240 N.C. App.—No. 4 Pages 483-604

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*MAY 1, 2017*

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

**THE COURT OF APPEALS**

**OF**

**NORTH CAROLINA**

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LINDA M. McGEE

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SANFORD L. STEELMAN, JR.[2]
MARTHA GEER[3]

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

*Clerk*
DANIEL M. HORNE, JR.

*Assistant Clerk*
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[4] 1 January 2016.

# COURT OF APPEALS

## CASES REPORTED

### FILED 21 APRIL 2015



## CASES REPORTED WITHOUT PUBLISHED OPINIONS



## HEADNOTE INDEX

### APPEAL AND ERROR

**Appeal and Error—interlocutory appeals and orders—substantial rights doctrine—underlying show cause order dismissed—no appellate jurisdiction—**An appeal was dismissed for lack of appellate jurisdiction where the underlying show cause order was dismissed and defendant no longer faced any threat of contempt or incarceration. The Court of Appeals cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order does not affect a substantial right. When this occurs, the proper course for the appellant is to petition for a writ of certiorari. **State of N. C. v. Oakes, 580.**

### CONSTITUTIONAL LAW

**Constitutional Law—effective assistance of counsel—failure to argue fatal variance in indictment—improper school address—surplusage—**The trial court did not err in a possession of a weapon on educational property case by

concluding that defendant did not receive ineffective assistance of counsel based on his failure to argue a fatal variance in the indictment regarding an improper school address. The indictment charged all of the essential elements of the crime and the physical address for High Point University listed in the indictment was surplusage. The indictment already described the educational property element as High Point University. **State v. Huckelba, 544.**

**EMINENT DOMAIN**

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**EMPLOYER AND EMPLOYEE**

**Employer and Employee—deputy sheriff—policymaking position—termination for political reasons—freedom of speech—**The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer on plaintiff employee's state constitutional claim based on wrongful termination of employment. Even assuming that the sheriff terminated plaintiff's employment for political reasons, the termination did not violate plaintiff's rights under the Constitution because, as a deputy sheriff, plaintiff occupied a policymaking position and therefore could be fired for political reasons. **Young v. Bailey, 595.**

**Employer and Employee—statutory prohibition on termination for political reasons—not applicable to employees of sheriff—**The trial court did not err by entering summary judgment in favor of defendant Sheriff of Mecklenburg County and his insurer in plaintiff employee's action for wrongful termination of employment. The termination of plaintiff, a deputy sheriff, did not violate N.C.G.S. § 153A-99 because plaintiff, as an employee of the sheriff, was not an employee of the county. **Young v. Bailey, 595.**

**INDICTMENT AND INFORMATION**

**Indictment and Information—sex offender's failure to register change of address—indictment sufficient—**The indictment charging defendant with violating N.C.G.S. § 14-208.11(a)(2) was sufficient to confer subject matter jurisdiction upon the trial court. While defendant argued that the language of the indictment did not provide that he failed to notify the sheriff's office in writing, defendant's indictment sufficiently alleged that defendant was a person required to register as a sex offender; that he changed his address; and that he failed to notify the appropriate agency within three business days after moving. **State v. Leaks, 573.**

**LARCENY**

**Larceny—of a motor vehicle—ineffective assistance of counsel—dismissed—**On appeal from his conviction for larceny of a motor vehicle, defendant's ineffective

assistance of counsel claim was dismissed without prejudice. Ineffective assistance of counsel claims should be asserted through a motion for appropriate relief, which allows development of an adequate factual record to determine the reasonableness of trial counsel's conduct. **State v. Hole, 537.**

**Larceny—of a motor vehicle—jury instruction—voluntary intoxication—**In defendant's trial resulting in his conviction for larceny of a motor vehicle, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. Because the trial court properly instructed the jury on the issue of voluntary intoxication, defendant could not show that the jury probably would have reached a different result if it had also received the instruction on unauthorized use of a motor vehicle. **State v. Hole, 537.**

## MORTGAGES

**Mortgages—satisfaction of note—bank no longer the holder—**In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, there was no genuine issue of fact that a bank (Mountain 1st) was not the noteholder on 4 June 2010, when a certificate of satisfaction from Mountain 1st was recorded, purporting to cancel the property owners' obligation under a note. HSBC Bank USA, N.A. (HSBC) was subsequently assigned the note and sought the funds from the sale of the property, which had been placed in escrow. The record demonstrated no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010. **In re Dispute Over Sum of $375,757.47, 505.**

**Mortgages—satisfaction of note—subsequent to transfer to another bank—** In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, a satisfaction executed by a bank was invalid and of no legal effect where the bank had assigned the note prior to the date the satisfaction was executed. **In re Dispute Over Sum of $375,757.47, 505.**

**Mortgages—satisfaction of note—transfer of note—summary judgement as to holder—**In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the property owner failed to forecast evidence sufficient to overcome the legal presumption and physical fact that HSBC Bank USA, N.A. (HSBC) was the holder of the original promissory note. HSBC presented the original note in open court at the summary judgment hearing and the note was unambiguously indorsed in blank by Wells Fargo. Although the property owners alleged that the note and deed of trust were separate legal contracts and that the note did not incorporate the terms of the deed of trust, they cited no law or authority to support their position. **In re Dispute Over Sum of $375,757.47, 505.**

**Mortgages—satisfaction of transferred note—attorney fees—**In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly awarded attorneys' fees to HSBC Bank USA, N.A. (HSBC). Although the property owners argued that they were not provided the required statutory notice of HSBC's intent to collect attorneys' fees, the uncontroverted evidence showed otherwise. **In re Dispute Over Sum of $375,757.47, 505.**

**Mortgages—satisfaction of transferred note—escrow funds—**In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly ordered escrowed funds from the sale of the property to be paid to HSBC Bank USA, N.A. (HSBC). The deed of trust provided

Commission denying his claim for Workers' Compensation benefits, the Court of Appeals affirmed the Commission, holding that the challenged findings of facts were supported by competent evidence; any reliance on incompetent evidence was not prejudicial; the evidence was not weighed improperly; and the Deputy Commissioner's findings of fact were not binding on the full Commission. **Lowe v. Branson Auto., 523.**

**Workers' Compensation—temporary total disability—failure to meet burden—expert testimony—inability to find any other work—**The Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary total disability (TTD) benefits. Plaintiff did not meet his burden to show that he was entitled to TTD compensation. Because plaintiff failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury, the opinion and award was reversed. **Fields v. H&E Equip. Servs., LLC, 483.**

## 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.

PAUL FIELDS, EMPLOYEE, PLAINTIFF
v.
H&E EQUIPMENT SERVICES, LLC, EMPLOYER, TRAVELERS, CARRIER, DEFENDANTS

No. COA14-1094

Filed 21 April 2015

**Workers' Compensation—temporary total disability—failure to meet burden—expert testimony—inability to find any other work**

The Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary total disability (TTD) benefits. Plaintiff did not meet his burden to show that he was entitled to TTD compensation. Because plaintiff failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury, the opinion and award was reversed.

Appeal by Defendants from Opinion and Award entered 21 May 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 18 February 2015.

*Hutchens Law Firm, by William L. Senter and Maggie S. Bennington, for the plaintiff-appellee.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Ryan W. Keevan, for the defendant-appellants.*

HUNTER, JR. Robert N., Judge.

Paul Fields ("Plaintiff") was injured at his place of employment on 24 May 2012. This injury resulted in significant pain and loss of physical capability. The Full Industrial Commission awarded Plaintiff total temporary disability ("TTD") compensation. H&E Equipment Services, LLC and Travelers ("Defendants") appeal, arguing that Plaintiff did not meet his burden to show that he is entitled to TTD compensation. Because Plaintiff failed to provide competent evidence through expert testimony of his inability to find any other work as a result of his work-related injury, we reverse the Opinion and Award.

## I. Factual & Procedural History

Plaintiff was employed as a mechanic for Defendant H&E Equipment Services for over eleven years. He is a sixty-five year old man with a tenth-grade education and some computer skills. Plaintiff's job as a mechanic involved physical activities such as changing batteries, tires, brakes, and other types of equipment. He was regularly required to stoop and lift, sometimes in excess of forty pounds. Beginning in 2006, Plaintiff saw Dr. James E. Rice ("Dr. Rice") for pain in his back. These visits escalated in 2011, when Plaintiff saw Dr. Rice three times for back and leg pain, at which time Dr. Rice placed Plaintiff on a home exercise program and gave him prescriptions for pain medicine and muscle relaxers. In addition to the prescriptions and exercise regimen, Dr. Rice also placed Plaintiff under a work restriction of lifting no more than twenty-five pounds. Dr. Rice also acknowledged that Plaintiff's condition, likely a degenerative disc disease, was expected to worsen over time without regard to work-related activities.

On 24 May 2012, Plaintiff sustained a back injury at his place of employment while removing a forty-three-pound battery from a vehicle, in violation of Defendant's and Dr. Rice's lifting restrictions. Plaintiff felt a "sting" in his back after lifting the battery, resulting in steadily increasing back and leg pain over the next few days. The following Tuesday, 29 May 2012, Plaintiff went to the emergency room for his pain. Plaintiff subsequently notified his employer of his accident and inability to work. Plaintiff's co-worker, Jeff Zima, took Plaintiff to U.S. Healthworks multiple times, for which Defendants covered the cost. After the second visit, U.S. Healthworks discharged Plaintiff, but Plaintiff sought continued help and treatment from Dr. Rice.

Dr. Rice noted Plaintiff's condition had worsened, with extremely limited ability to bend his back and legs. Additionally, Plaintiff's ranges of motion were limited and his spine and back muscles demonstrated increased tenderness, lumbar strain, lumbar degenerative disc disease, and sciatica. An MRI revealed significant changes in the lower three levels of his back. Dr. Rice then recommended that Plaintiff not return to his regular work and placed him on prescription pain medications and muscle relaxers. Plaintiff returned to Dr. Rice over the next few months with consistent back pain radiating through his legs, some numbness, and limited range of spinal and leg mobility. Dr. Rice testified it was more likely than not within a reasonable degree of medical certainty that Plaintiff had a pre-existing condition that had been aggravated by his work-related injury. Additionally, should Plaintiff's condition not improve, Dr. Rice stated he would recommend Plaintiff undergo surgery.

On 2 August 2012, Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or Dependent) and a Form 33 (Request that Claim be Assigned for Hearing), alleging a compensable injury to his back. On 1 October 2012, Defendant completed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease), and a Form 61, denying the compensability of Plaintiff's back claim on the grounds that he did not sustain a specific traumatic incident.

On 19 April 2013, Plaintiff's case was heard by Deputy Commissioner Robert J. Harris. On 30 October 2013, Deputy Commissioner Harris issued an opinion finding that Plaintiff had established ongoing disability as of 24 May 2012 and was entitled to TTD benefits from 25 May 2012 through the present and ongoing. Plaintiff's employer was ordered to pay Plaintiff's TTD benefits at the rate of $506.69 per week from 25 May 2012 onward, as well as payment for Plaintiff's medical treatments beginning 24 May 2012. Defendants gave proper Notice of Appeal to the Full Commission on 30 October 2013.

On 21 May 2014, the Full Commission issued an Opinion and Award affirming the Deputy Commissioner's decision. Defendants then filed a notice of appeal of the order of the Full Commission to this Court on 24 June 2014.

## II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2014).

## III. Standard of Review

"'Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.'" *Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). The Industrial Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), and therefore "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence 'notwithstanding evidence that might support a contrary finding.'" *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 34, 671 S.E.2d 14, 17 (2009) (quoting *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002)). "Unchallenged findings of fact are presumed to

be supported by competent evidence and are binding on appeal." *Allred*, ___ N.C. App. at ___, 743 S.E.2d at 51. "The Commission's conclusions of law are reviewable *de novo*." *Id.* "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotations omitted).

## IV. Analysis

The issue on appeal is whether the Full Commission erred in awarding Plaintiff disability benefits: specifically, whether Plaintiff failed to meet his burden of showing that he is disabled as a result of a work injury. Defendants argue that the Full Commission's Finding of Fact No. 37 is not supported by competent evidence in the record. Finding of Fact No. 37 states that, based on the evidence, it would be futile for Plaintiff to seek competitive employment that conforms with the work restrictions placed on Plaintiff by his doctor. Defendants also challenge the Commission's Conclusion of Law No. 4, based on Finding of Fact No. 37. Conclusion of Law No. 4 states:

> Plaintiff has met his burden of proving disability under prong three (3) of *Russell* by demonstrating that he has been and continues to be disabled as a result of his compensable 24 May 2012 injury in that it has been and continues to be futile for him to seek competitive employment that comports with the work restrictions that Dr. Rice has placed on him related to his 24 May 2012 injury. As such, plaintiff is entitled to temporary total disability compensation from 25 May 2012 through the present and continuing until plaintiff returns to work or further Order of the Commission.

The Workers' Compensation Act requires an employee seeking compensation to prove the existence of his disability and its extent. *Newnam v. New Hanover Reg'l Med. Ctr.*, 212 N.C. App. 271, 282, 711 S.E.2d 194, 202 (2011). In order to prove compensable disability, our Supreme Court requires a plaintiff to prove three things:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that . . . [the plaintiff's] incapacity to earn was caused by [his] . . . injury.

*Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). A plaintiff must establish all three of the *Hilliard* elements in order to prove that he is legally disabled. *Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 421, 760 S.E.2d 732, 737 (2014).

A plaintiff may satisfy the first two elements of *Hilliard* by producing one of the following: (1) medical evidence that he is mentally or physically incapable of working in any capacity; (2) evidence that he is capable of some work, but has not been able to find any; (3) evidence that he is capable of some work, but that it would be futile to attempt to find any based on his age, experience, or lack of education; or (4) evidence that he has obtained employment at a lower wage than his previous employment. *See Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). These are known as the *Russell* factors, and a plaintiff need only produce evidence of one *Russell* factor to satisfy the first two prongs of *Hilliard*. *See id.*

When an employee's attempts to obtain employment "would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986). In *Peoples* and a similar case, *Roset-Eredia v. F.W. Dillinger, Inc.*, medical and vocational expert testimony was offered to demonstrate futility of effort based on extreme injury, pain, and lack of transferable skill in a competitive market. *See Peoples*, 316 N.C. at 442-43, 342 S.E.2d at 809; *Roset-Eredia*, 190 N.C. App. 520, 525, 660 S.E.2d 592, 596-97 (2008).

In this case, Defendants argue that Plaintiff did not sufficiently demonstrate futility under the third prong of *Russell*. We agree.

Here, Plaintiff failed to meet prongs one, two, or four of *Russell* because he did not present any evidence of an attempt to gain employment as required by prongs two and four, nor that he is incapacitated so severely that he is incapable of working in *any* capacity as required by prong one. *See Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Plaintiff's only remaining option to satisfy *Russell*, and thus, *Hilliard*, is prong three, which requires a showing of evidence that it would be futile for Plaintiff to attempt to find any work because of his age, experience, or lack of education. *See id.*

Plaintiff offered no testimony from a vocational expert that his preexisting condition made it futile to seek any other employment opportunities in his job market. There was no evidence presented of any labor

market statistics stating that his pre-existing condition made him incapable of re-entering the labor market. Plaintiff's medical expert did not state that his pre-existing condition or medical injury would make it impossible for him to work, only that he should not continue in his current role. Without any expert testimony establishing that Plaintiff's job with Defendant is the only job obtainable, or any evidence demonstrating that no other man of his age, education, experience, and physical capabilities is currently working anywhere, Plaintiff did not meet his burden of proof of disability under *Russell* prong three. Therefore, he failed to meet the first two requirements of *Hilliard*. *See Peoples*, 316 N.C. at 442-43, 342 S.E.2d at 809; *Roset-Eredia*, 190 N.C. App. at 525, 660 S.E.2d at 596-97 (concerning the need for vocational or medical expert testimony concerning futility of job search).

Defendants also argue that Plaintiff failed to present evidence to fulfill the third prong of *Hilliard*: "that . . . [the plaintiff's] incapacity to earn was caused by [his] . . . injury." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683. We reject this argument. Based on the testimony of Dr. Rice, an expert in orthopedics and spinal injuries, Plaintiff established that his ongoing pain and disability is a result of his work-related injury from 24 May 2012. Dr. Rice testified that the injury was an aggravation of a pre-existing condition caused by the work-related incident. He also noted that Plaintiff's condition is significantly worse than his condition prior to the injury on 24 May 2012. Dr. Rice further recommended after the injury on 24 May 2012 that Plaintiff not resume his previous work activities. This expert testimony is sufficient to meet the requirement of the third prong of *Hilliard*.

Nevertheless, because Plaintiff failed to meet his burden of proof by failing to produce competent evidence that it is futile for him to seek any other employment, he has not satisfied the first two prongs of *Hilliard*. The Commission's Finding of Fact No. 37 is not supported by competent evidence. Thus, the Commission erred in making Conclusion of Law No. 4. We reverse the Commission's Opinion and Award.

REVERSED.

Judge STEPHENS and Judge TYSON concur.

**IN RE C.J.H.**

[240 N.C. App. 489 (2015)]

IN THE MATTER OF C.J.H.

No. COA14-1176

Filed 21 April 2015

**1. Termination of Parental Rights—motion to continue hearing—denial not abuse of discretion**

In an action to terminate a father's parental rights, the trial court did not abuse its discretion by initially denying respondent's motion to continue because respondent had not demonstrated any "extraordinary circumstances" that necessitated a continuance. At the beginning of the 9 July 2014 hearing, more than 90 days after the petition was filed, respondent's counsel moved to continue the hearing due to respondent's absence. After hearing arguments from both respondent and petitioner, the trial court denied the motion. Although respondent argued that the trial court erred because the case had not been previously continued and there was no indication that an additional week or two would have prejudiced either party, respondent bore the burden of demonstrating sufficient grounds for continuance and petitioner had no burden to show lack of prejudice.

**2. Termination of Parental Rights—hearing—respondent not present initially—notice of arrival next day—allowing witness to finish testimony**

In a termination of parental rights case where respondent was not present for the hearing initially but called and said he would appear the next day, the trial court did not abuse its discretion in allowing the petitioner to finish the direct examination of her witnesses, given the trial court's finding that respondent knew the correct date of the hearing, that respondent's counsel was present during the entire hearing, and that respondent was present the next day when any cross-examination would have occurred.

**3. Termination of Parental Rights—abandonment—some support payments made**

The trial court's findings of fact in a termination of parental rights case were sufficient to support at least one ground for termination, abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7). The fact that respondent made some child support payments during the relevant six-month period did not undermine the trial court's findings that respondent did not voluntarily provide financial support for the juvenile before entry of a Tennessee child support order and

that he failed to provide timely, consistent child support since the entry of that order.

**4. Termination of Parental Rights—abandonment—requests for visitation—good faith—timeliness**

Clear, cogent, and convincing evidence in a termination of parental rights case supported the trial court's conclusion that respondent had failed to make a good faith effort to visit the child. The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith and, although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions.

**5. Termination of Parental Rights—abandonment—presents and cards—no prejudicial error**

In a termination of parental rights hearing, there was no prejudicial error where the trial court erred by finding that respondent failed to send birthday and Christmas presents or cards in 2014, considering the discussion elsewhere in the opinion.

**6. Termination of Parental Rights—abandonment—last-minute payments—last-minute requests for visitation**

The trial court did not err in a termination of parental rights case by concluding that respondent had abandoned the juvenile. The trial court found that, during the relevant six-month period, respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile. Respondent's last-minute child support payments and requests for visitation did not undermine the conclusion that respondent had abandoned the juvenile.

Appeal by respondent from order entered 21 July 2014 by Judge Timothy I. Finan in District Court, Wayne County. Heard in the Court of Appeals 16 March 2015.

*Mary McCullers Reece, for petitioner-appellee.*

*Jeffrey William Gillette, for respondent-appellant.*

STROUD, Judge.

Respondent-father appeals from an order terminating his parental rights to his daughter, C.J.H. ("Shelly").[1] Respondent contends that the trial court erred in denying his motion to continue and challenges all three of the trial court's grounds for termination of his parental rights. Because the trial court did not err in denying respondent's motion to continue and the trial court's findings of fact are sufficient to support at least one ground for termination, abandonment, we affirm the trial court's order.

## I. Background

While respondent and petitioner were dating, petitioner became pregnant with Shelly. In December 2008, Shelly was born. The three lived together in a mobile home in Tennessee for approximately eighteen months. On 31 May 2010, respondent left Shelly and petitioner without notifying petitioner that he intended to leave. A few months later, respondent resumed a previous relationship with another woman ("Ms. Smith") with whom he had previously fathered a child. At the time of the hearing, respondent, Ms. Smith, and their two children lived in Mountain City, Tennessee.

