procedures, No. VII.F Sex Offender Management Interim Policy 2007. This Court declined, noting that defendant did not specifically mention the policy before the trial court; the policy was not included in the record for appeal, but was rather appended to defendant's brief; and that taking judicial notice of the policy would introduce "information which has not been subjected to adversarial testing in the trial courts." *Id.*, at 505–06, 700 S.E.2d at 778 (quoting *State v. Vogt*, 200 N.C. App. 664, 669, 685 S.E.2d 23 (2009), *aff'd* 364 N.C. 425 (2010)). In *Johnson v. Johnson*, ___ N.C. App. ___, 750 S.E.2d 25, 29 (2013), the trial court declined to take judicial notice of Internet websites used to calculate the amount of defendant's pension where that information was not offered as evidence before the trial court. This Court held that a "flaw cannot be corrected with a post-trial memorandum that relies upon Internet websites and other materials not before the trial court as competent, admitted evidence." *Id.* at ___, 750 S.E.2d at 31.

In the instant case, both Version 4 and Version 7 of the SBI protocols are found on the North Carolina State Crime Laboratory's website. Defendant did not present either version to the trial court, but seeks to have them considered for the first time on appeal by appending them to his brief. The State did not have an opportunity to test the veracity of the protocols at trial.

Version 4 of the SBI protocols had an effective date of 8 March 2013. Agent Matkowsky completed her chemical analysis on 8 October 2013. Defendant has presented no information that would show that Version 4 was the controlling version of the protocols on the date of Agent Matkowsky's chemical analysis. In fact, between Version 4 and the date of Agent Matkowsky's chemical analysis, Version 5 went into effect with an effective date of 10 May 2013. Version 5 of the SBI protocols does not appear in the record or defendant's brief.

Version 7 of the SBI protocols had an effective date of 18 April 2014. Since Agent Matkowsky's chemical analysis took place roughly six months prior to that date, Version 7 is wholly irrelevant.

DISMISSED.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
MARCUS LEE MOORE

No. COA14-665

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 19 December 2013. There was no applicable tolling period, and the trial court's jurisdiction over defendant ended when his thirty-six month probationary period ended on or about 26 February 2012.

Appeal by defendant from judgments entered 19 December 2013 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Guy J. Loranger 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 17 February 2009, defendant Marcus Lee Moore was convicted in Rutherford County of one count of larceny from the person and sentenced to eight to ten months imprisonment. The trial court suspended defendant's sentence and ordered defendant to serve thirty-six months supervised probation. On 26 February 2009, defendant was convicted of fleeing/eluding arrest with a motor vehicle, possession of a stolen motor vehicle, and driving while license revoked. These charges were

consolidated for judgment with the larceny charge from 17 February and defendant was sentenced to eight to ten months imprisonment. The trial court suspended defendant's sentence and ordered that he serve a sixty day active sentence and be placed on supervised probation for thirty-six months.

On 24 July 2009, violation reports were filed against defendant alleging that he had violated monetary conditions of his probation and had committed three new offenses on 29 March 2009. On 14 July 2010, the trial court found that defendant had committed the three new offenses, entered orders which modified the monetary conditions of defendant's probation, and transferred his supervision from Rutherford to Buncombe County. The trial court did not extend or otherwise alter defendant's probationary period.

On 4 March 2013, new violation reports were filed against defendant alleging numerous violations of his probation. Additional violation reports were filed against defendant on 20 June 2013. In a hearing on 19 December 2013, defendant admitted to willful violations of his probation. The trial court found that defendant had violated his probation. The trial court revoked defendant's probation and ordered defendant to serve eight to ten months imprisonment with credit for sixty days already served. Defendant appeals.

In his sole issue on appeal, defendant contends the trial court lacked subject matter jurisdiction to revoke his probation as his probationary period had expired and he was not subject to a tolling period. 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* 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, when 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 26 February 2012, thirty-six months after defendant was placed on probation on 26 February 2009.

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 17 and 26 February 2009, prior to 1 December 2009. Defendant's probation revocation hearing was held on 19 December 2013, almost five years after his thirty-six month probation order was entered on 26 February 2009, 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.

VACATED.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CALVIN LEWIS MOORE, JR., DEFENDANT

No. COA14-1033

Filed 7 April 2015

Sexual Offenders—failure to register—failure to return verification form—motion to dismiss—insufficient evidence of receipt of verification form

The trial court erred by denying defendant's motion to dismiss for insufficient evidence that he actually received the verification form underlying his conviction of failure to register as a sex offender due to his failure to return the verification form. The judgments were vacated.

Appeal by Defendant from judgment entered 18 March 2014 by Judge Hugh B. Lewis in Cleveland County Superior Court. Heard in the Court of Appeals 3 February 2015.