In July 2010, petitioner began to date another man ("Mr. Jones"). Mr. Jones assumed the position of Shelly's father as soon as petitioner and he began dating. In February 2012, petitioner and Shelly moved to Goldsboro, North Carolina to live with Mr. Jones, who is employed as a maintenance instructor crew chief at Seymour Johnson Air Force Base. In June 2012, petitioner and Mr. Jones married.

In June 2013, respondent emailed petitioner to inquire about the possibility of Mr. Jones adopting Shelly. But in January 2014, after receiving Consent to Adoption documents, respondent refused to consent to the adoption and requested visitation with Shelly.

On 4 March 2014, petitioner filed a petition to terminate respondent's parental rights to Shelly and alleged that Mr. Jones would like to adopt Shelly, which was served upon respondent on 14 April 2014. The trial court appointed Kevin MacQueen as respondent's counsel upon the petition's filing. Respondent did not file an answer or any other responsive pleadings to the petition. MacQueen represented respondent at the pre-trial conference held on 8 May 2014. In the pre-trial conference order,

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

which was entered with the consent of petitioner, respondent, and the guardian ad litem, the trial court set a hearing for 9 July 2014.

At the beginning of the hearing, respondent's counsel moved to continue the hearing due to respondent's absence. After hearing argument from both respondent and petitioner, the trial court denied the motion. During a break in the hearing, a juvenile court administrator informed the trial court that respondent had called to inquire what time the hearing began the following day. The trial court allowed petitioner to finish the direct examination of her witnesses that day. But in an effort to accommodate respondent who indicated he would arrive in Wayne County the next day, the trial court postponed the cross-examination of petitioner's witnesses to the afternoon of the next day. On 10 July 2014, respondent was present for the remainder of the hearing. He declined to cross-examine petitioner's witnesses but did present his own evidence.

On 21 July 2014, the trial court entered an order in which it found the following grounds for termination: (1) abandonment; (2) neglect; and (3) failure to establish paternity. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (5), (7) (2013). The trial court terminated respondent's parental rights to Shelly. On 20 August 2014, respondent gave timely notice of appeal.

## II. Motion to Continue

Respondent contends that the trial court erred in (1) denying his motion to continue at the beginning of the hearing; If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary

### A. Standard of Review

> A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation. Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue.

*In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (citations and quotation marks omitted). "Abuse of discretion results where the

court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 (brackets omitted), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* at 531, 679 S.E.2d at 909 (quotation marks omitted).

B. Analysis

**[1]** Respondent contends that the trial court abused its discretion in initially denying his motion to continue. N.C. Gen. Stat. § 7B-803 describes when a trial court may continue a hearing in an abuse, neglect, and dependency proceeding:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. Resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance.

N.C. Gen. Stat. § 7B-803 (2013). Additionally, N.C. Gen. Stat. § 7B-1109(d) provides: "Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance." *Id.* § 7B-1109(d) (2013).

At the beginning of the 9 July 2014 hearing, more than 90 days after the petition was filed, respondent's counsel moved to continue the hearing due to respondent's absence. The trial court denied the motion and allowed petitioner to present evidence. During a break in the hearing,

a juvenile court administrator informed the trial court that respondent had called to inquire what time the hearing began the following day. The trial court allowed petitioner to finish the direct examination of her witnesses that day. But in an effort to accommodate respondent who indicated he would arrive in Wayne County the next day, the trial court postponed the cross-examination of petitioner's witnesses to the afternoon of the next day.

The trial court made the following findings of fact that support its initial decision to deny respondent's motion to continue:

> 8. Pursuant to the Pre-Trial Order entered on May 8, 2014, this case was set for a special session of Wayne County Juvenile Court on Wednesday, July 9, 2014. The Order was delivered to all of the parties involved in this matter.
>
> 9. During the week prior to the trial of this matter, the Respondent Father contacted the Juvenile Court administrator, Allyson Smith, directly to request a continuance of this hearing and she advised him to contact his attorney, Kevin MacQueen.
>
> 10. Upon calling the case for hearing on July 9, 2014, Kevin MacQueen, counsel for the Respondent father[,] made a Motion to continue the hearing. . . . Mr. MacQueen advised the Court that he had written the Respondent Father on two occasions including sending the Respondent Father a copy of the Pre-Trial Order entered on May 8, 2014. Mr. MacQueen advised the Court that he had spoken to the Respondent Father on the Wednesday or Thursday of the week prior to the hearing. The Respondent Father had advised Mr. MacQueen that he had accepted a job in Nashville, Tennessee for three weeks to begin the week before the trial of this matter. Mr. MacQueen advised that the Respondent Father was the sole provider for his fiancee and his other two children and that the Respondent Father advised Mr. MacQueen that he would lose his job if he left the job to come to Court. Kim Benton, Guardian ad litem, advised the Court that she had spoken to the Respondent Father a couple of weeks prior to the trial and that the Respondent Father was aware of the Court date and time of the hearing prior to him leaving for the job in Nashville, Tennessee because . . . she had specifically advised him of the date and time in at least three previous conversations.

> 11. The Petitioner objected to the Motion to continue and advised the Court that the Petition alleged a lack of involvement and unwillingness to travel to North Carolina to maintain a relationship with the minor child. Although the Court did not know if the above allegations of the Petitioner were true or not at the time of the Motion to Continue and the objection, the Court did consider these facts in making its ruling.

Respondent argues that the trial court erred in initially denying his motion to continue, because "the case had not been previously continued" and "there is no indication that an additional week or two would have prejudiced either party." But respondent bore the burden of demonstrating sufficient grounds for continuance; petitioner had no burden to show lack of prejudice. *See J.B.*, 172 N.C. App. at 10, 616 S.E.2d at 270. Respondent agreed to take the job in Nashville despite the fact that he was aware of its conflict with the court date, and instead of filing a written motion to continue the week prior to 9 July 2014 so petitioner, her counsel, and the guardian ad litem would be advised of the situation, he waited until the matter was called for hearing to make an oral motion for continuance. Because respondent had not demonstrated any "extraordinary circumstances" that necessitated a continuance, the trial court did not abuse its discretion in initially denying respondent's motion to continue. *See* N.C. Gen. Stat. §§ 7B-803, -1109(d).

**[2]** Respondent next contends that the trial court erred in allowing petitioner to finish the direct examination of her witnesses after it learned of respondent's intention to arrive the next day. The trial court made the following findings that support its decision to allow petitioner to finish the direct examination of her witnesses but to postpone the cross-examination of those witnesses to the following day:

> 13. During a break in the hearing, the Juvenile Court administrator, Allyson Smith, advised the Court that the Respondent Father had called to inquire as to what time Court began the following day, Thursday, July 10, 2014. The Court requested that [Mr. MacQueen] call the Respondent Father during the break.
>
> 14. Mr. MacQueen advised the Court that the Respondent Father advised that Mr. MacQueen had [told him that the hearing] was on Thursday, July 10, 2014. Mr. MacQueen advised the Court that he did not specifically recall the telephone conversation with the Respondent Father but he

> could have advised the Respondent Father that the [hearing] was on Thursday, July 10, 2014 and not Wednesday, July 9, 2014 because Thursday, July 10, 2014 was a regular juvenile session for Wayne County. Mr. MacQueen advised the Court that the Respondent Father advised that he could be in Court the following day, Thursday, July 10, 2014 by 11 a.m[.] The Court advised that the Petitioner could conclude her direct examination of her witnesses and that the Respondent Father would have the right to cross examine after he arrived and to recall these witnesses for further examination. The Court further advised that after the Petitioner concluded the direct examination of her witnesses with Mr. MacQueen being present that the Court would recess the hearing until the following day, Thursday, July 10, 2014. Court resumed on Thursday, July 10, 2014 at 1 p.m. with evidence from the Respondent Father after the Respondent Father had an opportunity to meet with his attorney. The Respondent Father did not choose to cross examine the witnesses of the Petitioner.

The trial court also found that respondent knew the correct date of the hearing, because the guardian ad litem "had specifically advised him of the date and time [of the hearing] in at least three previous conversations." We also note that the consent pre-trial order had set 9 July 2014 as the hearing date and that respondent had received that order.

Respondent argues that the trial court should have immediately recessed the hearing upon learning that respondent's counsel may have given respondent the wrong date for the hearing. Relying on *In re Gibbons*, respondent specifically asserts that the trial court erred in allowing petitioner to complete the direct examination of her witnesses, because it deprived respondent of hearing that testimony firsthand and assisting his counsel in preparing for cross-examination of those witnesses. *See* 245 N.C. 24, 29, 95 S.E.2d 85, 88 (1956). But *Gibbons* is distinguishable. There, the Court held that the trial court had erred in excluding both parties from its *in camera* interviews with the juvenile and other witnesses. *Id.* at 28-29, 95 S.E.2d at 88. In contrast, here, respondent's counsel was present during the entire hearing.

Additionally, the trial court afforded respondent the opportunity to confer with his counsel regarding petitioner's witnesses' testimony and be present for any cross-examination of those witnesses. Given the trial court's finding that respondent knew the correct date of the hearing, the respondent's counsel's presence during the entire hearing, and

respondent's presence for any cross-examination, we hold that the trial court did not abuse its discretion in allowing the petitioner to finish the direct examination of her witnesses. *See J.B.*, 172 N.C. App. at 10, 616 S.E.2d at 270.

## III. Abandonment

On appeal, respondent challenges all three of the trial court's grounds for termination of his parental rights. But if we determine that the findings of fact support one ground for termination, we need not review the other challenged grounds. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003). After reviewing the record, we conclude that the trial court's findings of fact are sufficient to support at least one ground for termination, abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). On 4 March 2014, petitioner filed her petition to terminate respondent's parental rights. We therefore examine whether respondent had willfully abandoned the juvenile during the determinative six-month period from 4 September 2013 to 4 March 2014. *See* N.C. Gen. Stat. § 7B-1111(a)(7); *In re B.S.O.*, ___ N.C. App. ___, ___, 760 S.E.2d 59, 63 (2014).

### A. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)." *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 734 (2014); *see also* N.C. Gen. Stat. § 7B-1109(e) (2013). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909 (quotation marks omitted). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N.*, *X.Z.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be

given their testimony." *S.C.R.*, 198 N.C. App. at 531-32, 679 S.E.2d at 909 (brackets omitted).

B. Findings of Fact

**[3]** Respondent first challenges the trial court's sub-conclusions 7(b), 7(c), and 7(d), because, during the relevant six-month period, respondent made some child support payments and "nearly" paid off his arrears. Although the trial court included these findings in its conclusions of law, we look at their substance and review them as findings of fact. *See B.S.O.*, ___ N.C. App. at ___, 760 S.E.2d at 63-64. The challenged findings of fact state that respondent acted in the following manner:

> b. Not voluntarily providing any financial support for the minor child prior to the entry of child support Order in Tennessee;
>
> c. Not providing *consistent* child support for the minor child since the entry of the child support Order in Tennessee;
>
> d. Intentionally not working for periods of time each year even though one direct consequence of these decisions by Respondent Father was his failure to pay child support in a *timely* and a *consistent* manner[.]

(Emphasis added.)

The fact that respondent made some child support payments during the relevant six-month period does not undermine the trial court's findings that respondent did not voluntarily provide financial support for the juvenile before entry of the Tennessee child support order and that he failed to provide timely, consistent child support since the entry of that order. Moreover, the trial court made additional findings of fact that address respondent's failure to provide timely, consistent child support:

> 27. After the Respondent Father and the Petitioner separated, the Respondent Father only paid a total of $400 toward child support until he was [o]rdered to do so by a Court in Tennessee in October 2011. The Respondent Father purposely chose not to pay child support prior to the Court entering an Order against him. Since the Child Support Order was entered in October 2011, the Respondent Father has not paid child support on a consistent basis. The Respondent Father was ordered to pay $181.00 per month plus an additional $40.00 a month

> toward arrears. The Respondent Father has had substantial arrears due to his failure to pay prior to the Order being entered and his failure to pay on a timely basis after the Order was entered. The Respondent Father has been cited back to Court in Tennessee on numerous occasions due to the Respondent Father's failure to pay child support in a timely manner. The Respondent Father also had his driver's license suspended by the State of Tennessee for his failure to pay child support on a timely basis. The Respondent Father had his entire 2013 Income Tax Refund garnished due to his failure to [pay] his arrears in child support. The Respondent Father's last child support payment was sent in April 2014.
>
> 28. Petitioner received her child support for the months of January, February and April 2014. Petitioner also received $2,500 on April 30, 2014. As of the date of this hearing, the Respondent Father is at least 2 months behind on his child support.

Respondent does not contend that he provided timely, consistent child support, nor does he challenge Findings of Fact 27 and 28. We also note that respondent's April 2014 payment falls outside the relevant six-month period. *See* N.C. Gen. Stat. § 7B-1111(a)(7). Accordingly, we hold that clear, cogent, and convincing evidence supports the trial court's sub-conclusions 7(b), 7(c), and 7(d). *See Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840.

**[4]** Respondent next challenges sub-conclusions 7(e) and 7(g), because he requested visitation with the juvenile in January, April, and May 2014. The challenged findings of fact state that respondent acted in the following manner:

> e. Refusing to drive five hours to have visits with the minor child (despite consistently driving to other states as far away as Utah for his job);
>
> . . . .
>
> g. Failing to make a *good faith* effort to maintain and subsequently to reestablish a relationship with the minor child despite having the email of the Petitioner, knowing the Petitioner and the minor child lived in Goldsboro, North Carolina, the Petitioner's keeping the same phone number after she got a new number when Respondent

> Father caused her to lose her former phone number, seeing Petitioner at child support hearings in Tennessee, and having the phone number and address of Petitioner's family near his residence in Tennessee.

(Emphasis added.) The trial court found that respondent had texted Mr. Jones three times in 2014 to request visitation with the juvenile.

> After no contact from the Respondent Father in 2013, the Respondent Father sent texts to [Mr. Jones] about visiting with the juvenile in January 2014 after the Respondent Father received the Consent to Adoption documents, in April 2014 after the Respondent Father was served with the Petition to Terminate his Parental Rights and in May 2014 after the Respondent Father was served with a copy of the Pre-Trial Order. [Mr. Jones] responded to the Respondent Father that given that there was a pending court action[,] they were advised by their attorney to wait until the Court action concluded.

The trial court noted that respondent made each of these requests after receiving a document related to either Shelly's adoption or this litigation. Moreover, the April and May 2014 requests for visitation fall outside the relevant six-month period. *See* N.C. Gen. Stat. § 7B-1111(a)(7). Additionally, the trial court made many additional findings of fact, which delineate respondent's history of sporadic contact with the juvenile, that support its ultimate finding that respondent's 2014 requests were not made in good faith:

> [Finding of Fact] 19. After the Respondent Father and the Petitioner separated, the Respondent Father only visited with the juvenile on 4 occasions: 1 time for 2 hours in the month of October, 2010; 1 time for 1 hour in the month of August, 2011; 1 time for 3 hours in the month of April, 2012 and 1 time for 4 to 6 hours in the month of December 2012. . . .
>
> 20. The Respondent Father's only contact in 2013 with the Petitioner was an email on June 15, 2013 where the Respondent Father stated to the Petitioner that [Mr. Jones] should adopt the juvenile. The Respondent Father stated that he had changed his mind prior to the Petitioner's sending him a Consent to Adoption in January 2014.
>
> . . . .

22. The Respondent Father stated that he had continuously attempted to contact the Petitioner through text messages. However, the Respondent Father failed to provide any cellphone records reflecting his attempts to contact Petitioner or her husband even though he had been with the same cellular provider for the last 7 years. The Respondent Father claims that he attempted to call or text 2 or 3 times a week to attempt to visit with the juvenile. The Respondent Father also met the Petitioner and [Mr. Jones] on several occasions in 2011 and 2012 when they all attended child support court in Tennessee due to the Respondent Father's failure to pay child support on time and during these meetings he failed to request visitation with the juvenile.

23. The Respondent Father stated that he did not know where the Petitioner was other than in Goldsboro, North Carolina and he did not know how to contact the Petitioner. The Petitioner has had the same cellphone number since shortly after the Respondent Father and Petitioner separated. The family of the Petitioner still lives at the same address with the same telephone numbers as when the Respondent Father and Petitioner were still together. The Respondent Father took no steps to contact Petitioner or locate the Petitioner in Goldsboro, North Carolina. The Petitioner and [Mr. Jones] have lived at the same address since July 2013. Furthermore, the Respondent Father's girlfriend, [Ms. Smith], was able to communicate and coordinate visits between the Respondent Father and the juvenile in April and December 2012 after the Petitioner moved to North Carolina.

. . . .

25. The Respondent Father has not provided any other gifts or cards since December 2012. The family of the Respondent Father has not visited or inquired of the minor child since October 2010. The mother of Respondent Father provided a $50 gift card in October 2010 but has not provided any other gifts or cards since October 2010. The Respondent Father has chosen not to provide gifts or cards because he would not be there to see the juvenile receive these items. The Respondent Father acknowledged that

the juvenile may know who he was if he had sent something to the juvenile.

. . . .

32. All of the visitations [between respondent and the juvenile] took place in Tennessee near the home of the Respondent Father. Petitioner and [Mr. Jones] would offer visitation between the Respondent Father and [the] juvenile when they were in Tennessee visiting family. The Respondent father has not seen the juvenile since December 2012. The Petitioner visited to the State of Tennessee in January 2013 and February 2013 and offered the Respondent Father visitation. On one occasion the Respondent Father agreed and then later cancelled stating that . . . his other daughter[] was sick. On the other occasion, the Respondent Father replied that he was working out of town.

33. The Petitioner has offered the Respondent Father the opportunity to come to Goldsboro, North Carolina to visit with the juvenile since the Petitioner was concerned [with] letting the juvenile go since the juvenile does not know the Respondent Father. It is a 5 hour drive from Mountain City, Tennessee to Goldsboro, North Carolina. The Respondent Father refused the Petitioner's offers to visit in Goldsboro, North Carolina because he does not think it is fair that he has to travel to North Carolina and that he should be able to bring the juvenile back to Tennessee with him. The Respondent Father never attempted to visit the juvenile in Goldsboro, North Carolina.

. . . .

[Conclusion of Law] 4. Petitioner offered Respondent Father visits on several occasions when she and her husband were travelling to Tennessee to see some of her family members.

5. Petitioner provided transportation from North Carolina to and from Tennessee for every visit the minor child had with Respondent Father, while Respondent Father never made a single trip to North Carolina to visit with the minor child.

> 6. Respondent Father's complaints that he has been treated unfairly (by Petitioner regarding visitation with the minor child) are not credible or persuasive.

The trial court examined respondent's history of sporadic contact with the juvenile in evaluating whether his 2014 requests for visitation were made in good faith. Although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions. *See S.C.R.*, 198 N.C. App. at 531-32, 679 S.E.2d at 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (brackets omitted)); *cf. Gerhauser v. Van Bourgondien*, ___ N.C. App. ___, ___, 767 S.E.2d 378, 389 (2014) (considering a party's conduct after determinative date established under the Uniform Child-Custody Jurisdiction and Enforcement Act in order to assess "the party's credibility and intentions"). In light of the trial court's findings on respondent's history of sporadic contact with the juvenile, we hold that clear, cogent, and convincing evidence supports the trial court's sub-conclusions 7(e) and 7(g) that respondent failed to make a good faith effort to visit Shelly. *See Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840.

**[5]** Respondent also challenges the trial court's sub-conclusion 7(f) that he "[failed] to send birthday and Christmas presents or cards in 2013 and 2014 for the minor child[,]" because the hearing took place before Shelly's 2014 birthday and Christmas 2014. The hearing took place on July 9 and 10, 2014. Shelly's birthday is December 22. Accordingly, we hold that the trial court erred in finding that respondent failed to send birthday and Christmas presents or cards in 2014. But in light of the following discussion, we hold that this error did not prejudice respondent.

C. Conclusion of Law

**[6]** Respondent challenges the trial court's conclusion of law that he abandoned Shelly. N.C. Gen. Stat. § 7B-1111(a)(7) provides: "The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1111(a)(7).

"Abandonment implies conduct on the part of the parent which manifests a willful determination to forgo all parental duties and relinquish all parental claims to the child. The findings must clearly show that the

parent's actions are wholly inconsistent with a desire to maintain custody of the child." *B.S.O.*, ___ N.C. App. at ___, 760 S.E.2d at 63 (citation, quotation marks, and brackets omitted). Abandonment also includes "[willful] neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.*, 126 S.E.2d at 608. "The word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). The willfulness of a parent's conduct is a "question of fact to be determined from the evidence[.]" *B.S.O.*, ___ N.C. App. at ___, 760 S.E.2d at 63. To constitute abandonment, "it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest." *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. A delinquent parent may not dissipate at will the legal effects of his abandonment by merely expressing a desire for the return of the abandoned juvenile. *Id.* at 502, 126 S.E.2d at 609.

In *Searle*, this Court held that the respondent's $500 child support payment during the relevant six-month period did not preclude a finding of willful abandonment. 82 N.C. App. at 276, 346 S.E.2d at 514. In *Pratt*, the North Carolina Supreme Court similarly held that the respondent's visit with the juvenile during the relevant six-month period did not preclude a finding of willful abandonment. 257 N.C. at 503, 126 S.E.2d at 609.

Here, the trial court found that, during the relevant six-month period, respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile. In light of *Searle* and *Pratt*, we hold that respondent's last-minute child support payments and requests for visitation do not undermine the trial court's conclusion that respondent had abandoned the juvenile. *See Searle*, 82 N.C. App. at 276, 346 S.E.2d at 514; *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. Accordingly, we hold that the trial court did not err in concluding that respondent had abandoned the juvenile. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

Because we hold that the findings of fact support one ground for termination, we need not review the other challenged grounds. *See Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426-27.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Judges HUNTER, JR and DILLON concur.

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IN RE DISPUTE OVER THE SUM OF $375,757.47, CONSTITUTING THE SURPLUS CLOSING PROCEEDS FROM THE SALE OF THAT CERTAIN REAL PROPERTY AS DESCRIBED IN A DEED RECORDED IN DEED BOOK 712, AT PAGE 570, RUTHERFORD COUNTY, NORTH CAROLINA, PUBLIC REGISTRY

No. COA14-1239

Filed 21 April 2015

**1. Mortgages—satisfaction of note—bank no longer the holder**

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, there was no genuine issue of fact that a bank (Mountain 1st) was not the noteholder on 4 June 2010, when a certificate of satisfaction from Mountain 1st was recorded, purporting to cancel the property owners' obligation under a note. HSBC Bank USA, N.A. (HSBC) was subsequently assigned the note and sought the funds from the sale of the property, which had been placed in escrow. The record demonstrated no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010.

**2. Mortgages—satisfaction of promissory note—subsequent to transfer to another bank**

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, a satisfaction executed by a bank was invalid and of no legal effect where the bank had assigned the note prior to the date the satisfaction was executed.

**3. Mortgages—satisfaction of note—transfer of note—summary judgement as to holder**

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the property

owner failed to forecast evidence sufficient to overcome the legal presumption and physical fact that HSBC Bank USA, N.A. (HSBC) was the holder of the original promissory note. HSBC presented the original note in open court at the summary judgment hearing and the note was unambiguously indorsed in blank by Wells Fargo. Although the property owners alleged that the note and deed of trust were separate legal contracts and that the note did not incorporate the terms of the deed of trust, they cited no law or authority to support their position.

**4. Mortgages—satisfaction of transferred note—escrow funds**

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly ordered escrowed funds from the sale of the property to be paid to HSBC Bank USA, N.A. (HSBC). The deed of trust provided to HSBC, as the last note holder, a security interest in all proceeds from the sale of the real property, and the right to collect the balance due under the note. No genuine issue of fact existed to challenge HSBC's note holder status and physical possession of the original note with an unpaid balance.

**5. Mortgages—satisfaction of transferred note—attorney fees**

In a case involving the transfer of a promissory note, deed of trust and escrow funds from a sale of the property, the trial court properly awarded attorneys' fees to HSBC Bank USA, N.A. (HSBC). Although the property owners argued that they were not provided the required statutory notice of HSBC's intent to collect attorneys' fees, the uncontroverted evidence showed otherwise.

Appeal by respondent-third party defendants, from order entered 14 April 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 18 March 2015.

*Hutchens Law Firm, by J. Scott Flowers and Natasha M. Barone, for respondent-third party plaintiff, HSBC Bank, U.S.A, N.A.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Joseph A. Ponzi, for third party defendant, Mountain 1st Bank & Trust Company.*

*Ferikes & Bleynat, PLLC, by H. Gregory Johnson, for respondent-third party defendants Raymond and Judy Chapman.*

TYSON, Judge.

Raymond and Judy Chapman ("the Chapmans") appeal from the trial court's order granting summary judgment in favor of HSBC Bank USA, N.A. ("HSBC"), and awarding attorneys' fees in favor of HSBC. We affirm the trial court's order.

## I. Background

In 1998, the Chapmans purchased property located at 304 Seton Road in Lake Lure. They obtained title by general warranty deed recorded in the Rutherford County Registry. On or about 7 April 2006, the Chapmans refinanced their mortgage loan. They obtained a loan and executed a promissory note in the amount of $600,000.00 from Mountain 1st Bank ("Mountain 1st"). The note was secured by a deed of trust recorded in the Rutherford County Registry, which pledged the subject property and any proceeds from the sale of the property as collateral for the note.

In the deed of trust, Mountain 1st named Mortgage Electronic Registration Systems, Inc. ("MERS") as its nominee. MERS maintained an electronic registration system, by which it tracked any assignment of the promissory note and deed of trust.

Mountain 1st assigned the promissory note and deed of trust to Resource Mortgage Solutions, a division of Netbank, on or before 20 April 2006. On 30 June 2006, Netbank assigned the promissory note and deed of trust to Wells Fargo Bank, N.A. ("Wells Fargo"). On 4 June 2010, while Wells Fargo was the holder of the promissory note and deed of trust, Mountain 1st recorded a Certificate of Satisfaction in the Rutherford County Registry, purporting to satisfy and cancel the Chapmans' obligation under the note.

Mountain 1st had assigned and relinquished being the holder of the promissory note and beneficiary of the deed of trust nearly four years before the Certificate of Satisfaction was recorded. Mountain 1st acknowledges it was without authority to execute and record the erroneous Certificate of Satisfaction. Wells Fargo assigned the promissory note and deed of trust to HSBC on 30 October 2012.

The Chapmans continued to make payments on the note for more than two years after Mountain 1st's purported Certificate of Satisfaction was recorded. In August 2012, the Chapmans entered into an offer to purchase and contract to sell the property to Sylvia Pflum. Ms. Pflum's attorney performed a title search in preparation for the closing and discovered the Mountain 1st Certificate of Satisfaction. The Chapmans

were previously unaware of the Certificate of Satisfaction. Wells Fargo claimed to be the holder of the Chapmans' note and deed of trust, and demanded payment of the sale proceeds.

At the closing of the sale, the Chapmans and the closing attorney deposited $375,757.47, the balance owed on the note, with an escrow agent pursuant to an Escrow Agreement executed by the Chapmans on 4 September 2012. Pursuant to the Escrow Agreement, the funds are to be held in escrow until either an agreement between the Chapmans and Wells Fargo is reached, or a court order directing the disbursement of funds is issued. The Escrow Agreement states that Wells Fargo asserts the Chapmans owe Wells Fargo $363,936.00 in unpaid principal, interest and other fees and charges in connection with the mortgage. It further states that a payoff of the purported debt after 27 August 2012 "may include other fees and charges, including late fees and/or interest." After Wells Fargo assigned the note to HSBC, it recanted its claim to the funds.

On 15 October 2012, after the property was sold and titled to Pflum, MERS executed and recorded a Document of Rescission, which purported to rescind the Certificate of Satisfaction and reinstate the deed of trust. MERS executed and recorded a Corporate Assignment of Deed of Trust on 30 October 2012, which also assigned Mountain 1st's beneficial interest under the deed of trust to HSBC. On 3 March 2014, HSBC executed and recorded another Document of Rescission, purporting to rescind the Certificate of Satisfaction and reinstate the deed of trust. HSBC is in possession of the Chapmans' original note.

The promissory note and deed of trust specifically allow for the lender to collect all expenses, including reasonable attorneys' fees, from the Chapmans in the event the Chapmans breach their obligations under the promissory note.

After request, the Chapmans refused to release the escrowed funds to HSBC. On 6 February 2013, Daniel L. Strobel, the escrow agent, filed a complaint in Buncombe County Superior Court seeking a court order declaring the rights and interests of the parties to the escrowed funds. HSBC filed a motion to dismiss the complaint, answer, counterclaim against Strobel, cross-claim against the Chapmans, and third party complaint against Pflum and Mountain 1st.

HSBC filed a motion for summary judgment on 17 March 2014. The matter came before the trial court on 14 April 2014. The court granted summary judgment in favor of HSBC. The court entered judgment against the Chapmans in the amount of $403,902.18, with interest

accruing after judgment at the legal rate. The escrow agent was ordered to deliver the escrowed funds to HSBC to be applied toward satisfaction of the judgment. The court awarded attorneys' fees to HSBC in the amount of $57,162.76, representing fifteen percent of the amount due as provided in the promissory note. The Chapmans appealed.

## II. Issues

The Chapmans argue the trial court erred in: (1) granting summary judgment in favor of HSBC; and, (2) ordering them to pay HSBC's attorneys' fees.

## III. Summary Judgment

The Chapmans argue the trial court erred in granting summary judgment in favor of HSBC. They assert the escrowed funds belong to them as a result of Mountain 1st's cancellation of the deed of trust, and are not required to satisfy the promissory note from the closing proceeds. We disagree.

### A. Standard of Review

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

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

*Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (internal citations omitted). "In a motion for summary judgment, the evidence

presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

"[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (citation omitted) (emphasis supplied). "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Id.* (citation omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

B. Erroneously Recorded Certificate of Satisfaction

The Chapmans assert they are entitled to the escrowed proceeds from the sale of the property and are not required to satisfy any debt from the proceeds. They argue Mountain 1st canceled the promissory note and deed of trust, and the cancellation instrument was not rescinded prior to the closing. We disagree.

It is undisputed Mountain 1st, the Chapmans' original lender, purported to cancel the promissory note, secured by the deed of trust, by recording a Certificate of Satisfaction in the Rutherford County Registry on 4 June 2010. The Certificate of Satisfaction states:

> I, Jeff Griffin, Vice President of Mountain 1st Bank & Trust certify that Mountain 1st Bank & Trust are the Owners of the aforesaid referenced [promissory note] and that the debt or obligation was satisfied on the 4th day of June, 2010, and request that the certificate of satisfaction be recorded and the above referenced security instrument be canceled of record.

In response to the Chapmans' interrogatories and through its pleadings, Mountain 1st admits it was no longer the holder of the promissory note when Jeff Griffin recorded the Certificate of Satisfaction. At the time the certificate was recorded, Mountain 1st was without authority to discharge any obligation under the note. See N.C. Gen. Stat. § 25-3-604(a) (2013).

1. Status of Mountain 1st on 4 June 2010

**[1]** The Chapmans argue HSBC and Mountain 1st failed to prove as a matter of law Jeff Griffin lacked authority to cancel the note on behalf of Mountain 1st. They assert the banks failed to produce sufficient documentation showing Mountain 1st had assigned, sold, or transferred the note prior to the 4 June 2010 purported cancellation. We disagree.

Mountain 1st's verified pleadings and answers to interrogatories show Mountain 1st registered the loan with MERS on or about 20 April 2006. Mountain 1st assigned the promissory note and deed of trust to RMS, a division of NetBank, on or before the date of registration with MERS. RMS assigned the note and deed of trust to NetBank on or before 11 July 2006. NetBank assigned the promissory note and deed of trust to Wells Fargo on or after 11 July 2006. There is no genuine dispute of the fact that Wells Fargo was the note holder in due course on 4 June 2010.

The Chapmans argue at length that the banks, HSBC and Mountain 1st, did not produce "properly authenticated" documentation evidencing the dates on which the assignments of the note occurred. "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (1999) (citation and quotation marks omitted).

HSBC's verified third party complaint incorporates the promissory note and deed of trust, and alleges Mountain 1st was not the holder of the note on 4 June 2010, and it was without authority to execute and record the satisfaction. The pleading meets the three criteria set forth in *Rankin*, and was properly treated as an affidavit for summary judgment by the trial court.

HSBC also submitted verified responses to the Chapmans' Interrogatories and Requests for Admission, which evidenced transfer of the note and deed of trust, and which are also appropriate for the court's consideration in ruling on summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

Once HSBC produced verified evidence to show it was not the note holder on 4 June 2010, the burden shifted to the Chapmans to "demonstrat[e] specific facts, as opposed to allegations," to show Mountain 1st remained the note holder and possessed the lawful authority to cancel the note and deed of trust on 4 June 2010. *Pacheco*, 157 N.C. App. at 448, 579 S.E.2d at 507.

The Chapmans attack the authenticity and admissibility of the verified documents relied upon by the trial court in ruling on summary judgment. However, they produced no forecast of evidence to show Mountain 1st did not assign the note prior to and it was not "the person entitled to enforce the instrument" on 4 June 2010. N.C. Gen. Stat. § 25-3-604(a) (2013). The record demonstrates no genuine issue of fact that Mountain 1st was not the note holder when the purported Certificate of Satisfaction was filed on 4 June 2010.

2. Authority to Cancel the Promissory Note

**[2]** "Discharge of instruments is controlled by N.C. Gen. Stat. § 25-3-604," a subsection of the UCC. *G.E. Capital Mortg. Servs., Inc. v. Neely*, 135 N.C. App. 187, 190, 519 S.E.2d 553, 556 (1999); *see also* N.C. Gen. Stat. § 45-37(e) (2013) ("Any transaction subject to the provisions of the [UCC, Chapter 25], is controlled by the provisions of that act and not by this section."). The statute provides:

> (a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

N.C. Gen. Stat. § 25-3-604(a) (2013).

Jeff Griffin, agent of Mountain 1st, was not "a person entitled to enforce [the] instrument" on 4 June 2010. *Id.* The record shows Mountain 1st assigned the note prior to that date, no longer held or owned the loan, and was not "a person entitled to enforce an instrument." *Id.* The erroneous satisfaction executed by Mountain 1st is invalid and was of no legal effect.

C. HSBC's Status as Note Holder

**[3]** The Chapmans argue a genuine issue of material fact exists of whether HSBC attained holder status of the promissory note. We disagree.

An entity is considered the holder of a promissory note when they are the party in possession of the original note, and the note is "payable either to bearer or to an identified person that is the person in possession." N.C. Gen. Stat. § 25-1-201(b)(21) (2013). Pursuant to our Uniform

Commercial Code ("Code"), a promissory note is payable to bearer when it:

> (1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
>
> (2) Does not state a payee; or
>
> (3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

N.C. Gen. Stat. § 25-3-109 (2013).

"Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." N.C. Gen. Stat. § 25-3-201(b) (2013).

An indorsement is a signature on the note that is intended to negotiate the instrument. N.C. Gen. Stat. § 25-3-204(a) (2013). The signature may be made on the instrument itself or on a paper affixed to negotiate the instrument, which becomes a part of the instrument. *Id.*

"[A] signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement." *Id.* We recognize "a strong presumption in favor of the legitimacy of indorsements" to protect the transferees of negotiable instruments. *In re Bass*, 366 N.C. 464, 468, 738 S.E.2d 173, 176 (2013). A signature on an indorsement is presumed valid "until some evidence is introduced which would support a finding that the signature is forged or unauthorized." *Id.* at 470, 738 S.E.2d at 177 (citation omitted).

Under the Code, the party in possession of a negotiable instrument indorsed in blank is presumptively the holder. N.C. Gen. Stat. § 25-1-201(b)(21) (2013); N.C. Gen. Stat. § 25-3-109 (2013) (emphasis supplied). *See also*, *In re Manning*, __ N.C. App. __, __, 747 S.E.2d 286, 291-92 (2013) (presentation of the original note to the court, indorsed in blank, "serves as competent evidence to support the trial court's finding that [the party] was the present holder.").

Here, HSBC presented the original note in open court at the summary judgment hearing. The note is unambiguously indorsed in blank by

Wells Fargo. The indorsement is made by Joan M. Mills, Vice President of Wells Fargo, and does not identify a person to whom it is payable. HSBC holds physical possession of the note. The law presumes HSBC is the holder of the promissory note.

To attempt to overcome the Code's legal presumption, the Chapmans argue a genuine issue of fact exists of HSBC's holder status. They assert the version of the promissory note faxed to their counsel on 24 August 2012 differed from the original note their counsel inspected on 18 December 2012.

Our review of the record shows the only substantive difference between the two "versions" of the note is that the note faxed to the Chapmans' counsel does not show the blank indorsement made by Wells Fargo. This difference is logical. The note was transferred by Wells Fargo to HSBC on 30 October 2012, in between the time of the fax and the in-person inspection by counsel. The faxed copy of the note also establishes that the blank indorsement by Wells Fargo was the most recent indorsement to and negotiation of the note, which also supports HSBC's holder status.

The Chapmans also argue MERS, the nominee of Mountain 1st under the deed of trust, was without authority to assign the promissory note. They allege the note and deed of trust are separate legal contracts and the note did not incorporate the terms of the deed of trust.

The Chapmans cite no law or authority to support this bald position. The record shows MERS was merely the nominee under the deed of trust, and the note was never negotiated or transferred to MERS. The parties do not dispute that MERS was never the holder of the note. Moreover, a transfer of the promissory note or other instrument secured by the deed of trust "shall be an effective assignment of the deed of trust." N.C. Gen. Stat. § 47-17.2 (2013).

The "pleadings, depositions, answers to interrogatories, and admissions on file," establish: (1) the Chapmans' note was originally payable to Mountain 1st; (2) the note was negotiated and transferred to RMS on or before 20 April 2006, as evidenced by an allonge attached to the original note, signed by Mountain 1st and payable to the order of RMS; (3) RMS negotiated and transferred possession of the note to NetBank, on or before 30 June 2006, as evidenced by a second allonge attached to the original note signed by RMS and payable to NetBank; (4) NetBank negotiated and transferred possession of the note to Wells Fargo on 30 June 2006, evidenced by an indorsement on the RMS allonge signed by NetBank and payable to Wells Fargo; (5) Wells Fargo negotiated and

transferred possession of the note to HSBC on 30 October 2012, as evidenced by an indorsement on the RMS allonge signed by Joan M. Mills, Vice President of Wells Fargo, and payable in blank, or to bearer. HSBC holds physical possession of the original note signed by the Chapmans. N.C. Gen. Stat. § 1A-1, Rule 56(c).

The Chapmans failed to forecast evidence sufficient to rebut or overcome the legal presumption and physical fact that HSBC is the holder of the original Chapman promissory note. *See Bass*, 366 N.C. at 470, 738 S.E.2d at 177 (The borrower's "bare assertions" did not constitute evidence to support a finding that the indorsement signature was forged or unauthorized, the presumption in favor of the signature prevailed, and the bank was not required to prove the signature was vaild.).

D. HSBC's Entitlement to the Escrow Funds

**[4]** The deed of trust provides to HSBC, as the note holder, a security interest in all proceeds from the sale of the real property, and the right to collect the balance due under the note. The priority security interest in the deed of trust attached to the escrowed proceeds immediately upon the sale of the secured property to Pflum. *See In re Castillian Apartments, Inc.*, 281 N.C. 709, 711, 190 S.E.2d 161, 162 (1972) (The funds from the sale of real property "are constructively, at least, real property, and belong to the mortgagor or his assigns."). As discussed and held above, the execution and recording of the Certificate of Satisfaction by Mountain 1st was invalid, because Griffin was not "a person entitled to enforce [the] instrument," and his actions had no legal effect on HSBC's note holder status. N.C. Gen. Stat. § 25-3-604(a) (2013).

As the Chapmans concede, the purpose of the Escrow Agreement was to ensure the holder of the note was paid from the closing proceeds. No genuine issue of fact exists to challenge HSBC's note holder status and physical possession of the original note with an unpaid balance. The trial court properly ordered the escrowed funds from the sale of the property to be paid to HSBC.

IV. Award of Attorneys' Fees

**[5]** The Chapmans argue the trial court erred in awarding attorneys' fees in favor of HSBC. They assert they were not provided the required statutory notice of HSBC's intent to collect attorneys' fees. We disagree as the uncontroverted evidence shows otherwise.