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

M. Alexander Charns, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Calvin L. Moore, Jr. ("Defendant") appeals from judgments and commitments sentencing him to 127 to 165 months' imprisonment for failure to register as a sex offender under N.C. Gen. Stat. § 14-208.11 and, as a result, for attaining habitual felon status. Defendant contends that the trial court erred by denying his motion to dismiss for insufficient evidence that he actually received the verification form underlying his conviction of failure to register as a sex offender due to his failure to return the verification form. We agree and vacate the judgments.

I. Factual & Procedural History

Defendant was indicted on 12 August 2013. The indictment reads as follows:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county

> named above the defendant named above unlawfully, willfully and feloniously did
>
> as a person required by Article 27A of Chapter 14 of the General Statutes of North Carolina to register as a sexual offender, knowingly and with the intent to violate the provisions of that article fail to register as a sexual offender in that the Defendant *failed to return his verification notice as required pursuant to N.C. Gen. Stat. § 14-208.9A*.

Defendant's trial began on 17 March 2014 in Cleveland County before the Honorable Hugh B. Lewis. The transcript and record reflect the following relevant facts.

On 7 March 2002, Defendant was convicted of indecent liberties with a child in Cleveland County. On 9 January 2003, Defendant first registered as a sex offender with the Cleveland County Sheriff's Office. Pursuant to the North Carolina Sex Offender Registration Act ("Act") at the time of the alleged offense, codified at N.C. Gen. Stat § 14-208.5 *et seq*. N.C. Gen. Stat. § 14-208.19A:

> (1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division shall mail a nonforwardable verification form to the last reported address of the person.
>
> (2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.
>
> . . . .
>
> (4) If the person fails to return the verification form in person to the sheriff within three business days *after receipt of the form*, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address[.]

N.C. Gen. Stat. § 14-208.9A(a) (2013) (emphasis added).

At trial, the State called Mike Proctor of the Cleveland County Sheriff's Office ("Deputy Proctor"). Deputy Proctor testified that he has overseen the sex offender registry in Cleveland County since August 2008 and explained the process of registering sex offenders as follows:

> During the initial registration we go through their duties as a registrant as provided by the Department of Justice, and that includes annual verification of information and after the first annual verification there's a law that the verification is every six months after if you're a regular offender, which [Defendant] is. The state's sexual offender coordination unit mails those letters from Raleigh on their anniversary date and six months thereafter, via certified mail, and the letter instructs the individual to report to the sheriff's office within three business days after receiving the letter.

The address verification sex offender ("AVSO") letter contains the "verification form" referenced in N.C. Gen. Stat. § 14-208.9A and "is mailed to the registrant's current registered address[.]" The procedure for sending the AVSO letter follows: "The SBI mails these out state-wide, in batch, on the Tuesday before the anniversary date or six months thereafter." That Tuesday, Deputy Proctor "receive[s] an electronic notification of whose letters have been mailed from Raleigh." Although the AVSO letter is "mailed by the state's sex offender coordination unit in Raleigh, the return address is to the local county sheriff's office because [they] maintain those records, and of course, the address to the registrant at their registered address." The sheriff's office receives what Deputy Proctor "call[s] the green receipt, which is the U.S. Post Office return receipt that the – whoever receives the letter signs, they date, and return to the sheriff's office." Deputy Proctor continued: "When the post office certifies that the letter has been delivered, that's the start of the three-day, the three business days[.]" Deputy Proctor confirmed that the AVSO letter was sent to Defendant's address in January 2012, July 2012, and January 2013 (this last address verification form contained Defendant's notice to the sheriff's office that he planned to enroll in Cleveland Community College as a full-time student), and that he had returned the verification form timely and properly.

Deputy Proctor further testified that on 9 July 2013, he received electronic notice that the SBI sent the AVSO letter to Defendant's last registered address. Shortly thereafter, Deputy Proctor received the AVSO letter's certified mailing receipt, which was signed by Carolyn Smith ("Smith") on 11 July 2013. On the mailing receipt, adjacent to Smith's signature, were two unchecked boxes: one for "addressee" and one for "agent." Also on the mailing receipt was an option that provided: "Restricted Delivery? (Extra Fee)," with an unmarked box adjacent to it, indicating that restricted delivery was not chosen by the

sender. Deputy Proctor admitted that he was not familiar with Smith nor did he inquire into whom she was. On 19 July 2013, Deputy Proctor wrote a report informing his supervising lieutenant that Defendant had not returned the verification form within three business days. Deputy Proctor further admitted that he took no action to verify whether Defendant still resided at the same address except to call the county jail and confirm that Defendant was not incarcerated.

The State then called Deputy Proctor's supervisor, Richard Acuff of the Cleveland County Sheriff's Office's Criminal Investigation Division ("Lieutenant Acuff"). Lieutenant Acuff stated that when he reviewed Deputy Proctor's report on Defendant, he noted that the return receipt was signed by Smith on 11 July 2013 and concluded that Defendant's three-business-day window had closed on 16 July 2013. Lieutenant Acuff admitted that he was unfamiliar with Smith and that he took no action to inquire into her identity or to verify that Defendant still lived at the same address. On 19 July 2013, Lieutenant Acuff initiated proceedings against Defendant and secured a warrant for Defendant's arrest for "failure to supply us with his address." Defendant was arrested on 24 July 2013 and remained in custody until 5 August 2013. Lieutenant Acuff testified that, to his knowledge, no subsequent AVSO letter was mailed to Defendant. Three business days after being released from prison, on 8 August 2013, Defendant was charged again for failure to return the verification form. Lieutenant Acuff stated that the sheriff's office did not contact Defendant, nor did Defendant contact the sheriff's office, at any time after the alleged violation in July and before 23 October 2013, when Defendant presented to the sheriff's office and returned the verification form.

The State called David Bramlett of the Cleveland County Sherriff's Office ("Deputy Bramlett") last, who has worked in court security at the courthouse since 1996. Deputy Bramlett testified that, on 24 September 2013, he saw Defendant at the courthouse and arrested him upon discovering there was an outstanding order for his arrest that was issued on 8 August 2013 for Defendant's alleged violation of N.C. Gen. Stat. § 14-208.11.

At the close of the State's evidence, Defendant moved to dismiss the charges on grounds that the State presented insufficient evidence that he actually received the verification form. The trial court denied Defendant's motion, but dismissed the 8 August 2013 count for failure to return the verification form and its attached count of habitual felon status; the trial proceeded to Defendant's evidence.

Defendant called his sister, Smith, to testify. Smith and Defendant have lived at the same address for approximately six years. Smith testified that for approximately the last four years, she has been out of work, receiving disability benefits, for health issues including: "[b]ipolar, schizophreni[a], COPD, . . . high blood pressure, high cholesterol, anxiety, you name it, just about, I got it." Smith testified that she takes prescription medication including, *inter alia*, "Prozac, . . . haloperidol, . . . Xanax, . . . three blood pressure pills, . . . [and] clonidine[.]" Around the time of the incident, Smith lived with Defendant, her husband, her daughter, and her son. Smith stated that she typically receives the mail for the house and "sort[s] it and put[s] it on the arm of the living room couch."

Smith testified that she did not remember receiving the AVSO letter or signing for it but readily admitted that it was her signature on the return receipt. Smith stated that she first learned about the AVSO letter when Defendant called her from jail. Once it came to her attention that the AVSO letter supposedly came to the house, Smith told Defendant "[she] didn't remember it and [she] was sorry for what was going on, but . . . that [she] would look for it." Smith searched the house unsuccessfully, and it wasn't until months later that she eventually found the AVSO letter

> when [she] was cleaning up the living room, because the room where [she] put[s] the mail, that's not a room that people sit it. [sic] It's just the very first room of the house with living room furniture, and no one sits there. There's not a TV there or anything. And it was like [the AVSO letter] had fell over the arm of the couch; it was like sticking off down in the cushion.

Smith testified that she found the AVSO letter "sometime in October, because that's when [she] usually do[es her] re-hanging of [her] curtains for the winter to make it warm." She explained that "[w]hen [she] stepped up in the chair that's when [she] could see that there was something in between there." She continued:

> When I stepped up in the chair . . . I saw that something was in there when my feet was in the chair, then I could see that there was something in between there. And when I looked down – I was hanging curtains, and when I looked down and I saw it, I just pulled it up and I was like, oh, my goodness. And I was like when did this come, and I just gave it to [Defendant] and he said, "That's the letter that I was telling you about."

At the close of all the evidence, Defendant again moved to dismiss the charge for insufficient evidence. The trial court denied the motion and instructed the jury on the charge of Willfully Failing to Comply with Sex Offender Registration Law, pursuant to N.C.P.I. 207.75, as follows: "If you find from the evidence beyond a reasonable doubt that . . . Defendant, after receiving an address verification form, failed to verify and return the form in person within three business days of receiving it to the sheriff's office listed on the address verification form, it would be your duty to return a verdict of guilty." The trial court then instructed: "It is to be noted that the statute has no requirement of knowledge or intent so as to require that the State prove either that the Defendant knew he was in violation of or intended to violate the statute when he failed to return the form in person within three business days."[1] After deliberations, the jury returned a verdict of guilty on 18 March 2014. Defendant consequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 127 to 165 months' imprisonment. Defendant appealed.

II. Analysis

Defendant contends that the trial court erred in denying his motion to dismiss, because the State failed to present sufficient evidence that Defendant actually received the verification form. We agree and, for the following reasons, vacate the lower court's judgment.