N.C. Gen. Stat. § 6-21.2 allows for an award of attorneys' fees in actions to enforce obligations owed under a promissory note, if the

note provides for the payment of attorneys' fees. N.C. Gen. Stat. § 6-21.2 (2013). Under the statute, a provision in the note for "reasonable fees" results in an award of fifteen percent of the outstanding balance owed on the note. N.C. Gen. Stat. § 6-21.2(2) (2013). "As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the 'outstanding balance' shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt." N.C. Gen. Stat. § 6-21.2(3) (2013). Here, the promissory note and deed of trust both contain provisions permitting the holder of the note and beneficiary of the deed of trust to collect their reasonable attorneys' fees upon breach and default. "Reasonable attorneys' fees" would equal fifteen percent of the outstanding balance owed on the note at the time HSBC filed its third party complaint and counterclaim. *Id.*

The statute also contains a notice provision, which requires the individual or entity seeking to enforce the note and/or deed of trust to notify the debtor "that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that [the debtor] has five days from [providing] such notice to pay the 'outstanding balance' without the attorneys' fees." N.C. Gen. Stat. § 6-21.2(5) (2013). If the debtor pays the "outstanding balance" prior to the expiration of five days, then the obligation to pay attorneys' fees becomes void and unenforceable. *Id.*

"[T]he purpose of G.S. 6-21.2 is to allow the debtor a last chance to pay his outstanding balance and avoid litigation, not to reward the prevailing party with the reimbursement of his costs in prosecuting or defending the action." *Trull v. Central Carolina Bank & Trust*, 124 N.C. App. 486, 491, 478 S.E.2d 39, 42 (1996), *aff'd in part, review dismissed in part*, 347 N.C. 262, 490 S.E.2d 238 (1997).

The closing attorney discovered the Certificate of Satisfaction when the Chapmans were under contract to sell the property to Pflum. Prior to the closing, the Chapmans entered into the Escrow Agreement with Wells Fargo, the note holder and secured party, who claimed entitlement to the sale proceeds. The Escrow Agreement states the escrow agent shall retain the escrowed funds

> until such time as a written agreement is entered into between Wells Fargo Bank/Wells Fargo Home Mortgage and [the Chapmans] regarding the validity and/or satisfaction of the aforesaid purported debt and Mortgage on the Real Property and the disposition of the Escrow Amount,

> or until such time as a court of competent jurisdiction, upon the institution of a declaratory judgment civil action by the Escrow Agent and after due notice to Wells Fargo Bank/Wells Fargo Home Mortgage, enters a final judgment regarding the validity and/or satisfaction of the aforesaid purported debt and mortgage on the Real property and the disposition of the Escrow Amount.

HSBC stepped into the shoes of Wells Fargo when Wells Fargo assigned and delivered physical possession of the note to HSBC. *See* N.C. Gen. Stat. § 25-3-203(b) (2013) ("Transfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument[.]") Pursuant to the Escrow Agreement, the Chapmans could have entered into a written agreement with HSBC, the transferee, and relinquished the escrowed funds to HSBC.

On 30 October 2012, following the execution of the Escrow Agreement, Wells Fargo assigned the note to HSBC and relinquished its claim to the sale proceeds. The escrow agent filed the complaint in February of 2013, and sought a court order declaring the rights and interests of the parties to the escrowed funds. The Chapmans filed an answer. HSBC filed a motion to dismiss, answer, counterclaim, cross-claim, and third party complaint.

HSBC's pleading states:

> The Chapmans are hereby notified pursuant to N.C. Gen. Stat. § 6-21.2 that the Chapmans have five days from the date of service of this pleading to pay the Note in full to avoid the payment of HSBC's attorney fees and costs for collection of the Note.

HSBC's pleading contained the statutory notice required by N.C. Gen. Stat. § 6-21.2. The Chapmans received HSBC's notice of intent to collect attorneys' fees, as evidenced by their answer to HSBC's pleading, and failed to release and pay the escrowed funds to HSBC within five days. The trial court properly awarded attorneys' fees in the amount of fifteen percent of the outstanding balance to HSBC as provided in the promissory note and deed of trust the Chapmans agreed to and signed as provided in N.C. Gen. Stat. § 6-21.2(3) (2013).

## V. Conclusion

Mountain 1st's erroneous cancellation of the promissory note and deed of trust was invalid and of no legal effect. Mountain 1st was not the note holder or a person entitled to enforce the instrument when the

Certificate of Satisfaction was executed and recorded. N.C. Gen. Stat. § 25-3-604(a) (2013). The Chapmans failed to present evidence to overcome the legal presumption that HSBC is the note holder, and entitled to the escrowed proceeds from the sale of the property.

No genuine issue of material fact exists of HSBC's note holder status. The trial court properly awarded summary judgment in favor of HSBC. The trial court also properly determined that HBSC is entitled to the escrowed funds, and to be paid from the escrowed funds.

HSBC provided the required statutory notice of its intent after five days to collect attorneys' fees in its responsive pleading and counterclaim, as is provided both in the promissory note and deed of trust the Chapmans signed. The trial court did not err in awarding attorneys' fees in favor of HBSC, against the Chapmans, under N.C. Gen. Stat. § 6-21.2. The trial court's order of summary judgment is affirmed.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

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IN THE MATTER OF FORECLOSURE OF DEEDS OF TRUST EXECUTED BY GROVER C. BROWN AND WIFE, MARGARET C. BROWN DATED APRIL 1, 1980, RECORDED IN BOOK 949 AT PAGE 109, AND BOOK 949 AT PAGE 111 OF THE BUNCOMBE COUNTY REGISTRY

No. COA14-937

Filed 21 April 2015

**Statutes of Limitation and Repose—foreclosure—ten years—failure to exercise acceleration clauses—power of sale on due date of final payments**

The trial court did not err by concluding that the statute of limitations did not bar foreclosure of the pertinent two notes. The trial court correctly applied N.C.G.S. § 1-47(3), finding that it was the later of the provisions contained in the statute that triggered the accrual of the statute of limitations. Since the note holder elected not to exercise either of the notes' acceleration clauses, the power of sale did not become absolute until the date that the final payments were due. Since foreclosure proceedings were initiated in 2012, well within the ten-year statute of limitations, N.C.G.S. § 1-47(3) did not bar the foreclosure action on either Note 1 or Note 2.

**IN RE FORECLOSURE OF BROWN**

[240 N.C. App. 518 (2015)]

Appeal by respondents from order entered 9 April 2014 by Judge J. Thomas Davis in Buncombe County Civil Court. Heard in the Court of Appeals 4 March 2015.

*BULL & REINHARDT, PLLC, by Adam W. Bull, for appellee.*

*Wilder Wadford, for appellants.*

ELMORE, Judge.

On 1 April 1980, Sherrill Brown and Merton L. Brown conveyed two pieces of real property in Buncombe County to Grover C. Brown and Margaret C. Brown ("appellants") by two warranty deeds. Grover C. Brown was Sherrill Brown's father and Merton Brown was Grover's step-mother. In exchange for the conveyance, appellants executed two purchase money promissory notes, secured by separate deeds of trust, in the amounts of $245,000.00 ("Note 1") and $55,000.00 ("Note 2"). The principal and interest due on the notes was payable to Sherrill and Merton Brown in monthly installments over the next thirty years. The parties have stipulated that the maturity date on the notes was 1 April 2010. A deed of trust securing Note 1 was recorded in Book 949 at Page 109. A deed of trust securing Note 2 was recorded in Book 949 at Page 111, with both deeds of trust appearing on record in the Buncombe County Registry of Deeds. Both deeds of trust contain provisions allowing for acceleration of the indebtedness upon default.

Upon Sherrill Brown's death in 1988, Merton Brown, as executrix of his estate, assigned herself Sherrill Brown's interest in Note 1 and Note 2, which had remaining principal balances of $214,572.26 and $48,169.03, respectively.

Appellants continued to make payments on both notes until 1 February 1995. At that time, the remaining principal balance was $214,572.26 on Note 1 and $48,169.03 on Note 2. After appellants made their final payment in 1995, Merton Brown did not accelerate the amounts due under Note 1 or Note 2.

In April 1995, Grover Brown offered Merton Brown $100,000.00 in proceeds from the sale of dairy cattle as payment on Note 1 and Note 2. Merton Brown refused to accept the $100,000.00. Merton Brown informed Grover Brown that she had forgiven the debts and would not foreclose on the deeds of trust. In reliance on this, Grover Brown and Margaret Brown ceased making additional payments on the notes.

Appellants allegedly used the $100,000.00 to convert the property into a beef cattle, hay, and tobacco farm, which is how it currently operates today. Both parties concede that after 1 April 1980, Sherrill B. Brown and Merton L. Brown resided on the property described in the deeds of trust for the remainder of their respective lives. There is evidence in the record that appellants were Merton Brown's primary caretakers until her death in October 2012.

Appellants live on a lot adjacent to the mortgaged property and their two sons live on portions of the mortgaged property. Appellants and their family have farmed and maintained the property since 1980. Therefore, appellants have been in actual possession of the subject property for over thirty-three years, and for more than eighteen years since the last payment was made on Note 1 and Note 2.

The deeds of trust securing the notes were never cancelled on the record in the Buncombe County Registry, and both deeds contain a power of sale as contemplated by the Foreclosure Statute of Limitations. As the holder of Note 1 and Note 2, the Estate of Merton Brown accelerated payment on the notes after Merton Brown's death, demanding that appellants tender a total of $1,288,969.81 in full satisfaction of their indebtedness. Appellants were unable to meet the Estate's demand.

On 8 October 2012, the Executor of Merton Brown's estate commenced this foreclosure action. The matter came on for a hearing before the trial court on 9 April 2014. The trial court found as a matter of law that debts evidenced in Note 1 and Note 2 had not been discharged in full in April of 1995. As such, the trial court found that the notes were currently in default and that the Trustee was authorized and had the right to proceed with the sale and foreclosure of the property described in the deeds of trust.

Appellants have appealed the trial court's determination.

## I. Analysis

Appellants argue that the trial court erred in concluding that the statute of limitations does not bar foreclosure in this matter. We disagree.

N.C. Gen. Stat. § 1-47 sets a ten-year statute of limitations during which time a foreclosure action may be commenced. The statute provides:

> For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage,

> or after the power of sale became absolute, or within ten years after the last payment on the same.

N.C. Gen. Stat. § 1-47 (2013).

Therefore, in order for a foreclosure to be barred under this section, two events must occur: (1) the lapse of ten years after the forfeiture or after the power of sale becomes absolute or after the last payment, and (2) the mortgagor remains in absolute possession during the entire ten-year period. *Matter of Lake Townsend Aviation, Inc.*, 87 N.C. App. 481, 484, 361 S.E.2d 409, 411 (1987). "These two requirements must be coexistent." *Id.*

In the instant case, the parties have stipulated that the maturity date of the notes was 1 April 2010. The last payment on the notes was made in February 1995, more than ten years before this foreclosure proceeding was initiated. As such, the central question on appeal is when did the power of sale become absolute—on the date of the last payment or on the date of maturity? To answer this question, we must consider whether the conditions set forth in N.C. Gen. Stat. § 1-47 are interpreted as beginning to run ten years from the later of the three conditions it sets forth (lapse of ten years after the forfeiture, after the power of sale becomes absolute, or after the last payment) or from the earlier occurrence of the conditions.

Appellants' position is that the statute of limitations begins to run when any of the statutory conditions *first* occurs. In the instant case, the first statutory condition to occur was the date of the last payment (date of default), which was in February 1995. Thus, according to appellants, the statute of limitations for the foreclosure action began to run in 1995 and expired ten years later, in 2005. Appellants thus argue that this foreclosure action is barred by the statute of limitations.

We are not persuaded by appellants' argument. In *E. H. & J. A. Meadows Co. v. Bryan*, 195 N.C. 398, 401-02, 142 S.E. 487, 489-90 (1928), our Supreme Court concluded:

> A provision in a mortgage or deed of trust by the terms of which the maturity of a note or of notes secured thereby is accelerated, for the purpose of foreclosure, upon a default of the maker, confers upon the mortgagee or trustee an option to foreclose, at the date of such default, by the exercise of a power of sale, contained in the mortgage or deed of trust, or by civil action. This option may be waived by the mortgagee, or by the holder of the notes secured by the

> deed of trust. *In the absence of evidence tending to show some action on the part of the mortgagee [to accelerate the loan] . . . waiver will be conclusively presumed. In that event, the statute of limitations will not begin to run from the date of such default, and an action to foreclose said mortgage or deed of trust will not be barred,* ***until after the expiration of ten years from the maturity of all the notes secured thereby****, notwithstanding the provision for the acceleration of the maturity of notes not due at date of such default.* A power of sale contained in a mortgage or deed of trust may be exercised at any time within ten years after the maturity of any note, secured by the said mortgage or deed of trust, according to its tenor, for the purpose of enforcing its payment out of the proceeds of a sale of the land.

*Id.*

*Bryan* stands for the proposition that the statute of limitations does not begin to accrue on the date of default (last payment), but instead begins on the date of maturity of the loan, unless the note holder or mortgagee has exercised his or her right of acceleration.[1] However, if payment on a promissory note is accelerated, the power of sale would begin to run on the date of acceleration.

This legal principal is evidenced in *Matter of Lake Townsend Aviation, Inc.*, 87 N.C. App. 481, 361 S.E.2d 409 (1987). On 22 May 1970, Lake Townsend executed a $12,000 note payable to the mortgagee. *Id.* at 482, 361 S.E.2d at 410. However, Lake Townsend never made any payments on this note. *Id.* at 486, 361 S.E.2d at 412. Although the mortgagee sent letters to Lake Townsend demanding payment and threatening to accelerate the note, this Court found that the mortgagee did not in fact accelerate payment on the note. *Id.* Since the mortgagee failed to exercise the acceleration clause, this Court held that the statute of limitations did not begin to run until 1 June 1976, the maturity date or the day the last payment on the $12,000 note was due. *Id.* Notably, the *Lake Townsend* court did not conclude that the statute of limitations began to accrue on the date of default, which would have been the date that the first payment on the note was due. *See id.*

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1. We note that the statute of limitations our Supreme Court was interpreting in *Bryan* contains the same language as our present statute, N.C. Gen. Stat. § 1-47.

In the instant case, the trial court found (and the parties do not dispute) that, after appellants' final payment in 1995, Merton Brown did not accelerate the amounts due under either Note 1 or Note 2. Since Merton Brown elected not to exercise either of the notes' acceleration clauses, the power of sale did not become absolute until the date that the final payments were due. As such, the statute of limitations did not begin to accrue until April 2010, the stipulated maturity date for each note. *See id.* at 486, 361 S.E.2d at 412. Had there been a prior acceleration of the total indebtedness, the power of sale would have become absolute at that time and the statute of limitations would have started to run. However, this is not the scenario in the present case.

The trial court correctly applied N.C. Gen. Stat § 1-47(3), finding that it is the later of the provisions contained in the statute that triggers the accrual of the statute of limitations. Because foreclosure proceedings were initiated in 2012, well within the ten-year statute of limitations, N.C. Gen. Stat. § 1-47(3) does not bar the foreclosure action on either Note 1 or Note 2. We affirm.

Affirmed.

Judges GEER and INMAN concur.

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TIMOTHY LOWE, EMPLOYEE, PLAINTIFF
v.
BRANSON AUTOMOTIVE, EMPLOYER AND HARTFORD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA 14-1118

Filed 21 April 2015

**Workers' Compensation—claim denied—findings supported by competent evidence**

In plaintiff's appeal from the Opinion and Award of the full Industrial Commission denying his claim for Workers' Compensation benefits, the Court of Appeals affirmed the Commission, holding that the challenged findings of facts were supported by competent evidence; any reliance on incompetent evidence was not prejudicial; the evidence was not weighed improperly; and the Deputy Commissioner's findings of fact were not binding on the full Commission.

Appeal by plaintiff from Opinion and Award entered 26 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 February 2015.

*Casey S. Francis, for plaintiff.*

*Hedrick Gardner Kincheloe & Garofalo, LLP, by Lindsay N. Wise and M. Duane Jones, for defendants.*

ELMORE, Judge.

Plaintiff appeals from the North Carolina Industrial Commission's ("the Commission" or "the Full Commission") Opinion and Award denying his claim for Workers' Compensation benefits. After careful consideration, we affirm.

## I. Facts

Timothy Lowe (plaintiff) was employed as a tire technician by Branson Automotive (defendant-employer) for over six years as of the date of review by the Commission. Plaintiff's duties as a tire technician included mounting, dismounting, and balancing tires and conducting oil changes. The job also required frequent lifting of 50-100 pounds, bending, and squatting.

Plaintiff filed a Form 18 ("Notice of Accident to Employer") on 28 February 2012 seeking workers' compensation benefits, alleging that on 8 February 2012:

> [He] was lifting a wheel and tire, which weighed approximately 110 pounds with both hands. As he was lifting the tire he felt a pop and an immediate onset of pain in his neck. [He] went to grab his neck with one hand, leaving the wheel and tire in his other hand. While supporting the weight of the wheel and tire with one hand, [he] felt another pop in his lower back an[d] immediately began to experience pain in his lower back with radiating tingling and numbness in his bilateral hands and feet.

Plaintiff's claim was heard before Deputy Commissioner Kim Ledford on 12 December 2012. The Deputy Commissioner entered an Opinion and Award concluding that plaintiff "sustained an injury by accident in the form of a specific traumatic incident arising out of and in the course of his employment with [defendant-employer], resulting in injury to his neck and lower back." The Deputy Commissioner ordered

defendant-employer and defendant Hartford Insurance Company (collectively "defendants"), the insurer on the risk on the date of the alleged injury, to pay for: 1.) all medical treatment reasonably necessary for plaintiff's injury and 2.) temporary total disability benefits to plaintiff at the rate of $443.18. Defendants appealed to the Full Commission.

After reviewing defendants' appeal, the Commission reversed the Deputy Commissioner's Opinion and Award, concluding that "[p]laintiff did not sustain an injury by accident or suffer an injury to his back as a result of a specific traumatic incident of the work assigned, on February 8, 2012. . . . Therefore, [p]laintiff's claim for benefits under the North Carolina Workers' Compensation Act must be denied."

The Commission found the following relevant facts in support of its legal conclusion: during both the discovery period and hearing before the Deputy Commissioner, plaintiff did not fully disclose his history of treatment for back problems that occurred before the alleged 8 February 2012 injury. Although plaintiff conceded his back ached on occasion and that he saw his primary care physician, Dr. Thomas Milton Futrell, for back pain, evidence presented at the hearing indicated that plaintiff sought treatment on numerous occasions for re-occurring back pain before 8 February 2012.

On 9 and 15 February 2012, plaintiff sought medical treatment at Medzone. Nurse Martha Jo Denton met with plaintiff. Ms. Denton testified that plaintiff gave her no indication that his back pain resulted from a specific incident at work. Rather, Ms. Denton stated that plaintiff reported having suffered daily back pain for the past two years and the pain had worsened within the last two days.

Similarly, Mrs. Patti Branson, wife of Elliott Branson (the owner of defendant-employer) and defendant-employer's benefits manager, testified that plaintiff did not contact her about his alleged back injury even though he had previously reported a workers' compensation claim to her on 14 June 2010 related to a knee injury. She learned about the alleged 8 February 2012 injury 16 days after the purported incident, when she called plaintiff at home to inform him of his short-term disability benefits.

After the alleged work-related injury, plaintiff saw several specialists to help treat his back pain, including Dr. Mark Dumonski, Dr. Hao Wang, and Dr. Andreas David Runheim. All three doctors gave expert witness deposition testimony before the Deputy Commissioner and stated they had no knowledge of plaintiff's preexisting history of back

pain when they evaluated plaintiff and reached their conclusions about the cause of his back problems.

Accordingly, the Full Commission also found plaintiff's lack of credibility as a key factor in denying his claim:

> 11. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's testimony that he sustained an injury to his neck and back at work on February 8, 2012 is not accepted as credible. Since the inception of the litigation of this claim, Plaintiff has given varying descriptions of how his alleged injury occurred. Plaintiff did not disclose his prior back problems to Defendants in discovery and did not tell Drs. Dumonski, Wang, or Runheim about his prior back problems. Plaintiff did not report a work-related injury to Mr. Branson on the alleged date of injury, and when he saw Nurse Denton, he did not relate his low back pain to an injury or incident occurring at work on February 8, 2012. To the extent that Plaintiff's wife, Manda Lowe, and Plaintiff's life-long friend, Joey Creasey, testified that Plaintiff told them he was injured at work, the Full Commission places greater weight on the testimony of Mr. and Mrs. Branson and the records and testimony of Nurse Denton.

## II. Analysis

### a.) Findings of Fact

Plaintiff challenges numerous findings of fact in the Commission's Opinion and Award. We examine each of plaintiff's contentions below.