This Court reviews a 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), wherein this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation mark and citation omitted). Upon the defendant's motion, this Court's inquiry is "whether

1. As discussed hereinafter, the trial court may have been under an erroneous view of law existent at the time of trial. The trial judge cited to and quoted *State v. Young*, 140 N.C. App. 1, 8, 535 S.E.2d 380, 384 (2000), *disc. review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001), for the proposition that "the statute has no requirement of knowledge or intent, so as to require that the State prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address." *Id.* As will be discussed below, this conclusion was based on an older version of the statute which had removed a previously-included *mens rea* requirement and, therefore, our Supreme Court had interpreted the amendment to mean that a violation of the statue was a strict liability offense. *See State v. Bryant*, 359 N.C. 554, 562, 614 S.E.2d 479, 484 (2005), *on remand*, 178 N.C. App. 742, 632 S.E.2d 599 (2006) (unpublished). The statute was amended in 2006 to provide that registrants who "willfully" failed to comply with sex offender laws on or after 1 December 2006 would be guilty of a Class F Felony. 2006 Sess. Laws 1065, 1070, 1085-86, Ch. 247 §§ 8(a), 22.

there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In making this determination, "all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (internal quotation marks omitted). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration. However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (internal citation and quotation marks omitted).

Defendant was convicted of violating N.C. Gen. Stat. § 14-208.11, which provides in pertinent part: "A person required by this Article to register who willfully does any of the following is guilty of a Class F Felony: . . . (3) Fails to return a verification notice as required under [N.C. Gen. Stat.] § 14-208.9A." N.C. Gen. Stat. § 14-208.11(a)(3). Because N.C. Gen. Stat. §§ 14-208.9 and 14-208.11 " 'deal with the same subject matter, they must be construed in *pari materia* to give effect to each.' " *State v. Fox*, 216 N.C. App. 153, 156, 716 S.E.2d 261, 264 (2011) (quoting *State v. Holmes*, 149 N.C. App. 572, 576, 562 S.E.2d 26, 30 (2002)). N.C. Gen. Stat. § 14-208.9A(a), listed above, states in pertinent part:

> (1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division[2] shall mail a nonforwardable verification form to the last reported address of the person.
>
> (2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.
>
> (3) The verification form shall be signed by the person and shall indicate the following:

2. As of 1 July 2014, "Division" was changed to "Department of Public Safety." *See* 2014 N.C. Sess. Laws Ch. 100, S.B. 744.

a. Whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.

b. Whether the person still uses or intends to use any online identifiers last reported to the sheriff. If the person has any new or different online identifiers, then the person shall provide those online identifiers to the sheriff.

c. Whether the person still uses or intends to use the name under which the person registered and last reported to the sheriff. If the person has any new or different name, then the person shall provide that name to the sheriff.

. . . .

(4) If the person fails to return the verification form in person to the sheriff within three business days after receipt of the form, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. If the person cannot be found at the registered address and has failed to report a change of address, the person is subject to the penalties provided in [N.C. Gen. Stat.] § 14-208.11, unless the person reports in person to the sheriff and proves that the person has not changed his or her residential address.

N.C. Gen. Stat. § 14-208.9A(a) (2013). In *State v. Braswell*, 203 N.C. App. 736, 692 S.E.2d 435 (2010), a jury found the defendant guilty of violating N.C. Gen. Stat. § 14-208.11 for failure to register as a sex offender by failing to verify his address, because the defendant failed to return a verification form pursuant to N.C. Gen. Stat. § 14-208.9A(a)(4).[3] *Id.* Accordingly, this Court interpreted what constitutes a violation of Section 14-208.9A(a)(4) and concluded that

3. We recognize that this Court in *Braswell* was interpreting an older version of the statute. However, the relevant portions interpreted are identical. *See* 2006 N.C. Sess. Laws Ch. 247, H.B. 1896.

> [i]n order to be convicted for failure to return the verification form after the receipt of the form pursuant to N.C. Gen. Stat. § 14-208.9A(a)(4), a defendant must have *actually* received the verification form. . . . The statute goes on to require that if the form is not timely returned, that the "sheriff shall make a reasonable attempt to verify that the person is residing at the registered address." N.C. Gen. Stat. § 14-208.9A(a)(4). . . .
>
> However, if a defendant is not found to be at the registered address, the crime to be charged is failure to report a change of address, subject to a defendant proving that he or she has "not changed his or her residential address." N.C. Gen. Stat. § 14-208.9A(a)(4).

Id. at 738-39, 692 S.E.2d at 437 (emphasis added).