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citations and quotation marks omitted). We review the Full Commission's conclusions of law *de novo*. *Starr v. Gaston Cnty. Bd. of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Bishop v. Ingles Markets, Inc.*, ___ N.C. App. ___, ___, 756 S.E.2d 115, 118 (2014) (citation and quotation marks omitted).

i.) Finding #2

> 2. Plaintiff had a significant history of treatment for back problems prior to February 8, 2012, which he failed to disclose in his discovery responses and in his testimony on direct examination at the hearing before the Deputy Commissioner. The most that Plaintiff would concede about his back at the hearing was that his back would ache from time to time due to lifting heavy tires all day, and that he saw his primary care physician, Dr. Thomas Milton Futrell, for back pain from lifting tires. In actuality, Plaintiff sought treatment multiple times for ongoing back complaints and was prescribed various medications for treatment of back pain. When Plaintiff was seen by Dr. Harrison A. Latimer for treatment of his knee on June 21, 2010, Plaintiff told Dr. Latimer that he had been treating for low back pain for the past three to four years. From December 6, 2010 to January 26, 2011, Plaintiff treated with Dr. Futrell for back pain and spasms. Dr. Futrell prescribed multiple medications to treat the back pain and ultimately referred Plaintiff to a neurologist, at Plaintiff's request.

Plaintiff first challenges the portion of finding #2 that plaintiff "had a significant history of treatment for back problems prior to February 8, 2012" as being unsupported by competent evidence. We disagree.

Dr. Dumonski initially testified that the injury on 8 February 2012 was responsible for defendant's back pain. However, he then testified that after subsequently examining medical notes from Dr. Futrell and Ms. Denton's testimony, both of which noted plaintiff's prior treatment for daily back pain occurring two years prior to 8 February 2012, "[f]rom the standpoint of causation of his back pain that [evidence] would have an impact on my thoughts regarding the causation of [plaintiff's] back pain[.]"

Dr. Wang testified that plaintiff's prior back pain for two years prior to the alleged 8 February incident was:

> important information because we all base on what the patient report[s] back to us when we first saw the patient. We don't have any information regarding his previous medical history. If we don't know he had any chronic problems – and of course, his problem could be happening with th[ese] work-related injuries.

Because the doctors testified that plaintiff's prior back issues would have been key factors in their determination of causation, the finding that plaintiff had a "significant history of treatment for back problems" is supported by competent evidence.

With regard to plaintiff's argument that the remainder of finding #2 is unsupported by competent evidence, plaintiff, in his discovery responses, failed to disclose his prior back injuries on various occasions. In plaintiff's response to Interrogatory #12, he did not mention any prior back treatment within ten years and merely disclosed a 2010 knee injury. In his response to Interrogatory #15, he stated, "[t]o the best of my recollection my only physical complaints other than my injuries sustained in my accident on February 8, 2012 are identified in Interrogatory #12." Plaintiff's response to Interrogatory #16 stated, "[t]o the best of my recollection, I have had no other physical problems, illnesses, injuries or other complaints involving the same parts of my body that are a result of my accident on February 8, 2012."

In Requests For Production of Documents #4, plaintiff responded he "has not injured his back prior to this work related injury, and as such, no prior [medical] records exist." During direct examination, plaintiff also consistently denied the extent of his prior history of treatment for back problems:

> PLAINTIFF'S ATTORNEY: Okay. Had you ever received any types of medical treatment for any types of back pain?
>
> PLAINTIFF: I think one time before that I had – was having headaches. They sent me to the doctor. And one time before, you know, I said something about my back was kind of hurting me a little bit, and he gave me muscle relaxers for it then. But, you know, ever since then, I ain't [sic] never been to the doctor for my back or nothing [sic].
>
> . . .
>
> PLAINTIFF'S ATTORNEY: Okay. And if the medical records reflected that you went a few times, would that – would you agree with that?
>
> PLAINTIFF: For my back?
>
> PLAINTIFF'S ATTORNEY: Right.
>
> PLAINTIFF. No. I don't remember going a few times for my back.

> PLAINTIFF'S ATTORNEY: Did you receive a referral from them for – for your back–
>
> PLAINTIFF: No.
>
> PLAINTIFF'S ATTORNEY: – for back treatment? If the medical records reflect that you were actually referred to see a treatment facility called Neuroscience Center, do you – does that ring a bell to you?
>
> PLAINTIFF: No.

Plaintiff also denied having any prior treatment other than obtaining muscle relaxers from Dr. Futrell on a singular occasion and attributed his prior back pain to "lift[ing] tires and wheels all day."

Contrary to plaintiff's testimony, the medical records (stipulated as admitted evidence) reflect Dr. Harrison A. Latimer's notations that plaintiff received treatment for lower back pain for three or four years prior to 21 June 2010. Moreover, defendant saw Dr. Futrell on multiple occasions for back pain. On 6 December 2010, plaintiff complained of back spasms and received a muscle relaxer and narcotic medicine to relieve the pain. On 4 January 2011, plaintiff returned to Dr. Futrell and said "he was having a lot of trouble with his back[.]" Dr. Futrell prescribed plaintiff with different medication, but it failed to work effectively. Plaintiff saw Dr. Futrell on 26 January 2011 and requested to see a specialist. After that appointment, Dr. Futrell recommended that plaintiff see a neurologist, and plaintiff scheduled a consult with the Johnson Neurological Clinic.

Based on the foregoing discussion, the Commission's finding of fact #2 is supported by competent evidence.

ii.) Finding #4

> 4. Mr. Branson testified that he recalls Plaintiff telling him on February 8, 2012 that his back was sore and that he would probably have to go to the doctor, but that Plaintiff did not tell him that he had injured his back or neck at work.

Plaintiff appears to challenge this finding of fact by arguing the Commission failed to address Mr. Branson's ensuing testimony that Mr. Branson: 1.) did not recall hearing plaintiff say he sustained the injury by "lifting up a tire" and 2.) he did not "know what actually occurred that day at the time." Plaintiff essentially asks us to reweigh Mr. Branson's testimony and does not contend the finding of fact relating to Mr. Branson's

testimony is unsupported by competent evidence. Notwithstanding plaintiff's impermissible contentions, our review of the record indicates that this finding is supported by Mr. Branson's testimony. *See id.* at ___, 756 S.E.2d at 119 ("[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there may be evidence that would support findings to the contrary.").

iii.) Finding # 8

> 8. Patti Branson handles all the bookkeeping and benefits for Defendant-Employer. Despite having dealt with Mrs. Branson with regard to an earlier workers' compensation claim involving an injury to his knee on June 14, 2010, Plaintiff did not contact Mrs. Branson about his alleged February 8, 2012 back injury.

Plaintiff does not argue that finding #8 is unsupported by competent evidence. Plaintiff does not even contest that he did not contact Mrs. Branson about the alleged injury. Rather, plaintiff points to other evidence in the record to explain why he did not contact Mrs. Branson directly. Thus, this finding is binding on appeal. We also note that after reviewing the record, this finding is supported by competent evidence in the form of Mrs. Branson's testimony.

iv.) Finding #9

Plaintiff argues that a portion of the Commission's finding #9, "Plaintiff did not report any complaints of neck pain to Dr. Dumonski[,]" is not supported by competent evidence. We disagree.

Dr. Dumonski evaluated plaintiff on 10 March 2012 and testified that plaintiff "did not complain of neck pain" and any conclusion as to the causal connection between plaintiff's pain and the alleged incident on 8 February 2012 was "specific just to back pain and not neck pain[.]" He further stated, "[plaintiff] and I did not discuss his neck. I didn't get x-rays of his neck. I didn't review an MRI of his neck until just now, and . . . I've sort of been out of the loop with the treatment of his neck[.]"

Plaintiff also argues that the remaining portion of finding #9, "Plaintiff did not tell any of the doctors about his preexisting back problems, and these doctors relied on Plaintiff's inaccurate and incomplete medical history when giving their initial opinions regarding causation in this case[,]" is unsupported by competent evidence. We disagree.

As previously mentioned, Dr. Dumonski initially testified that the alleged injury on 8 February 2012 was responsible for defendant's back pain. However, he premised his medical opinion, in part, on the assumption that plaintiff had no previous back pain before that date. Defendant's attorney asked Dr. Dumonski to review Dr. Futrell's notes and Ms. Denton's testimony regarding plaintiff's treatment for prior back pain. Dr. Dumonski testified that in light of this new information he had not previously considered, "[f]rom the standpoint of causation of his back pain that would have an impact on my thoughts regarding the causation of his back pain[.]"

Dr. Wang testified that he evaluated plaintiff on 12 March 2012 based on plaintiff's alleged work-related injury occurring on 8 February 2012. Plaintiff did not mention his previous back pain. The only information regarding the back pain, according to Dr. Wang, was provided by plaintiff because Dr. Wang did not "have any [other] information regarding his previous medical history." Dr. Wang testified that "[i]f we don't know he had any chronic problems . . . this information [is] important to be known[.]"

After evaluating plaintiff on 14 December 2012, Dr. Runheim concluded to a reasonable degree of medical certainty that more likely than not, the alleged injury of 8 February 2012 significantly contributed to plaintiff's back pain. However, he testified that he did not know plaintiff had daily back pain for two years prior to 8 February 2012. Defendants' counsel asked Dr. Runheim to look at Dr. Futrell's notes regarding plaintiff's prior treatment for back pain, and he testified that the information in Dr. Futrell's notes was different from his conversations with plaintiff because "[plaintiff] did not talk about any prior back pain with me." When asked whether the additional medical evidence added doubt to his causation conclusion, Dr. Runheim stated:

> Well, prior to this, from what I'm taking part of today, the only thing I've seen is nonradiating back pain previous to this injury in February 2012, and whether or not that was radicular or not–or whether that was radiculopathy or not, I have no idea. It was nonradiating, so I mean I'm just not going to comment on that because there's no way for me to know[.]

Based on the foregoing evidence, the Commission's finding of fact #9 is supported by competent evidence.

v.) Finding # 10

Plaintiff challenges finding #10, "Dr. Wang testified that his diagnosis of degenerative disc disease could correlate with Plaintiff's complaints of ongoing back pain, and that based upon the imaging studies alone, Plaintiff's complaints were 'more like a chronic process' than an acute injury." Plaintiff argues this finding is unsupported by competent evidence. We disagree.

Defendants' attorney asked Dr. Wang whether "the diagnosis of degenerative joint disease or degenerative disc disease correlate with [plaintiff]'s ongoing back pain for the last two years" and Dr. Wang replied, "[t]hat could be." With regard to plaintiff's complaints being a chronic process, Dr. Wang testified that "[i]f only based on the [MRI] imaging . . . it's more like a chronic process." Thus, Dr. Wang's testimony constitutes competent evidence to support the Commission's finding #10.

vi.) Finding #11

Plaintiff argues no competent evidence in the record exists to support the portion of the Commission's finding #11 that "Plaintiff's testimony that he sustained an injury to his neck and back at work on February 8, 2012 is not accepted as credible." We disagree.

Plaintiff's own testimony and his answers to interrogatories, when compared with Ms. Denton's testimony and plaintiff's documented history of treatment for back problems cast doubt as to whether a work-related injury on 8 February 2012 occurred. Thus, the Commission's finding of fact with regard to plaintiff's credibility remains undisturbed.

**b.) Weight to Witnesses**

Next, plaintiff argues that the Commission erred by placing more weight on purported medical causation testimony of Ms. Denton over the testimony of Drs. Dumonski, Wang, and Runheim. We disagree.

Plaintiff mischaracterizes the findings related to Ms. Denton's testimony as medical causation testimony. In finding #11, the Commission stated that it did not find plaintiff's testimony credible and "places greater weight on the testimony of . . . Nurse Denton." With regard to Ms. Denton's testimony, the Commission found:

> 6. On February 9, 2012, Plaintiff sought medical treatment at Medzone, where he was seen by Martha Jo Denton, RN, a nurse practitioner. Plaintiff reported to Ms. Denton that he had suffered daily back pain for the past

> two years, but that it had worsened within the last two days and that he now had radiating pain down the back of his legs. Ms. Denton asked Plaintiff if his back pain occurred from a specific injury or incident. She testified that Plaintiff responded '[n]o, that he could not relate it back to a specific incident but that, you know, he did work lifting heavy tires all day long, but that he could not relate it back to a specific incident.' When Plaintiff returned to see Ms. Denton on February 15, 2012, he again gave no indication that his back pain was the result of an injury or specific incident at work.
>
> . . .
>
> 11. To the extent that Plaintiff's wife . . . and Plaintiff's life-long friend . . . testified that Plaintiff told them he was injured at work, the Full Commission places greater weight on the testimony of Mr. and Mrs. Branson and the records and testimony of Nurse Denton.

Thus, the Commission's findings related to Ms. Denton's lay testimony indicate that plaintiff failed to report that he injured his back at work on 8 February 2012. The Commission, within its discretion, placed more weight on Ms. Denton's testimony than plaintiff's wife and friend's statements that plaintiff told them he was injured at work.

Additionally, the Commission considered the expert testimony of Drs. Dumonski, Wang, and Runheim but found, based on competent evidence previously discussed, that "these doctors relied on Plaintiff's inaccurate and incomplete medical history when giving their initial opinions regarding causation in this case." As such, the Commission was free to assign as little or as much weight to the doctors' testimony in concluding that plaintiff did not sustain as an injury to his back as a result of work-related injury on 8 February 2012. *See Harrell v. J. P. Stevens & Co., Inc.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980) ("[T]he Commission is the sole judge of the credibility of witnesses and may believe all or a part or none of any witness's testimony[.]"). Thus, plaintiff's argument fails.

**c.) Reliance on Dr. Futrell's Testimony**

Plaintiff argues the Commission erred in its finding of fact #10 by considering Dr. Futrell's purported non-competent testimony that "it was possible that the degenerative changes shown on the MRI [after 8 February 2012] were causing the back pain Plaintiff was experiencing when he treated Plaintiff in 2010 and 2011."

Assuming *arguendo* the Commission erred by considering Dr. Futrell's testimony above, any such error is not prejudicial to plaintiff. After reviewing the Commission's Opinion and Award, its decision to deny plaintiff's claim for benefits hinged on plaintiff's non-credible testimony, plaintiff's failure to disclose his prior back problems, plaintiff's failure to report a work-related injury to Ms. Denton or the Bransons, and the doctors' reliance on plaintiff's incomplete medical history.

Thus, the Commission's consideration of Dr. Futrell's testimony above was not prejudicial error because that portion of his testimony was not material to the outcome of this case. *See Estate of Gainey v. S. Flooring & Acoustical Co., Inc.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) ("[W]here there are sufficient findings of fact based on competent evidence to support the [tribunal's] conclusions of law, the [decision] will not be disturbed because of other erroneous findings which do not affect the conclusions.").

**d.) Form 44**

Plaintiff argues that defendants' challenges to the Deputy Commissioner's conclusions of law #1, #2, #3, and #5 on the Form 44 were not properly before the Commission. Plaintiff avers, purely from a procedural standpoint, that defendants' "failure to assign error with specificity, coupled with the Commission's sparse Opinion and Award, results in portions of Deputy Commissioner Ledford's original decision being binding." We disagree.

Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission states:

> (2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). . . .
>
> (3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

*Adcox v. Clarkson Bros. Const. Co.*, ___ N.C. App. ___, ___, 763 S.E.2d 792, 796-97 (2014). Our Court has stressed that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). Accordingly, "the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 249, 652 S.E.2d 713, 715 (2007). We determine whether the Commission abused its discretion by not ruling that defendants waived issues by violating Rule 701 through our consideration of "whether the appellant provided the appellee with adequate notice of the grounds for appeal through other means such as addressing the issue in its brief to the Full Commission" and whether the Commission addressed the issues raised by appellants in its Opinion and Award. *Adcox*, ___ N.C. App. at ___, 763 S.E.2d at 798.

For the reasons set forth below, even if defendants' assignments of error in their Form 44 lacked the requisite specificity under Rule 701, the Commission did not abuse its discretion by failing to deem defendants' issues as waived. Defendants assigned error to the Deputy Commissioner's conclusions of law #1, #2, #3, and #5 in their Form 44 by stating, with respect to each challenged conclusion: "Error is assigned to Conclusion of Law No. [x], as this conclusion is contrary to law, omits salient facts, and is not adequately supported by findings of fact which are supported by the competent evidence in the Record."

The Deputy Commissioner's conclusion of law #1 states that "Plaintiff sustained an injury by accident in the form of a specific traumatic incident arising out of and in the course of his employment with the Defendant-employer[.]" Conclusion of law #2 states that "as a consequence of the accident of February 8, 2012, Plaintiff sustained significant aggravation of his pre-existing underlying degenerative disc disease in this lower back[.] . . . [A]ll the consequences of the accident . . . are compensable[.]" Conclusion of law #3 states that "[plaintiff] is found to be a credible witness." Conclusion of law #5 entitled plaintiff to "compensation for temporary total disability" because he "met his burden of proving he is disabled due to the injury by accident[.]"

In reversing the Deputy Commissioner, the Full Commission specifically reviewed and considered "the briefs . . . of the parties[.]" As a result, the Commission concluded that "Plaintiff did not sustain an injury by accident or suffer an injury to his back as a result of a specific traumatic incident of the work assigned, on February 8, 2012[,]" "Plaintiff's claim for benefits . . . must be denied[,]" and "Plaintiff's testimony . . . is

not accepted as credible." Thus, the Commission's conclusions of law directly addressed the issues raised by defendants' in their Form 44 and brief. As such, plaintiff cannot and does not contend that he received inadequate notice of defendants' grounds for appeal—the underlying consideration behind the spirit of Rule 701. Thus, plaintiff's argument fails. *See Cooper v. BHT Enterprises*, 195 N.C. App. 363, 368-69, 672 S.E.2d 748, 753 (2009) (holding that defendants "complied with Rule 701(2)'s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission" and taking into account the fact that plaintiff did not argue that defendant's Form 44 provided inadequate notice of their grounds for appeal).

**e.) Findings of Fact not Challenged by Defendants**

Plaintiff argues that defendants failed to properly assign error to several findings of fact made by the Deputy Commissioner in its Form 44. Accordingly, he contends that these findings are binding on appeal. We disagree.

Although we are limited to determining whether competent evidence supports the Commission's findings of fact and whether those findings support the Commission's conclusions of law, the Deputy Commissioner's Opinion and Award "is fully reviewable upon appeal to the Full Commission." *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 709, 654 S.E.2d 263, 267 (2007). The Commission "may weigh the same evidence that was presented to the deputy commissioner and decide for itself the weight and credibility of that evidence." *Id.* Importantly, the Commission has the authority to "strike entirely the deputy commissioner's findings of fact even if no exception was taken to them." *Id.* Because the Commission could reject, adopt, or modify the Deputy Commissioner's findings of fact, plaintiff's argument fails.

**III.) Conclusion**

In sum, the challenged findings of fact are supported by competent evidence. Any error arising from the Commission's reliance on Dr. Futrell's testimony is not prejudicial. Finally, the Commission neither erred by placing more weight on Ms. Denton's testimony nor by failing to deem the Deputy Commissioner's legal conclusions and findings of fact as binding. Accordingly, we affirm the Full Commission's Opinion and Award.

Affirmed.

Judges GEER and INMAN concur.

**STATE v. HOLE**

[240 N.C. App. 537 (2015)]

STATE OF NORTH CAROLINA
v.
BRIAN PHILIP HOLE

No. COA14-1142

Filed 21 April 2015

**1. Larceny—of a motor vehicle—jury instruction—voluntary intoxication**

In defendant's trial resulting in his conviction for larceny of a motor vehicle, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. Because the trial court properly instructed the jury on the issue of voluntary intoxication, defendant could not show that the jury probably would have reached a different result if it had also received the instruction on unauthorized use of a motor vehicle.

**2. Larceny—of a motor vehicle—ineffective assistance of counsel—dismissed**

On appeal from his conviction for larceny of a motor vehicle, defendant's ineffective assistance of counsel claim was dismissed without prejudice. Ineffective assistance of counsel claims should be asserted through a motion for appropriate relief, which allows development of an adequate factual record to determine the reasonableness of trial counsel's conduct.

Appeal by defendant from judgment entered 29 May 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 4 March 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.*

*Amanda S. Zimmer, for defendant.*

TYSON, Judge.

Brian Philip Hole ("Defendant") appeals from judgment entered, following his conviction of larceny of a motor vehicle. We hold the trial court did not commit plain error. We dismiss Defendant's ineffective assistance of counsel claim, without prejudice.