Therefore, to convict for the crime of failing to return a verification form as required under N.C. Gen. Stat. § 14-208.9A(a)(4), the State must prove five essential elements: (1) the defendant is a "person required . . . to register," N.C. Gen. Stat. § 14-208.11(a); (2) the SBI mailed a nonforwardable verification form to the defendant's last reported address, *id.* § 14-208.9A(a)(1); (3) the defendant actually received the verification form, *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435; (4) "the sheriff [made] a reasonable attempt to verify that the [defendant] is residing at the registered address[,]" N.C. Gen. Stat. § 14-208.9A(4); *see also Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435; and (5) the defendant *willfully* failed to "return the verification form in person to the sheriff within three business days[,]" N.C. Gen. Stat. §§ 14-208.9A(a)(4), 14-208.11(a). "When reviewing a defendant's motion to dismiss for insufficiency of the evidence, this Court must determine whether there is substantial evidence of every essential element of the offense." *Holmes*, 149 N.C. App. at 577, 562 S.E.2d at 31 (citation omitted). Here, essential elements one and two are uncontested.

A. Element Three: Actual Receipt

Defendant argues that the State presented insufficient evidence of element three, that he actually received the verification form, and cites to *Braswell* for his assertion that: "The statute requires actual receipt of the verification form by the defendant, not simply the verification form being mailed and received by someone." The State argues that it met its burden to show receipt and that *Braswell* is distinguishable because the mailing receipt in that case was returned unclaimed to the sheriff's office.

In *Braswell*, this Court held that the State failed to present sufficient evidence of receipt of the verification form in a similar situation and vacated the trial court's judgment sentencing the defendant for failure to register as a sex offender. *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435. The defendant in *Braswell* was a registered sex offender who verified his registration information as required in May 2007, November 2007, and May 2008. *Id.* at 737, 692 S.E.2d at 436. When the SBI mailed a verification form in November 2008 via certified mail, return receipt requested, it was returned unclaimed to the Durham County Sheriff's Office on 2 December 2008. *Id.* On 23 January 2009, a deputy presented on two separate occasions to the defendant's last registered address in an attempt to verify his residence, but no one answered the door both times. *Id.* That same day, a warrant was issued for the defendant's arrest in violation of N.C. Gen. Stat. § 14-208.11. *Id.*

The defendant was indicted for failing to register as a sex offender by failing to verify his address for failure to return the verification form. *Id.* At trial, the defendant in *Braswell* testified that he never received the verification from; that he went to the sheriff's office to meet with the person in charge of the sex offender registration program to inquire about it, but she was out sick; that he made several calls to the person in charge of the program, never spoke with her, but left several messages; and that when he went to the sheriff's office in February 2009, he was arrested for failure to return the verification form. *Id.* The jury returned a guilty verdict against the defendant for failing to register as a sex offender by failing to verify his address. *Id.*

The defendant appealed to this Court and argued that the trial court erred in denying his motion to dismiss for insufficient evidence that the defendant received the verification form. *Id.* The State conceded error and this Court vacated the trial court's judgment, holding that

> [i]n order to be convicted for failure to return the verification form after the receipt of the form pursuant to N.C. Gen. Stat. § 14-208.9A(a)(4), a defendant must have *actually* received the verification form. The evidence is uncontroverted that defendant never received the form; therefore, he cannot be convicted for failure to return the verification form.

Braswell, 203 N.C. App. at 739, 692 S.E.2d at 437 (emphasis added).

We recognize that in *Braswell*, the State conceded error, and it was uncontroverted that the defendant never received the verification form,

as the certified mailing receipt was returned unclaimed. However, we are bound by our decision in *Braswell* that a registrant must *actually* receive the verification form before being convicted for the failure to return it. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). In *Braswell*, evidence was presented that a nonforwardable verification form was sent to the defendant's last registered address, but this was insufficient to sustain the conviction of failure to register as a sex offender for failure to verify his address. Therefore, in the instant case, we find unpersuasive the State's contention that "N.C.G.S. § 14-208.9A indicates that a nonforwardable verification form shall be sent to the last reported address of the offender[.] . . . The evidence presented at trial shows that this statute was complied with by the State." Furthermore, in *Braswell*, there was evidence that the defendant was familiar with the semi-annual verification requirement, as he had timely and properly verified his information in the past. Therefore, in the instant case, the State's assertion that Defendant "was on notice of the requirement that he verify his information on the first anniversary of his registration date and every six months afterward" is of no consequence and also unpersuasive.

The State contends that it satisfied its burden to show receipt of the verification form by presenting the following evidence: that Defendant initially registered with Cleveland County in 2003 and was made aware of his regular registration requirements; that "[o]n or about the anniversary date and subsequent verification dates, the State's sexual offender coordination unit mails a certified letter/packet" to registrants' last reported addresses; that the AVSO letter informs the registrant that he or she must appear within three business days to verify or update his or her information at the sheriff's office; "that the State system mailed certified [AVSO] letters to [D]efendant in 2012, January 2013 and 2014 and he timely appeared in person at the Sheriff's office to verify his information[;]" and that in July 2013, AVSO letter was sent via certified mail, return receipt requested, to Defendant's last registered address, and the mailing receipt was signed by Smith and returned to the sheriff's office. We are not persuaded this constitutes actual receipt as considered in *Braswell* and note that actual receipt could have been easily shown by the State if it simply checked the box marked "Restricted Delivery?" and paid the extra fee to restrict delivery of the AVSO letter to the addressee, the sex offender.