I. Background

Defendant began drinking beer at 7:00 a.m. on 12 May 2013. He arrived at the Double K Bar between 7:00 p.m. and 8:00 p.m. and continued to consume beer. A patron of the bar, John Staten, played a game of pool with defendant. Staten testified that Defendant appeared to be very intoxicated. By 8:45 p.m., Mr. Staten noticed Defendant was having difficulty standing and he leaned against a drink machine.

Emily Story was also a patron in the Double K Bar that evening. She drove her 1986 Chevrolet Blazer to the bar, left the keys in the ignition, and went inside. Story testified her Blazer had large, thirty-eight inch tires, and was raised two feet from the ground. She had to grasp the steering wheel or seat belt to pull herself into the vehicle.

Story had been inside the bar about thirty minutes when she heard her vehicle crank. She went to the door and saw Defendant drive away in her Blazer. Story's boyfriend, Joe Graves, and Graves' friend, Samuel Turner, immediately got into Graves' truck and followed Defendant.

Defendant attempted to turn and drove into a ditch. He was able to drive the Blazer out of the ditch and continued driving down the road, with Graves and Turner following behind. As Defendant came to a sharp curve, he drove off the road, traveled about 500 yards through a field, and crashed into a barn. Hayes and Turner left their truck and walked through the field to the barn. Defendant was unconscious and lying in the floorboard of Story's vehicle.

Defendant was transported by ambulance to Moses Cone Memorial Hospital in Greensboro and arrived in the emergency room at 11:40 p.m. Defendant called Dr. Brian Opitz, the emergency room physician who treated him, to testify at trial. Dr. Opitz testified that Defendant registered a blood alcohol level of .334 at 11:51 p.m. Defendant was offered beer at the hospital to prevent symptoms of alcohol withdrawal, but refused.

Dr. Opitz evaluated Defendant using the Glasgow Coma Scale ("GCS") as part of his medical treatment. The GCS is a scale used by emergency medicine practitioners to determine how trauma may have affected the patient's mental function. The GCS ranges from 3 to 15 and a score of 15 is normal. Dr. Opitz explained that the first component of the test involves the patient's eyes. Four points are assessed if the patient opens his eyes normally when he is approached and spoken to. The patient is assessed one point, if he cannot respond by opening his eyes.

The second component involves verbal communication. Five points are assessed if the patient is able to speak normally and coherently. One point is assessed if the patient cannot speak at all. The final component tests the patient's fine motor skills. Six points are assessed if the patient is able to follow commands to perform fine motor movements. He will be assessed one point if he cannot do anything at all.

The EMS team evaluated defendant using the GCS and determined he scored 11 out of the 15 possible points. When Dr. Opitz evaluated him, defendant scored 13 points. Dr. Opitz testified he assessed 3 points for the eye component of the test and 4 points for the verbal component. Dr. Opitz scored Defendant with 6 points, a perfect score, on the fine motor skills portion of the test.

Defendant was indicted on the charge of felonious larceny of a motor vehicle. He was tried before a jury and convicted on 29 May 2014. The trial court sentenced Defendant to an active prison term of fifteen to twenty-seven months. Defendant appeals.

## II. Issues

Defendant argues: (1) the trial court committed plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle; and, (2) his trial counsel was ineffective by failing to request a jury instruction on the lesser-included offense of unauthorized use of a motor vehicle.

## III. Jury Instruction

**[1]** Defendant argues the trial court committed plain error by failing to instruct the jury on the offense of unauthorized use of a motor vehicle. He contends unauthorized use of a motor vehicle is a lesser-included offense of larceny. Defendant also contends the evidence showed he was too intoxicated to form the requisite intent to support a conviction of felonious larceny. We disagree.

### a. Standard of Review

Defendant failed to object to the jury instructions provided at trial. We review unpreserved error in criminal cases under a plain error standard. N.C.R. App. P. 10(a)(4); *State v. Black*, 308 N.C. 736, 739-41, 303 S.E.2d 804, 805-07 (1983). Under the plain error standard, the defendant must establish "the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). "[B]ecause plain error is to be applied cautiously and only in the

exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (citation and quotation marks omitted). In reviewing for plain error, appellate courts are to "examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 379 (1983).

b. Unauthorized Use of a Motor Vehicle

A person is guilty of unauthorized use of a motor vehicle, a Class 1 misdemeanor, if he takes or operates a motor vehicle without the express or implied consent of the owner or person in lawful possession. N.C. Gen. Stat. § 14-72.2(a) and (b) (2013). "The essential elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property." *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300, *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985) (citing *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982)). When the value of the property stolen exceeds $1,000, the larceny in question is classified as a Class H felony. N.C. Gen. Stat. § 14-72(a) (2013). The offense of larceny requires the State to prove the defendant possessed the intent to permanently deprive the owner of the property, while the offense of unauthorized use of a motor vehicle does not.

A trial court must instruct the jury on a lesser-included offense, if there is evidence the defendant might be guilty of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 190-91 (1993). "If the State's evidence is clear and positive as to each element of the charged offense, and if there is no evidence of the lesser-included offense, there is no error in refusing to instruct on the lesser offense." *State v. Howie*, 116 N.C. App. 609, 613, 448 S.E.2d 867, 869 (1994) (citing *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)).

Our Court has held unauthorized use of a motor vehicle "may be a lesser-included offense of larceny where there is evidence to support the charge." *State v. Ross*, 46 N.C. App. 338, 339, 264 S.E.2d 742, 743 (1980); *State v. McRae*, 58 N.C. App. 225, 229, 292 S.E.2d 778, 780 (1982). *But see State v. Nickerson*, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011) (holding unauthorized use of a motor vehicle is not a lesser-included offense of possession of stolen goods because unauthorized use of motor vehicle requires the State to prove the property in question is a "motor-propelled conveyance," an element not found in the definition of possession of stolen goods).

c. Voluntary Intoxication and Specific Intent

"Voluntary intoxication may negate the existence of specific intent as an essential element of a crime." *Howie*, 116 N.C. App at 613, 448 S.E.2d at 869. Evidence of defendant's intoxication at the time of the crime may support an instruction on the lesser-included offense, which requires no specific intent, in addition to an instruction on larceny. *Id.* at 613, 448 S.E.2d at 869-70 (citing *Peacock*, 313 N.C. at 560, 330 S.E.2d at 194).

"In order for intoxication to negate the existence of specific intent, the evidence must show the defendant was 'utterly incapable' of forming the requisite intent." *Id.* at 613, 448 S.E.2d at 869-70 (citation omitted). "Evidence of mere intoxication is insufficient to meet this burden." *Id.* If the evidence showed defendant was "utterly incapable" to form the intent to commit larceny, the trial court should instruct the jury on the lesser-included offense. *Id.*

Defendant asserted he was too intoxicated to form the requisite intent to commit larceny. The court instructed the jury on voluntary intoxication, as follows:

> You may find that there is evidence which tends to show that the defendant was intoxicated at the time of the acts alleged in this case. Generally, voluntary intoxication is not a legal excuse for a crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected the defendant's ability to formulate the specific intent which is required for conviction of felonious larceny.
>
> In order for you to find the defendant guilty of felonious larceny, you must find beyond a reasonable doubt that the defendant had the specific intent required to commit this crime, as I have previously instructed you. If, as a result of intoxication, the defendant did not have the required specific intent, you must find the defendant not guilty of felonious larceny.
>
> Therefore, I charge that if, upon considering the evidence with respect to the defendant's intoxication, you have a reasonable doubt as to whether the defendant formulated a specific intent required for conviction of felonious larceny, you will not return a verdict of guilty of felonious larceny and must find the defendant not guilty.

The trial court properly instructed the jury on the issue of voluntary intoxication. Under plain error review and in light of this instruction, defendant has not shown the absence of an instruction on unauthorized use of a motor vehicle impacted the jury's larceny verdict. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Whether defendant possessed the intent to permanently deprive the owner of the vehicle was a question of fact to be found by the jury. The jury heard Dr. Opitz's testimony and had EMS and Dr. Opitz's evaluations of Defendant's mental functioning and intoxication at the hospital shortly after the wreck. After receiving the proper instruction, the jury found the element of defendant's intent to commit larceny beyond a reasonable doubt. Defendant has not shown the jury probably would have reached a different result, if the trial court had given an additional instruction on unauthorized use of a motor vehicle. The trial court did not commit plain error in failing to instruct the jury on unauthorized use of a motor vehicle. Defendant's argument is overruled.

IV. Ineffective Assistance of Counsel

**[2]** Defendant argues he received ineffective assistance of counsel because his attorney failed to request an instruction on the lesser-included offense of unauthorized use of a motor vehicle. He asserts there is a reasonable probability the jury would have acquitted him of larceny, if the jury had been instructed on the lesser-included offense of unauthorized use of a motor vehicle.

The defendant must demonstrate his "counsel's conduct fell below an objective standard of reasonableness" to obtain relief for ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984)). Precedents require defendant to show: (1) "counsel's performance was deficient;" and, (2) "that the deficient performance prejudiced his defense." *Id.* at 562, 324 S.E.2d at 248. Judicial scrutiny of trial counsel's performance is highly deferential.

Trial counsel is given wide latitude in discretionary matters of trial strategy. *State v. Milano*, 297 N.C. 485, 495-96, 256 S.E.2d 154, 160 (1979) (citation and quotation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). An appellate court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Mason*, 337 N.C. 165, 178, 446 S.E.2d 58, 65 (1994) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

In a recent decision, this Court thoroughly discussed the preference for litigating ineffective assistance of counsel claims before the trial court, as opposed to the appellate courts:

> The preference for the assertion of ineffective assistance of counsel claims in postconviction proceedings rather than on direct appeal inherent in numerous decisions by this Court and the Supreme Court stems from the fact that evidence concerning the nature and extent of the information available to the defendant's trial counsel at the time that certain decisions were made and the fact that information concerning any discussions that took place between the defendant and his or her trial counsel, while needed in evaluating the validity of the ineffective assistance of counsel claim under consideration, are generally not contained in the record presented to a reviewing court on direct appeal.

*State v. Pemberton*, __ N.C. App. __, __, 743 S.E.2d 719, 725 (2013).

On the record before us, this Court can only speculate to whether defense counsel's failure to request a jury instruction on unauthorized use of a motor vehicle constituted a reasonable trial strategy. *Id.* at __, 743 S.E.2d at 727. In cases such as this, "ineffective assistance of counsel claim[s] should be asserted through the filing and litigation of a motion for appropriate relief, during the course of which an adequate factual record can be developed, rather than during the course of a direct appeal." *Id.* at __, 743 S.E.2d at 725. We dismiss Defendant's ineffective assistance of counsel claim, without prejudice to Defendant's right to assert the claim in the trial court.

## V. Conclusion

Defendant has failed to show the trial court committed plain error in failing to instruct the jury on the offense of unauthorized use of a motor vehicle, a lesser-included offense of larceny. The jury was instructed on voluntary intoxication, heard all the evidence, and found Defendant to be guilty of larceny.

Defendant's ineffective assistance of counsel claim is dismissed, without prejudice to Defendant's right to assert the claim in the trial court.

NO ERROR IN PART, DISMISSED IN PART.

Judges STEPHENS and HUNTER, Jr. concur.

STATE OF NORTH CAROLINA
v.
ANNA LAURA HUCKELBA

No. COA14-916

Filed 21 April 2015

**1. Schools and Education—possession of weapon on educational property—jury instruction—knowingly on educational property**

The trial court committed plain error by instructing the jury that defendant was guilty of possessing a weapon on educational property even if she did not know she was on educational property. The State bears the burden of proving a defendant's mental state not only for the "possess or carry" element of the statute, but also for the knowing presence on educational property element.

**2. Constitutional Law—effective assistance of counsel—failure to argue fatal variance in indictment—improper school address—surplusage**

The trial court did not err in a possession of a weapon on educational property case by concluding that defendant did not receive ineffective assistance of counsel based on his failure to argue a fatal variance in the indictment regarding an improper school address. The indictment charged all of the essential elements of the crime and the physical address for High Point University listed in the indictment was surplusage. The indictment already described the educational property element as High Point University.

BRYANT, Judge, concurring in part and dissenting in part.

Appeal by Defendant from judgment entered on 3 October 2013 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals on 20 January 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.*

*Edward Eldred for the defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Anna Laura Huckelba[1] ("Defendant") appeals from a final judgment of the trial court, based on a jury verdict finding her guilty of three counts of misdemeanor weapon on educational property and one count of felony weapon on educational property pursuant to N.C. Gen. Stat. § 14-269.2(b) (2011). On appeal, Defendant first contends that the trial court committed plain error by instructing the jury that Defendant was guilty of possessing a weapon on educational property even if she did not know she was on educational property. Second, Defendant argues that her trial counsel was ineffective by failing to argue a fatal variance in the indictment. For the following reasons, we reverse and remand for a new trial consistent with this opinion.

## I. Factual & Procedural History

On 11 February 2013, Defendant was indicted on three counts of misdemeanor possession of a weapon on campus or other educational property and one count of felony possession of a weapon on campus or other educational property in violation of N.C. Gen. Stat. § 14-269.2(b). Defendant's case was called for trial in Guilford County Superior Court on 1 October 2013. The evidence presented at trial tended to show the following facts:

On 25 December 2012, Defendant was a senior at High Point University in High Point, North Carolina. Because it was Christmas day, school was not in session, and there were few cars on campus. That evening, sometime after 4:30 P.M., Defendant pulled into a parking spot in front of High Point University's Administration Building. In order to get to this parking spot, Defendant had to drive past a fence, but she did not have to drive through any security gates. Had Defendant chosen to move her car from its location in front of the Administration Building to the residential area of campus, she would have encountered a security gate, and would need a security card to drive into the residences. Instead, Defendant parked her car in an area that was open to the public, approximately two miles away from "main" campus, where most of the academic buildings are located.

Officer Jeffrey Thomas ("Officer Thomas"), a security officer employed by High Point University, noticed Defendant as she parked. Officer Thomas recognized Defendant because the officers were previously instructed to "be on the lookout" for Defendant for an unspecified

1. Although the caption on Defendant's brief and the Record on Appeal spell Defendant's name "Huckleba," the filings with the trial court (including the indictments and judgment) spell Defendant's name "Huckelba." We adopt the spelling of Defendant's name used by the trial court in the judgment.

reason. The officers were directed to call a Student Life employee if they saw Defendant on campus. Officer Thomas approached Defendant and spoke to her while she was still in her car. He asked her whether she had spoken to anyone in the Student Life department. When Defendant responded that she had not, Officer Thomas escorted her into the lobby of the Administration Building. Defendant's demeanor was calm. Officer Thomas left Defendant in the lobby and Lieutenant Dennis Shumaker ("Lieutenant Shumaker"), another security officer employed by High Point University, joined them in the lobby.

Lieutenant Shumaker contacted the on-duty resident director of Student Life, Lance Dunlap ("Mr. Dunlap"), who arrived at the Administration Building ten to fifteen minutes later. During those ten to fifteen minutes, Lieutenant Shumaker asked Defendant why she was on campus. Defendant responded that she wanted to do her laundry in her townhome-style dorm room on campus. When Mr. Dunlap arrived, he asked Defendant if she had a gun. Defendant responded that she did have a gun in her car. Lieutenant Shumaker told Defendant that he needed to retrieve the gun from her car. Defendant handed Lieutenant Shumaker her car keys without objection. Before Lieutenant Shumaker left the room, Defendant told him that she had a "concealed carry" permit.

Lieutenant Shumaker went outside to the parking lot of the Administration Building, unlocked and opened Defendant's car. Initially, Lieutenant Shumaker did not see any weapons in the car, only a cardboard box on the back-seat floorboard. Lieutenant Shumaker eventually located a loaded gun[2] in the glove compartment of Defendant's car and three knives in the cardboard box in the back seat. The knives' blades were not exposed. At that point, Lieutenant Shumaker contacted the High Point Police Department and waited for an officer to arrive on the scene. Before leaving for the night, Lieutenant Shumaker wrote a report of the incident. In that report, he documented a direct statement made by Defendant: "I know I'm not supposed to have [the gun] on campus, but I don't take it in my room, or anything."

High Point Police Officer Ian Stanick ("Officer Stanick") eventually arrived on the scene and immediately secured the weapons in his police vehicle. He later took the weapons to the police department and logged them into evidence. Once the weapons were secure, Officer Stanick arrested Defendant and transported her to the police station. At the station, Defendant waived her *Miranda* rights and made several

2. The gun was later identified by police as a Ruger 380 pistol.

statements to Officer Stanick about the weapons in her car. Defendant stated again that "[s]he knew she was not supposed to have a gun on campus" because "she was taught that in her concealed carry class." She also indicated that her concealed carry permit was valid on the day of her arrest.[3] Defendant told Officer Stanick that she bought the gun for protection because she works the night shift at a retail clothing store in Winston-Salem. She explained to Officer Stanick that she does not feel safe walking through the dark parking lot after work. Defendant indicated to Officer Stanick that "she did not have anywhere else to keep the weapon so she kept it locked in the glove compartment of the car." Defendant was subsequently charged with one count of felony weapon on educational property for the gun and three counts of misdemeanor weapon on educational property for the knives. She spent thirty-nine days in jail before she was released on bail.

Defendant's case was called for trial in Guilford County Superior Court on 1 October 2013. During her opening statements to the jury, Defendant admitted to the element of possession for each of the four weapons charges, but adamantly denied that she was on educational property. At the close of the State's evidence, Defendant made a motion to dismiss, which the trial court denied. No evidence was presented by Defendant.

During the charge conference, outside the presence of the jury, the trial court proposed to read to the jury North Carolina Pattern Jury Instruction 235.17 for the substantive elements of the offenses charged. Neither party objected. Accordingly, the trial court charged the jury with the following instructions:

> The defendant in this case has been charged with knowingly possessing a Ruger pistol on educational property.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant knowingly possessed a Ruger pistol.

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3. The evidence suggests that Defendant had a valid permit to carry a concealed handgun at the time of her arrest. We note that had the same incident occurred nine months later, Defendant would have been guilty of no crime—at least with regard to the felony gun charge. Effective 1 October 2013, the North Carolina legislature added the following exemption to the statute prohibiting weapons on educational property: "The provisions of this section shall not apply to a person who has a concealed handgun permit that is valid . . . who has a handgun in a closed compartment or container within the person's locked vehicle." N.C. Gen. Stat. § 14-269.2(k) (2013).

> And second, that the defendant was on educational property at the time she possessed the pistol.
>
> Therefore, if you, the jury, find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed a Ruger pistol, and that the defendant was on educational property at the time she possessed the pistol, then it would be your duty to return a verdict of guilty of knowingly possessing a Ruger pistol on educational property. On the other hand, if you fail to so find or you have a reasonable doubt as to one or both of these things, then it would be your duty to return a verdict of not guilty as to this charge.

The trial court repeated this instruction to the jury for each additional weapon charge, substituting the words "Ruger pistol" for the names of the three knives found in Defendant's car. The jury found Defendant guilty of all four weapons charges. At sentencing, because Defendant was a prior record level I with zero points, the trial court imposed a suspended sentence of six to seventeen months imprisonment for the Class I felony gun charge, and a suspended, consolidated sentence of forty-five days imprisonment for the misdemeanor weapons charges.

On 8 October 2013, five days after the judgment against her was entered, Defendant filed a handwritten notice of appeal. The notice states that Defendant "give[s] notice of appeal to the Court of Appeals of Guilford County." The bottom right hand corner of the notice states: "10/8/13 CC DA," suggesting that Defendant possibly gave the District Attorney's office the same notice. On 4 December 2014, the State moved this Court to dismiss Defendant's appeal, citing a violation of Rule 4 of the North Carolina Rules of Appellate Procedure, which requires a defendant-appellant to serve the State with a copy of the notice of appeal. *See* N.C. R. App. P. 4. On 15 December 2014, Defendant filed a response to the State's motion to dismiss, as well as a petition for writ of *certiorari* with this Court. On 16 January 2015 we allowed the State's motion to dismiss the appeal, based on the procedural violations. However, on 21 January 2015, we granted Defendant's petition for writ of *certiorari* to decide this case on the merits.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, which provides for appellate review under the extraordinary writ of *certiorari*. "The writ of certiorari may be issued in appropriate circumstances by either appellate court

to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1).

## III. Standard of Review

With regard to the first assignment of error, the allegedly erroneous jury instructions, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). "A party may not make any portion of the jury charge or omissions therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires." N.C. R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024 (2008). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835 (2008). Therefore, an unpreserved issue with the jury instructions in a criminal case may only be reviewed by this Court if we find that the instructions as given by the trial court amounted to plain error. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (noting that the Supreme Court of North Carolina "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury[.]").

"The North Carolina plain error standard of review . . . requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). First, "a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. Second, "a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Finally, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks omitted).

In this case, Defendant argues on appeal that the trial court erred by instructing the jury that Defendant was guilty of possessing a gun on educational property even if she did not know she was on educational property. Defendant did not object at trial to the proposed jury instructions; however, she now specifically and distinctly contends that the instructions amounted to plain error. Therefore, we review the trial court's instructions to the jury for plain error.

With regard to the second assignment of error, the alleged ineffective assistance of counsel, "a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quotation marks omitted). To establish prejudice, "a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

## IV. Analysis

Defendant's two arguments on appeal are: (1) the trial court committed plain error by instructing the jury that Defendant was guilty of possessing a gun on educational property even if she did not know she was on educational property; and (2) Defendant's trial counsel was ineffective by failing to argue a fatal flaw in the indictment. We address each assignment of error in turn.

### A. Jury Instructions

**[1]** "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Here, the statute under which Defendant was convicted provides: "It shall be a class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." N.C. Gen. Stat. § 14-269.2(b) (2011). On appeal, Defendant argues that the trial court failed to instruct the jury on the proper mental state for the "on educational property" element of the crime. Specifically, Defendant argues that the trial court should have instructed the jury that it must find Defendant not guilty of the crime if it finds that Defendant was not *knowingly* on educational property.

The issue of whether the word "knowingly," as used in N.C. Gen. Stat. § 14-269.2(b), modifies both clauses "possess or carry" *and* "on educational property" is an issue of first impression for this Court. The plain language of N.C. Gen. Stat. § 14-269.2(b) provides us little guidance in determining which words in the sentence "knowingly" should modify. While the clause "whether openly or concealed" is separated from the rest of the sentence by commas, there is no punctuation separating the "knowingly to possess or carry" clause from the latter clauses in the sentence.[4]

Our Supreme Court has addressed the issue of which clauses in a statutory sentence the adverbial mental state "knowingly" should modify. However, in that case, the statutory language was much more clear than in the case at bar. In 1964, the Supreme Court of North Carolina analyzed N.C. Gen. Stat. § 18-78.1, which governed licenses to sell alcoholic beverages. *See Campbell v. North Carolina State Bd. of Alcoholic Control*, 263 N.C. 224, 225–26, 139 S.E.2d 197, 199 (1964) (overruled on other grounds by *Nat'l Food Stores v. North Carolina Bd. of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1975)). Section 5 of the statute provided that no licensee shall "sell, offer for sale, possess, or knowingly permit the consumption on the licensed premises of any kind of alcoholic liquors the sale or possession of which is not authorized by law." N.C. Gen. Stat. § 18-78.1(5) (1966). The Supreme Court noted that "it appears by the punctuation that the word 'knowingly' does not modify sell, offer for sale, or possess but does modify 'permit the consumption of the licensed premises.' " *Campbell*, 263 N.C. at 226, 139 S.E.2d at 199. This interpretation of the statute is clear from its plain language. The word "knowingly" is placed *after* the clauses "sell, offer for sale, and possess," but *before* the clause "permit the consumption." The statutory

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4. One criminal law treatise describes this grammatical conundrum in a similarly worded statute:

> Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit" from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel—whether it modifies "sells," or "sells a security," or "sells a security without a permit."

W. LaFave & A. Scott, Criminal Law § 27 (1972).

language of N.C. Gen. Stat. § 14-269.2(b) is far less clear because the modifying word "knowingly" is placed before all of the other clauses in the statutory sentence. Thus, *Campbell* provides us little guidance in our analysis of N.C. Gen. Stat. § 14-269.2(b).

Although our State court decisions provide little guidance, this issue has been raised several times in the federal courts of appeal and in the United States Supreme Court. *See*, *e.g.*, *United States v. X-Citement Video*, *Inc.*, 513 U.S. 64 (1994); *United States v. Staples*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998); *United States v. Langley*, 62 F.3d 602, 604 (4th Cir. 1995); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995). Therefore, we look to these cases as persuasive authority for our inquiry. In all of the cases addressing this issue, the Courts resolve the grammatical ambiguity by looking to other principles of statutory construction.

In accordance with United States Supreme Court and Fourth Circuit cases, and our State law presumptions, we analyze N.C. Gen. Stat. § 14-269.2(b) under the following principles of statutory construction: (1) the common law presumption against criminal liability without a showing of *mens rea*; (2) the General Assembly's intent in enacting and amending the statute; and (3) the rule of lenity. We hold under each relevant principle of statutory construction, the "knowingly" mental state in N.C. Gen. Stat. § 14-269.2(b) must modify both clauses "possess or carry" and "on educational property."

**1. *Mens Rea***

The first principle of statutory construction articulated by the federal courts is the common law presumption that criminal culpability requires a guilty mind, or some knowledge that the actor is performing a wrongful act.[5] *See Staples v. United States*, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.") (internal citations omitted).

The United States Supreme Court first addressed the issue of the extent to which a mental state requirement should be "read into" a statute in *Liparota v. United States*. 471 U.S. 419 (1985). In *Liparota*, the

5. *See* 1 Wharton's Criminal Law § 27 (15th ed. 1993) ("In the ordinary case, an evil deed, without more, does not constitute a crime; a crime is committed only if the evil doer harbored an evil mind.").

defendant was convicted under a federal statute which was similarly ambiguous as to how much of the sentence the word "knowingly" should modify. *Id.* at 420. The statute in *Liparota* prohibited the unauthorized use of federal food stamps, and provided that "whoever knowingly uses, transfers, acquires, alters or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations is subject to a fine and imprisonment." *Id.* at 420–21 (quotation marks omitted). The issue, then, was whether the Government must prove *only* knowing use, transfer, acquisition, alteration, or possession of the foods stamps, or whether the Government must *also* prove that the defendant *knowingly* violated the statute or the regulations. *Id.*

The Court held that the Government must prove that the defendant not only knowingly used, transferred, acquired, altered, or possessed food stamps, but also that the defendant knowingly acted in violation of the food stamp statutes. *Id.* at 425. In support of its decision, the Supreme Court cited the "universal and persistent" presumption that "an injury can amount to a crime only when inflicted by intention[.]" *Id.* This presumption is especially true, the Court held, in cases where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.*

After *Liparota*, the federal courts of appeal rendered several decisions consistent with that opinion. For example, in 1998, the Second Circuit considered a similarly ambiguously worded statute with a knowingly mental state requirement. *See Figueroa v. United States*, 165 F.3d 111 (1998). In *Figueroa*, the criminal statute at issue was 8 U.S.C. § 1327, which provided that "[a]ny person who knowingly aids or assists any excludable alien . . . to enter the United States" shall be fined or imprisoned. *Id.* at 114. The issue on appeal was whether the Government was required to prove that the defendant had knowledge of *not only* his act of aiding and assisting entrance to the United States, *but also* of the excluability of the alien to whom he knowingly gave aid or assistance.

Writing for the majority, Judge Sotomayor held that "[a]bsent clear congressional intent to the contrary, statutes defining federal crimes are . . . normally read to contain a mens rea requirement that attaches to enough elements of the crime that together would be sufficient to constitute an act in violation of the law." *Id.* at 116. The Second Circuit held, in accordance with *Liparota*, that because it is normally not a crime to aid or assist an alien in entering the United States *unless* that alien is for some reason "excludable," the "knowingly" mental state must also modify the "excludability" element of the statute. *Id.*

Therefore, in interpreting N.C. Gen. Stat. § 14-269.2(b), we adhere to the presumption that the "knowingly" *mens rea* requirement must attach to enough elements of the statute to make the commitment of that act illegal. In North Carolina, the act of "knowingly possessing or carrying . . . a gun" is not, on its own, a criminal act unless the gun is possessed or carried in violation of one of North Carolina's other gun laws.[6] In fact, the mere act of possessing or carrying a gun in accordance with the law is stringently protected by both the United States and North Carolina Constitutions. *See* U.S. Const. amend. II; N.C. Const. art I, § 30. Thus, the "knowingly" *mens rea* requirement in N.C. Gen. Stat. § 14-269.2(b) must attach to the "on educational property" element of the crime in order to sufficiently constitute an act in violation of the law.

There is, however, an exception to the general presumption favoring a *mens rea* requirement which we must address before we may conclude that the "knowingly" mental state should be read to modify the entire statutory sentence in this case. The United States Supreme Court has recognized that in certain cases, where the prohibited activity deals with "public welfare" or "regulatory" offenses, Congress may impose a form of strict criminal liability. Typically, these cases "involve statutes that regulate potentially harmful or injurious items." *Staples*, 511 U.S. at 607. For the following reasons, we hold that the "public welfare" exception does not apply in this case.

In *United States v. Freed*, the United States Supreme Court upheld a criminal conviction without requiring the Government to prove that the defendant had a culpable mental state for one element of the offense. In *Freed*, the defendant was indicted for possession of unregistered grenades in violation of 26 U.S.C. § 5861(d), which makes it unlawful for any person "to receive or possess a [grenade] which is not registered to him." *United States v. Freed*, 401 U.S. 601 (1971). The defendant argued that, in accordance with the presumption favoring a *mens rea* requirement for every criminal act, the Government must prove *not only* knowing receipt or possession of a grenade, *but also* knowledge that the grenade was unregistered. *Id.* at 607.

The Court agreed that the Government must prove knowledge of receipt or possession of the grenade, but the Court refused to read the *mens rea* requirement into the registration element. *Id.* at 612. The Court

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6. *See*, *e.g.*, N.C. Gen. Stat. Ch. 14, Art. 52A (governing sale of weapons); N.C. Gen. Stat. Ch. 14, Art. 53 (governing purchase of weapons); N.C. Gen. Stat. Ch. 14, Art. 54B (governing concealed handgun permits).

held that the Government need *only* prove that the defendant knew that the items in his possession were grenades—not that the defendant knew that the grenades were unregistered. *Id.* at 609. The Court identified the statute requiring grenade registration as "a regulatory measure in the interest of public safety." *Id.* Thus, with regard to knowledge of registration, the Court reasoned that proof of a guilty mind was not required, because "one would hardly be surprised to learn that possession of a hand grenade is not an innocent act." *Id.*

Later, though, in *Staples v. United States*, the United States Supreme Court explicitly refused to extend its holding in *Freed* to statutes criminalizing certain gun use. *Staples*, 511 U.S. 600. In *Staples*, the defendant was convicted under a federal statute that required certain "automatic" firearms to be registered under the National Firearms Act. *Id.* at 602. The evidence presented at trial showed the defendant knew he possessed a firearm, but did not know about the firearm's automatic firing capabilities. *Id.* at 603–04. The Government asked the Court to rule in accordance with *Freed* that no proof of *mens rea* regarding the "automatic" qualities of the gun is required because the defendant should have known that possession of a gun is not an innocent act. The Court refused, holding that

> the gap between *Freed* and this case is too wide to bridge. In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct."

*Id.* at 610 (quoting *Liparota*, 471 U.S. at 426). The Court went on to explain that "there is a long tradition of widespread lawful gun ownership by private individuals in this country," *id.*, and "[e]ven dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611. Thus, in *Staples*, the United States Supreme Court specifically removed gun possession from the category of "public welfare" or "regulatory" offenses that would allow for strict criminal liability.

Six months after *Staples*, the United States Supreme Court once again read a "knowingly" mental state requirement into a statute prohibiting dissemination of child pornography, even though the statute was ambiguous. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64

(1994). In *X-Citement Video*, the defendant was convicted under a statute providing:

> Any person who . . . knowingly receives, or distributes, any visual depiction . . . if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct . . . shall be punished as provided in [this statute].

18 U.S.C. § 2252 (1988). The defendant argued that the Government must prove *not only* knowing receipt or distribution of the prohibited depiction, *but also* that the defendant knew that the depiction involved a minor. The Supreme Court agreed. *Id.* at 78. The Court first pointed out that the crime in *X-Citement Video* is not a public welfare offense because "[p]ersons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view." *Id.* at 71. Next, the Court cited *Liparota* and *Staples*, and held that the "knowingly" mental state must modify the "minor engaging in sexually explicit conduct" element because "the age of the performers is the crucial element separating legal innocence from wrongful conduct." *Id.* at 73.

Immediately following the United States Supreme Court's decisions in *Staples* and *X-Citement Video*, the Fourth Circuit Court of Appeals heard three cases on this issue. *See United States v. Cook*, 76 F.3d 596 (4th Cir. 1996); *United States v. Forbes*, 64 F.3d 928 (4th Cir. 1995); *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995). Our decision today is in line with that trilogy of Fourth Circuit cases.

First, in *United States v. Langley*, the Fourth Circuit considered the mental state requirement for a federal statute prohibiting felons from possessing firearms which have been shipped or transported through interstate commerce. *See Langley*, 62 F.3d 602. The issue in *Langley* was whether a mental state requirement should be read into the statute, and if so, whether the mental state requirement should be read into *only* the possession element, or all three elements of the crime: (1) possession of a firearm; (2) status as a felon; and (3) movement of the firearm through interstate commerce. *Id.* at 604-05. The Fourth Circuit read a mental state requirement into the "possession" element, but refused to read a mental state requirement into the other two elements of the crime. *Id.* at 606. The Court reasoned in *Langley* that courts across the country have consistently and explicitly "rejected the notion that the Government is required to prove either knowledge of felony status or interstate nexus"

in prosecutions under this statute. *Id.* at 606. The Court stated that "[i]f Congress intended such a revolutionary change in the law, a change that involves the perniciousness of felons possessing firearms, it would have made clear the intention to do so." *Id.* With regard to the congressional intent of the statute, the Court noted that "it is highly unlikely that Congress intended to make it *easier* for felons to avoid prosecution." *Id.*

Although the case at bar and *Langley* both involve firearm possession, this case is distinguishable from *Langley*. Here, there is no similar history of courts consistently providing for strict criminal liability under the statute. Additionally, the "perniciousness of felons possessing firearms" concern articulated by the Court is simply not present here.

Second, in *United States v. Forbes*, the Fourth Circuit analyzed a federal statute making it unlawful for "any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm . . . or receive any firearm . . ." *Forbes*, 64 F.3d at 931. The issue was whether the Government must prove the defendant's knowledge of being "under indictment." Although the statute in *Forbes* lacked a specific *mens rea* requirement, the Fourth Circuit held that "[t]he defendant must have knowledge of the fact or facts that convert this innocent act into a crime. Here, that fact is the existence of a pending indictment." *Id.* at 932.

This case presents essentially the same issue as *Forbes*. In this case, the fact that "convert[s] th[e] innocent act into a crime" is Defendant's presence on educational property. Thus, in accordance with *Forbes*, the State must be required to prove knowledge of such a fact at trial.

Finally, in *United States v. Cook*, the Fourth Circuit considered a federal statute that provided: "It shall be unlawful for any person at least eighteen years of age to knowingly and intentionally . . . receive a controlled substance from a person under 18 years of age, other than an immediate family member." 21 U.S.C. § 861 (1996); *see also Cook*, 76 F.3d at 598. In *Cook*, the evidence showed that the defendant sold crack cocaine in partnership with another person who was under the age of eighteen; he was convicted under the statute. *See id.* at 598–99. The defendant alleged on appeal that the he did not know that his criminal cohort was under eighteen years old. *See id.* He asked the Fourth Circuit to overturn his conviction because the trial court did not instruct the jury as to any mental state requirement for the "under eighteen years of age" element of the crime. The Fourth Circuit refused, distinguishing the case from *X-Citement Video* because the statute in *Cook* "applies to

persons who should be well aware that their conduct is subject to public regulation, *i.e.*, those receiving illegal drugs." *Id.* at 601. The Court also noted that "the statute does not impinge on constitutionally protected conduct." *Id.*

This case is easily distinguishable from *Cook*. Here, N.C. Gen. Stat. § 14-269.2(b) does not implicate conduct that is subject to public regulation (lawful gun possession, as described in *Staples*), and the statute here *does* impinge on constitutionally protected conduct (lawful gun possession pursuant to the Second Amendment of the United States Constitution and Section 30 of the North Carolina Constitution).

Therefore, in accordance with United States Supreme Court and Fourth Circuit precedent, as well as the well-settled presumption favoring proof of *mens rea* for criminal liability, we cannot allow for a conviction under N.C. Gen. Stat. § 14-269.2(b) without proof that Defendant *both* knowingly entered educational property *and* knowingly possessed a firearm or prohibited weapon when she did so. As the age of the performers was the "crucial element separating legal innocence from wrongful conduct" in *X-Citement Video*, here, the actor's presence on educational property is the crucial element, and thus the State must be required to prove a defendant's guilty mind for that element of the offense. *See X-Citement Video*, 513 U.S. at 73.

Such a reading of the N.C. Gen. Stat. § 14-269.2(b) not only adheres to our age-old principles of criminal law, but it is also entirely workable within our criminal justice framework. With regard to the burden of proof that the Government must bear in these cases, the Supreme Court held in *Liparota* that

> the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations. This holding does not put an unduly heavy burden on the Government in prosecuting violators of § 2024(b)(1). To prove that petitioner knew that his acquisition or possession of food stamps was unauthorized, for example, the Government need not show that he had knowledge of specific regulations governing food stamp acquisition or possession. Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by

> reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal.

*Liparota*, 471 U.S. at 419.

Under our reading of N.C. Gen. Stat. § 14-269.2(b), the State is not saddled with an unduly heavy burden of proving a defendant's subjective knowledge of the boundaries of educational property. Rather, the State need only prove a defendant's knowledge of her presence on educational property "by reference to the facts and circumstances surrounding the case." If, for example, the evidence shows that a defendant entered a school building and interacted with children while knowingly possessing a gun, the State would have little difficulty proving to the jury that the defendant had knowledge of her presence on educational property. If, however, the evidence shows that a defendant drove into an empty parking lot that is open to the public while knowingly possessing a gun—as in this case—the jury will likely need more evidence of the circumstances in order to find that the defendant knowingly entered educational property.

Thus, when considering a conviction under N.C. Gen. Stat. § 14-269.2(b), a jury must consider whether the defendant was knowingly on educational property by analyzing the facts and circumstances surrounding the event. In this case, the trial court precluded exactly that type of analysis in its instructions to the jury.

**2. Legislative Intent of N.C. Gen. Stat. § 14-269.2(b)**

The second principle of statutory construction that we consider in analyzing the *mens rea* requirement of N.C. Gen. Stat. § 14-269.2(b) is the probable legislative intent of the statute. In North Carolina, the "cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished." *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994). Generally, "[t]he intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). As we discussed above, the plain language of the statute is ambiguous—it does not make clear which clauses the mental state "knowingly" should modify. Therefore, in interpreting the *mens rea* requirement of N.C. Gen. Stat. § 14-269.2(b), we look to the legislative history of the statute and "the circumstances surrounding

its adoption which throw light upon the evil sought to be remedied." *State ex rel. North Carolina Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). For the following reasons, we hold that both the legislative history of the statute and the plain purpose of its enactment require proof of *mens rea* for the "on educational property" element.

In 1993, the North Carolina legislature amended the existing gun laws to make bringing a gun onto educational property a Class I felony. The 1993 version of N.C. Gen. Stat. § 14-269.2(b) read as follows: "it shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind . . . on educational property." 1993 N.C. Sess. Laws 558, HB 1008. Notably, the 1993 version of the statute contained no mental state requirement. In 2003, though, after the United States Supreme Court's rulings in *X-Citement Video*, *Staples*, and *Liparota*, and the Fourth Circuit's rulings in *Forbes*, *Langley*, and *Cook*, the issue of whether a mental state requirement should be "read into" N.C. Gen. Stat. § 14-269.2(b) was litigated in this Court. *See State v. Haskins*, 160 N.C. App. 349, 585 S.E.2d 766 (2003).

In *Haskins*, the defendant, a licensed "bail runner," was in pursuit of a fugitive facing felony drug charges. *Id.* at 351, 585 S.E.2d at 767. The defendant followed the fugitive onto an elementary school campus with a gun in his holster, entered the school building, and asked a faculty member if she had seen anyone. *See id.*, 585 S.E.2d at 768. School personnel called the police, and the defendant was arrested and eventually convicted under N.C. Gen. Stat. § 14-269.2(b). *See id.* Haskins argued that "although N.C. Gen. Stat. § 14-269.2(b) does not explicitly contain an element of criminal intent or *mens rea*, willfulness or unlawfulness should be read into the statute because . . . strict liability offenses are disfavored in our criminal justice system." *Id.* This Court disagreed.