In its brief, the State argues that "[t]he statute does not indicate nor require that the offender personally sign for the letter." It is true that the statute does not require the offender personally sign for the letter; however, it does require that the offender *actually* receives the form. *See* N.C. Gen. Stat. § 14-208.9A(a)(2) ("The *person* shall return the verification form . . . *after the receipt of the form*.") (emphasis added); *Braswell*, 203 N.C. App. at 737, 692 S.E.2d at 437 ("[A] defendant must have *actually* received the verification form.") (emphasis added).

Moreover, "[o]ur rules of statutory construction provide that '[s]tatutes imposing penalties are . . . strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction.' " *Holmes*, 149 N.C. App. at 576, 562 S.E.2d at 30 (quoting *Winston-Salem Joint Venture v. City of Winston-Salem*, 54 N.C App. 202, 205, 282 S.E.2d 509, 511 (1981)). Strictly construing N.C. Gen. Stat. § 14-208.9A, and bound as we are by our holding in *Braswell*, we conclude that "receipt" contemplates actual, and not constructive, receipt of the verification form by the registrant. Additionally, interpreting the clause "after receipt of the form" as considered in N.C. Gen. Stat. § 14-208.9A to identify someone other than the registrant—the "person" who potentially faces a Class F Felony—is a construction that would result in an impermissible extension of the criminal statute.

B. Element Four: Reasonable Attempt by Sheriff's Office to Verify Address

This Court cannot agree with the State in its assertion that: "The evidence presented at trial shows that this statute was complied with by the State[,]" because the State failed to show substantial evidence that the sheriff's office attempted to verify Defendant's address. N.C. Gen. Stat. § 14-208.9A(4) provides: "If the person fails to report in person and provide written verification as provided by this section, the sheriff *shall* make a reasonable attempt to verify that the person is residing at the registered address." *Id.* (emphasis added). This Court in *Braswell* noted that: "The statute goes on to require that if the form is not timely returned, that the 'sheriff shall make a reasonable attempt to verify that the person is residing at the registered address.' N.C. Gen. Stat. § 14-208.9A(a)(4). Deputy Baker performed this duty in the instant case." *Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 437.

Furthermore, the legislative history of N.C. Gen. Stat. § 14-208.9A(a)(4) indicates that our General Assembly intended for the sheriff's office to make a reasonable attempt to verify that a registrant is still residing at the registered address before subjecting the person to the penalties provided

in N.C. Gen. Stat. § 14-208.11. Prior to 2006, N.C. Gen. Stat. § 14-208.9A(a)(4) provided: "*If the verification form is returned to the sheriff as undeliverable*, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address." 2006 N.C. Sess. Laws 247, HB 1896, § 7(a) (emphasis added). The legislature amended the statute in 2006 to replace this language with: "*If the person fails to report in person and provide the written verification as provided by this section*, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address." *Id.* When the General Assembly amends a statute, " 'the presumption is that the legislature intended to change the law.' " *State v. White*, 162 N.C. App. 183, 189, 590 S.E.2d 448, 452 (2004) (quoting *State ex rel. Utilities Comm'n. v. Public Service Co.*, 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983)). Thus, by replacing the condition "the verification form is returned . . . undeliverable" with the condition "the person fails to report in person and provide the written verification[,]" the General Assembly expressed its intent to impose the duty on the sheriff's office to make a reasonable attempt to verify the person is residing at his or her last registered address before initiating charges against the registrant under N.C. Gen. Stat. § 14-208.9A(a)(4). We conclude as a matter of statutory construction that N.C. Gen. Stat. § 14-208.9A requires a showing that the sheriff's office made a reasonable attempt to verify the person is still residing at his or her last reported address before initiating criminal proceedings against the person.

The State failed to show that the sheriff's department performed this duty in the instant case. The evidence indicates that the only attempt Deputy Proctor made to verify that Defendant still resided at his last registered address was to confirm with the local jail that Defendant was not incarcerated. The evidence also indicates that Lieutenant Acuff made no attempt at all; rather, he issued an arrest warrant for Defendant the same day he received Deputy Proctor's report. Had the deputies performed their statutory duty in the instant case, this alleged violation would likely have been resolved before entering the court system.

C. Element Five: *Willful* Failure to Return the Verification Form

The record contains insufficient evidence that a jury could find Defendant *willfully* failed to return the verification form under N.C. Gen. Stat. § 14-208.9A(a).

While our Supreme Court has held that violating N.C. Gen. Stat. § 14-208.11(a) is a "strict liability offense," *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citing *Bryant*, 359 N.C. at 562, 614 S.E.2d at 484), this conclusion was based upon "a 1997 amendment

. . . deleting the statutory *mens rea* requirement," *Bryant*, 359 N.C. at 562, 614 S.E.2d at 484, which had previously provided that "only those offenders 'who, knowingly and with the intent to violate the registration provisions' " would be guilty. *Id.*; 1997 N.C. Sess. Laws at 2281-82 (codified as amended at N.C. Gen. Stat. § 14-2011 (1997)). Our Supreme Court thus concluded that "no showing of knowledge or intent is necessary to establish a violation of N.C.G.S. § 14-208.11." *Bryant*, 359 N.C. at 563, 614 S.E.2d at 484.

However, our legislature reinserted a statutory *mens rea* requirement of "willfulness" effective 1 December 2006. 2006 N.C. Sess. Laws, Ch. 247. By virtue of this 2006 amendment, we believe, as previously reasoned by this Court, that the legislature intended to consider violations under these provisions not as strict liability offenses, but as offenses requiring a showing of the requisite intent of willfulness. *See, e.g.*, *Fox*, 216 N.C. App. at 156 n.1, 716 S.E.2d at 264 n.1 ("[W]ith its 2006 amendment, the General Assembly re-introduced intent-based language into the provision, effectively reviving the original *mens rea* requirement that had first been removed by the 1997 amendment and had rendered a violation of the statute a strict liability offense. Consequently, we believe that the elements of this offense should reflect the General Assembly's reintroduction of intent-based language into the statute in 2006.").

" 'Willful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Crockett*, __ N.C. App. __, __, 767 S.E.2d 78, 85 (2014) (quoting *State v. Arnold*, 264 N.C. 348, 49, 141 S.E.2d 473, 474 (1965)).

> The word wilful, used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it without authority—careless whether he has the right or not—in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Barr, 218 N.C. App. 329, 335, 721 S.E.2d 395, 400 (2012) (quoting *In re Adoption of Hoose*, 243 N.C. 589, 594, 91 S.E.2d 555, 558 (1956) (quotation omitted)). Here, even when viewed in the light most favorable to it, the State failed to show any evidence of willfulness on behalf of Defendant. To the contrary, Smith's testimony that she never remembered signing for the July 2013 AVSO letter and that she discovered the

misplaced AVSO letter months later, provides an excuse for Defendant's failure to return the verification form by 16 July 2013—that he never received it until October.

While the defendant's evidence is typically not to be taken into consideration, "the defendant's evidence may be used to explain or clarify that offered by the State." *Nabors*, 365 N.C. at 312, 718 S.E.2d at 627 (internal citation and quotation marks omitted). Here, Defendant's evidence of Smith's testimony that she did not remember signing for the AVSO letter; that she first learned of its misplacement when Defendant called her from jail; that Smith located the misplaced AVSO letter in between the sofa cushions in an unfrequented room, because she gained a new vantage point by standing on a chair to change the curtains in October; and that she immediately gave the AVSO letter to Defendant, explains and clarifies the State's evidence that Defendant returned the July 2013 verification form to the sheriff's office on 23 October 2013. We conclude the State provided no evidence of criminal intent as required to bring Defendant within the meaning of the criminal statute.

In summary, the State did not present sufficient evidence that Defendant actually received the verification form on 11 July 2013, as required to trigger the provisions of N.C. Gen. Stat. § 14-208.11(a)(3) against him for a willful failure to return the verification form. Put another way, the State presented no evidence from which a reasonable inference could be drawn that: first, Defendant actually received the verification form as required for a conviction of failure to return the verification form under N.C. Gen. Stat. § 14-208.9A(a)(4), *see Braswell*, 203 N.C. App. at 738-39, 692 S.E.2d at 435; second, the sheriff's office made a reasonable attempt to verify Defendant still resided at his last reported address; and third, Defendant acted willfully in failing to return the verification form. Therefore, Defendant's conviction for failure to return the verification form, which resulted in a judgment of approximately 10.5 to 13.75 years' imprisonment, should be vacated. *See State v. Richardson*, 202 N.C. App. 570, 574, 689 S.E.2d 188, 191-92 (2010) (vacating the defendant's convictions based upon the trial court erroneously denying the defendant's motions to dismiss).

III. Conclusion

For the foregoing reasons, we vacate the judgment of the below court.

VACATED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
JOHNNY RAY STURDIVANT

No. COA14-1049

Filed 7 April 2015

Sentencing—prior record level—AOC report—identification of defendant

The trial court correctly determined that a defendant who plead guilty had six prior record points and was a felony record level III. Defendant received precisely the sentences for which he bargained, which were from the presumptive range of sentences for a defendant at felony sentencing level III. Defendant contended that he should have been sentenced at Level II because the State did not prove that one of the prior convictions was his. Although the birthdate on the AOC report was incorrect and the address was not defendant's address at the time of sentencing, it is not unusual for a person to have lived at a different address fourteen years earlier, and the discrepancy in the date of defendant's birth was not determinative. It is the role of the trial court to weigh the evidence, and the appellate court is bound by the trial court's determinations if supported by evidence in the record.

Appeal by defendant from judgments entered 2 April 2014 by Judge Ebern T. Watson, III, in Hoke County Superior Court. Heard in the Court of Appeals 16 February 2015.

Roy Cooper, *Attorney General*, *by Angenette Stephenson*, *Assistant Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by John F. Carella*, *Assistant Appellate Defender*, *for defendant-appellant.*

STEELMAN, Judge.

The trial court correctly determined the number of prior record points and record level of the defendant.

I. Factual and Procedural Background

On 2 April 2014, Johnny Ray Sturdivant (defendant) pled guilty to one count of attempted first degree statutory rape of a person 13,

14, or 15 years old, and nine counts of taking indecent liberties with a child. Defendant's plea arrangement with the State provided that all other charges against defendant were to be dismissed, and that defendant would be sentenced to three consecutive active sentences of 96-125 months, 21-26 months, and 21-26 months.

The trial court accepted defendant's plea, found defendant to be a prior record level III for purposes of felony sentencing, and entered three judgments imposing consecutive, active sentences in accordance with the plea agreement.

Defendant appeals.

II. Standard of Review

We review alleged sentencing errors for whether the sentence is supported by evidence introduced at the trial and sentencing hearing. *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." N.C. Gen. Stat. § 15A-1340.14(f) (2013).

III. Computation of Defendant's Felony Sentencing Level

In his only argument on appeal, defendant contends that the trial court incorrectly determined that he had six prior record points and was a felony record level III. We disagree.

We first note that defendant's plea arrangement was a plea bargain as to sentence as provided in N.C. Gen. Stat. §§ 15A-1021(c) and 15A-1023. Defendant received precisely the sentences for which he bargained, which were from the presumptive range of sentences for a defendant at felony sentencing level III.

At the sentencing hearing, defendant did not stipulate to his prior convictions or record level. The State submitted a print-out of defendant's record from the Administrative Office of the Courts (AOC). Defendant offered no evidence. The trial court found that defendant had six prior record points and was a prior record level III for felony sentencing. On appeal, defendant only contests one of the convictions found by the court, for communicating threats in Hoke County case 96 CRS 2984. He contends that the State failed to meet its burden of proving that this was a conviction of defendant, arguing that "the birthdate in the report was incorrect and the address was not Mr. Sturdivant's address at

the time of sentencing." Defendant contends that if the one sentencing point was removed, he would only be a prior record level II.

We first note that the address of defendant shown in the print-out for this conviction, "Lot 9 Lumbee Est MHP, Raeford, NC 28376," is the address for nine of defendant's cases prior to 2000, with the remaining five cases having the address of "Lot 7 Harts MHP, Raeford, NC 28376." We hold that the fact that defendant was living at a different address at the time of sentencing is not controlling on the issue of whether this conviction was that of defendant. The sentencing hearing was held in 2014, and it is not unusual for a person to have lived at a different address fourteen years earlier.

The charges in this case showed defendant's date of birth to be 27 March 1974. The AOC print-out presented at the sentencing hearing by the State identifies defendant by the same name and social security number, but contains two different birthdates; 27 January 1974 and 27 March 1974.

Under the provisions of N.C. Gen. Stat. § 15A-1340.14(f), a copy of a record maintained by the AOC "bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court. . ." N.C. Gen. Stat. § 15A-1340.14(f) (2013). As noted in Section II of this opinion, we review the sentence of the trial court to see if it is supported by evidence in the record. In the instant case, the identity of the name of the defendant is *prima facie* evidence that the record is that of the defendant. The name, coupled with the social security number and the same address in nine of his pre-2000 cases, provides evidence in the record that the conviction for communicating threats in Hoke County case 96 CRS 2984 was that of the defendant. Under the rationale of *State v. Safrit*, 154 N.C. App. 727, 572 S.E.2d 863 (2002), the discrepancy in the date of defendant's birth is not determinative. It is the role of the trial court to weigh the evidence, and this Court is bound by the trial court's determinations if supported by evidence in the record.

This argument is without merit.

IV. Conclusion

We affirm the trial court's decision to assess one sentencing point for defendant's conviction for communicating threats in Hoke County case 96 CRS 2984, and its determination that defendant was a prior record level III for felony sentencing.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

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