In *Haskins*, we refused to read any mental state requirement into N.C. Gen. Stat. § 14-269.2(b). In support of our holding, we cited the "public health, safety, and welfare" exception—despite the United States Supreme Court's holding in *Staples* which arguably removed lawful gun possession from that exception.[7] *See id.* at 352, 585 S.E.2d at 768. We reasoned that the statute was enacted "because of the increased necessity for safety in our schools," and therefore, it falls under the subset of crimes for which "the U.S. Supreme Court has upheld the imposition of criminal penalties without the finding of criminal intent." *Id.* The

7. *Staples* is not cited by the Court in *Haskins*.

Supreme Court of North Carolina subsequently denied review,[8] and our holding in *Haskins* remained undisturbed for eight years.

In 2011, though, the General Assembly passed a bill that greatly expanded many rights regarding individual use of firearms in our State.[9] *See* 2011 N.C. Sess. Laws 268, HB 650. Among other things, the bill added the "knowingly" mental state requirement to N.C. Gen. Stat. § 14-269.2(b), as follows: "It shall be a Class I felony for any person *knowingly* to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." 2011 N.C. Sess. Laws 268, HB 650, at Section 4 (emphasis added).[10] The 2011 version of the statute is the version under which Defendant in this case was convicted.

The General Assembly's 2011 addition of the word "knowingly" in front of "possess or carry" reflects a clear intent to prevent convictions under N.C. Gen. Stat. § 14-269.2(b) where the actor *unknowingly possesses or carries* a gun, and brings that gun onto educational property. In that instance, because of the unknowing possession, the actor harbors no evil mind. She could not maliciously use the gun if she does not know that she possesses it. The same must be true, then, for an actor who unknowingly enters educational property. She may not be convicted under the 2011 statute if she knowingly possesses or carries a gun, but *unknowingly* brings that gun onto land which the statute happens to deem "educational property."[11]

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8. Haskins petitioned the Supreme Court of North Carolina for discretionary review of his case under N.C. Gen. Stat. § 7A-31. He also moved to appeal his case under N.C. Gen. Stat. § 7A-30 on the grounds that it involved a substantial constitutional question. The State opposed the petition for discretionary review and moved to dismiss the appeal for lack of a substantial constitutional question. The Supreme Court of North Carolina denied Haskins' petition for discretionary review and allowed the State's motion to dismiss the appeal. *See State v. Haskins*, 357 N.C. 580, 580, 589 S.E.2d 356, 356 (2003).

9. Most significantly, the bill provided for the codification of the "Castle Doctrine," guaranteeing the right of citizens to use deadly force in defense of one's home, motor vehicle, or workplace, and abolishing the duty to retreat. *See* 2011 N.C. Sess. Laws 268, HB 650, at Section 1. The bill also expanded the rights of individuals with concealed handgun permits, allowing permit holders to carry guns at State parks and State-owned rest stops, *see id.* at Section 14, and allowing certain non-law enforcement State officials to carry concealed handguns without regard to many of the limitations to which other permit holders are subject. *See id.* at Section 22(b).

10. The bill was ratified on 17 June 2011 and became effective on 1 December 2011.

11. The statute provides that "educational property" is defined as "[a]ny school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school." N.C. Gen. Stat. § 14-269.2(a)(1) (2013).

It is particularly instructive here that—in the same breath—the legislature expanded the right to use and possess guns in North Carolina and also added the "knowingly" mental state requirement to N.C. Gen. Stat. § 14-269.2(b). The spirit of the 2011 act was to enhance the Second Amendment rights of North Carolina citizens, not to hinder those rights by allowing for convictions under the statute without proof of an evil mind. Therefore, the legislative history of the statute reveals an intent that the word "knowingly" modify both the "possess or carry" element and the "on educational property" element of N.C. Gen. Stat. § 14-269.2(b). We hold that the 2011 version of N.C. Gen. Stat. § 14-269.2(b) outlaws the act of bringing a gun—which the actor knowingly possesses or carries—onto property which she knows is educational property, or to a curricular or extracurricular activity which she knows is sponsored by a school.

Furthermore, the spirit and purpose of N.C. Gen. Stat. § 14-269.2(b) instructs that we should read a mental state requirement into the "on educational property" element of the crime. After all, the plain reason that the General Assembly enacted N.C. Gen. Stat. § 14-269.2(b) was to prevent the *presence of guns on educational property*—not to prevent individuals from possessing or carrying guns. The actor's presence on educational property is the very crux of the criminal act. The General Assembly could not have simultaneously intended to expand the rights of individuals to use and possess guns while also permitting strict liability for unknowing violators of one of our State's gun laws.

Finally, we note that our holding in *Haskins* was at least abrogated by the General Assembly's 2011 addition of the mental state requirement to N.C. Gen. Stat. § 14-269.2(b). To the extent that *Haskins* conflicts with this opinion, it is now overruled.

**3. The Rule of Lenity**

The third and final principle of statutory construction under which we analyze N.C. Gen. Stat. § 14-269.2(b) is the rule of lenity. The rule of lenity provides additional support for our conclusion that the "knowingly" mental state must modify the presence on educational property element.

The rule of lenity is a principle of statutory construction that only applies when an appellate court is charged with interpreting an ambiguous criminal statute. "[W]hen applicable, the rule of lenity requires that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity[.]' " *State v. Heavner*, ___ N.C. App. ___, ___, 741 S.E.2d 897, 901–02 (2013) (quoting *Rewis v. United States*, 401 U.S. 808, 812

(1971)); *see also State v. Abshire*, 363 N.C. 322, 332, 677 S.E.2d 444, 451 (2009) ("The rule of lenity requires that we strictly construe ambiguous criminal statutes."). However, in order for the rule of lenity to apply, there must be more than one "plausible reading that comports with the legislative purpose in enacting [the statute]." *See Abshire*, 363 N.C. at 332, 677 S.E.2d at 451 (refusing to apply the rule of lenity after determining that there was only one plausible construction of the statute).

Here, the question is whether the "knowingly" mental state requirement in N.C. Gen. Stat. § 14-269.2(b) modifies both clauses of the sentence: "possess or carry" and "on educational property." As discussed above, based on the word's placement in the sentence, it is plausible that the legislature either: (1) intended for "knowingly" to modify only the clause immediately following it, which is "possess or carry," or (2) intended for "knowingly" to modify both clauses following it in the sentence, "possess or carry" and "on educational property." *See* N.C. Gen. Stat. § 14-269.2(b) (2011).

Because there are at least two plausible ways to interpret the mental state requirement of N.C. Gen. Stat. § 14-269.2(b), we hold that the rule of lenity applies. Accordingly, we must resolve this issue in favor of lenity for Defendant, and we hold that the State bears the burden of proving a defendant's mental state not only for the "possess or carry" element of the statute, but also for the presence on educational property element.

**4. Plain Error**

Finally, we must determine whether, in this case, the trial court's failure to instruct the jury on the mental state requirement for the "on educational property" element amounted to plain error. For the following reasons, we hold that it did.

In 2012, our Supreme Court clarified how plain error review applies to unpreserved error in criminal cases where the trial court omits an element of the crime in its jury instructions. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). In *Lawrence*, the Supreme Court analyzed the evolution of both federal and State plain error review and developed a framework for future application of the plain error rule in North Carolina. *See id.* The dissenting opinion in this case concludes that the trial court's instructions did not rise to the level of plain error under *Lawrence*. We disagree.

In *Lawrence*, the defendant was indicted for two counts each of attempted robbery with a dangerous weapon, attempted kidnapping, attempted breaking and entering, and conspiracy to commit robbery

with a dangerous weapon. *See id.* at 510, 723 S.E.2d at 329. The defendant was tried and convicted of all charges. *See id.* On appeal, the defendant argued that the trial court erroneously omitted from the jury instructions the element of robbery with a dangerous weapon that "the weapon must have been used to endanger or threaten the life of the victim." *Id.* at 510–11, 723 S.E.2d at 329. The State conceded the trial court's instruction failed to set forth all of the elements of robbery with a dangerous weapon. *See id.* The Court of Appeals held the trial court's erroneous omission of an element of the crime amounted to plain error. *See State v. Lawrence*, 210 N.C. App. 73, 92, 706 S.E.2d 822, 836 (2011). The Supreme Court reversed. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335.

The Supreme Court set forth the following framework for plain error review:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

*Id.* at 518, 723 S.E.2d at 334 (internal citations and quotation marks omitted). The Supreme Court held that although the trial court's instruction to the jury was erroneous, *see id.*, it did not amount to plain error because the jury was presented with "overwhelming and uncontroverted" evidence of the defendant's guilt on the element of the crime which the trial court omitted from its instruction. *See id.* at 519, 723 S.E.2d at 335. The Court noted that "[t]he record contains testimony by multiple witnesses describing the efforts of the group, which included defendant, to kidnap, threaten, and rob [the victim] Ms. Curtis." *Id.* at 519, 723 S.E.2d at 334. The Court held that the defendant could not show the prejudicial effect necessary to establish fundamental error; thus, the error did not amount to plain error. *See id.* at 519, 723 S.E.2d at 335.

This case is similar to *Lawrence* in that the trial court erroneously failed to instruct the jury on an element of the crime—the *mens rea* requirement. Here, the trial court instructed the jury that "the State must prove two things beyond a reasonable doubt: First, that the defendant knowingly possessed a Ruger pistol. And second, that the defendant was on educational property at the time she possessed the pistol." For the

reasons stated above, these jury instructions improperly relieved the State of its burden to prove that Defendant was *knowingly* on educational property at the time she possessed the gun. However, this case differs from *Lawrence* in that the evidence of Defendant's knowledge of her presence on educational property was neither "overwhelming" nor "uncontroverted."

Here, the trial court's error in its jury instructions amounted to fundamental error because the jury was presented with sufficient evidence that Defendant lacked knowledge of her presence on educational property. The evidence presented at trial showed that Defendant knew that she was not allowed to bring her gun onto "campus," and does not bring the gun into her dorm room. Further, on the day in question, Defendant chose not to drive into the gated, residential area of campus with the gun in her glove compartment, even though her stated purpose for being in the parking lot was to do her laundry in her dorm room. Rather, Defendant chose to park her car in an area open to the public, requiring no special permit to enter. This evidence suggests that Defendant *knew* that the gated, residential area of campus was "educational property," but that the public parking lot—which was mostly empty at the time—was not.

According to the trial court's erroneous jury instructions, these facts would be irrelevant to the jury's analysis of Defendant's guilt because they pertain only to Defendant's knowledge of her presence on educational property. Proper consideration of such facts probably would have impacted the jury's finding of guilt in this case. This evidence establishes the prejudicial effect, and thus the fundamental error, that was lacking in *Lawrence*.

Lastly, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (quotation marks omitted). Here, the trial court's erroneous instructions to the jury seriously affected the fairness of Defendant's trial. Defendant admitted to the element of possession in her opening statement. Thus, the *only* element of the crime which the jury could consider in determining guilt or innocence was the "on educational property" element. It was crucial in this case that the trial court properly instruct the jury on the only element of the crime at issue. Nevertheless, based on the trial court's instructions, the jury was only permitted to consider whether the State proved that Defendant was, in fact, on educational property—not whether she *knew* she was on educational property.

We therefore find that the trial court committed plain error by failing to require the jury to consider whether the State met its burden of proving that Defendant was knowingly on educational property when she possessed the Ruger pistol. Our reading of N.C. Gen. Stat. § 14-269.2(b) requires the State to prove that a defendant both knowingly possessed or carried a prohibited weapon *and* knowingly entered educational property with that weapon. This interpretation of the statute safeguards the rights of lawful gun owners in our State while also protecting vulnerable citizens present on educational property.

### B. Ineffective Assistance of Counsel

**[2]** Defendant's second assignment of error on appeal is that her trial counsel was ineffective by failing to argue an allegedly fatal variance in the indictment. Defendant asserts that the indictment against her was flawed because it stated that she possessed weapons at "High Point University, located at 833 Montlieu Avenue" but the evidence presented at trial showed that she possessed the weapons two miles away from that address, at "1911 North Centennial Street." We are not persuaded.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985). Furthermore, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Id.* at 563, 324 S.E.2d at 248. Finally, a reviewing court "should avoid the temptation to second-guess the actions of trial counsel[;] . . . judicial review of counsel's performance must be highly deferential." *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (2002).

An indictment must contain

> [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2013). Our Supreme Court has held that "it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice

to defend against it and prepare for trial[.]" *State v. Sturdivant*, 302 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Furthermore, we have consistently held that, as long as the indictment contains all of the essential elements of the crime, mere surplusage in the indictment language does not render a variance in the indictment fatal. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) (upholding the indictment language as surplusage where the indictment alleged that the defendant discharged a "shotgun" and the evidence at trial showed he discharged a "handgun"); *State v. Bollinger*, 192 N.C. App. 241, 243, 665 S.E.2d 136, 138 (2008) (upholding the indictment language as surplusage where the indictment alleged that the defendant unlawfully carried "metallic knuckles" and the evidence at trial showed he carried a knife).

Here, the indictment stated:

> The jurors for the State upon their oath present that on or about the date of offense and in the county named above the defendant named above unlawfully, willfully and feloniously did knowingly possess a pistol, Ruger 380 semiautomatic pistol, on educational property, High Point University located at 833 Montlieu Avenue, High Point, North Carolina.

The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University. We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the "educational property" element as "High Point University." Because the indictment properly contained all of the essential elements of the crime, Defendant has failed to establish any fatal variance in her indictment. Therefore, her assertion that her attorney's representation fell below an objective standard of reasonableness for failure to argue this purported fatal variance must fail.

## V. Conclusion

For the foregoing reasons, we find that the trial court committed plain error while instructing the jury in this case. As such, we reverse Defendant's conviction, and remand for a new trial consistent with this opinion.

REVERSED and REMANDED.

Judge STROUD concurs.

BRYANT, Judge, concurring in part and dissenting in part.

I concur in the portion of the majority opinion overruling defendant's challenge based on her claim of ineffective assistance of counsel. However, as to the main portion of the majority opinion, because I do not believe the trial court's instruction to the jury amounted to the level of plain error, I respectfully dissent.

The majority reverses the verdict of the jury and the judgment of the trial court, and remands the matter for a new trial on the premise that the trial court committed plain error in failing to instruct the jury on an element in a statutory offense that is not clearly set forth in the statute and was not presented to the trial court for its consideration. "This case presents the question of how the . . . plain error standard of review should be applied to error that is not preserved for appellate review." *State v. Lawrence*, 365 N.C. 506, 511, 723 S.E.2d 326, 330 (2012).

Under our adversarial system, parties are to present their evidence and arguments at trial, and "have an obligation to raise objections to errors at the trial level. Any other approach would place an undue if not impossible burden on the trial judge. . . . If parties do not timely object, they waive the right to raise the alleged error on appeal." *Id.* at 512, 723 S.E.2d at 330 (citations and quotations omitted). In a criminal case, error that is not preserved at trial, is reviewed on appeal only for plain error. *Id.* (citing N.C. R. App. P. 10(a)(4) (2012)).

"[Our North Carolina Supreme Court] and the United States Supreme Court have emphasized that plain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333 (citing *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977), and *United States v. Ostendorff*, 371 F.2d 729 (4th Cir.) (1967))). "[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *Id.* at 516, 723 S.E.2d at 333 (citation omitted).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

*Id.* at 518, 723 S.E.2d at 334 (citation omitted).

The question here regards whether the trial court committed plain error when instructing the jury on the felony charge of possessing a weapon on campus or other educational property in violation of N.C.G.S. § 14-269.2(b). The burden is on defendant to show that the instructional error had a probable impact on the jury verdict.

Pursuant to General Statutes, section 14-269.2(b), "[i]t shall be a Class I felony for any person *knowingly* to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school." N.C.G.S. § 14-269.2(b) (emphasis added).

The majority opinion carefully considers whether "knowingly" modifies only "possess or carry" or whether it extends to the phrase "on educational property." Using principles of statutory construction addressing the common law presumption against criminal liability without a showing of *mens rea*, the General Assembly's intent in enacting and amending section 14-269.2(b), and the rule of lenity, as well as case law precedent from the United States Supreme Court and the Fourth Circuit Court of Appeals, the majority holds that "the 'knowingly' mental state in N.C. Gen. Stat. § 14-269.2(b) must modify both clauses – 'possess or carry' and 'on educational property.' " I do not necessarily take issue with the analysis of the statute. However, even accepting that a conviction pursuant to this statute requires that a defendant is knowingly on educational property and knowingly in possession of a firearm, the critical inquiry here is whether in failing to instruct the jury they had to find defendant was knowingly on educational property to find defendant guilty of possessing a weapon on campus or other educational property in violation of N.C.G.S. § 14-269.2(b) the trial court's error amounted to plain error. I submit that it does not.

We are required to apply the plain error rule cautiously. The prejudicial prong of plain error review requires that, even upon a showing of error, defendant can prevail only if she can establish that "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotations omitted); *see also State v. Smith*, 152 N.C. App 29, 37-38, 566 S.E.2d 793, 799 (2002). Such is not the case on this record. The trial court's failure to instruct the jury that in order to find defendant guilty it must find defendant was knowingly on educational property was not an error that had a probable impact on the jury verdict.

The majority opinion states that defendant "adamantly denied that she was on educational property." The record reflects that outside of the jury's presence, prior to and during a *Harbison* inquiry, defendant confirmed to the trial court that she knowingly and willingly allowed her counsel to make an admission before the jury that she was in possession of a firearm and three knives. And, in a statement before the court made outside the presence of the jury, and in opening statements made before the jury, defendant denied she was on educational property at the time she possessed the weapons. Other than during the *Harbison* inquiry and assertion during opening statements, and likely closing arguments, there is no indication in the record that defendant put forth any direct evidence before the jury that she was not on educational property. I do not consider this an adamant denial. It is clear however, that given defendant's general admission to possession of the weapons, her only defense at trial was that she was not on educational property.

In its case-in-chief, the State presented four witnesses: a security officer with High Point University; a security supervisor of officers in the Security Department at High Point University; and two law enforcement officers with the High Point Police Department. The security officer testified he encountered defendant in the parking lot of the Administration Building—High Point University property. At the time, there were two entrances to the parking lot; one required passing an automatic security arm and the other was an open entrance that did not require passing through security. The security officer testified that "the whole building [was] surrounded by security" and that fences stood on both sides of the open entrance to the parking lot.

> Q. Now just from your recollection – you're pretty familiar with the campus for this section where you encountered [defendant] . . . .
>
> . . .
>
> Were there any signs stating that this is campus property, no public allowed, anything of that nature?
>
> A. There are signs posted that [it] is High Point University property.

A supervisor of High Point University security officers also testified that there was a "signature fence" around the Administration Building, and he believed there was signage indicating High Point University at or near the entrance to the Administration Building parking lot defendant used.

*Q. Okay. But at the -- on December 25, 2012, was there the High Point University fence around that area?*

*A. Yes.*

(Emphasis added). Additionally,

*Q. All right. Was [defendant's] car located on campus?*

*A. Yes. It was in our parking lot of the Administration Building.*

(Emphasis added)

In response, defendant put forth no direct evidence that she was not on High Point University property. Furthermore, defendant presented no evidence that when she parked in the Administration Building parking lot to access her nearby on-campus apartment, *she did not know* she was on High Point University property.

The record evidence clearly shows that defendant was on High Point University Property when she entered the Administration Building parking lot encompassed by fencing with signage indicating the property belonging to High Point University, and that she was on notice she was on educational property. This evidence tends to show that not only was notice posted, but that defendant *knew* she was on High Point University property. Specifically, defendant was a senior at High Point University. On Christmas night she was going to her on-campus apartment to do laundry. So, she drove her car to the Administration Building parking lot, driving through one of two entrances surrounded by a fence and marked as High Point University property.

Evidence of defendant's knowledge that she was on High Point University property is further supported by defendant's statement to law enforcement. In defendant's statement to High Point Police Department officers, she stated that she had taken a concealed weapons class and knew she wasn't supposed to have a gun on campus. She said she didn't have anywhere else to keep the handgun, so she kept it locked in the glove compartment of her car. "I know I'm not supposed to have it on campus, but I don't take it in my room, or anything."

Defendant's written statement to law enforcement officers was admitted into evidence without objection. However, at some point later, after recognizing that the statement was prejudicial, and not at all helpful to her defense, defendant sought to make a late objection and rescind her earlier lack of objection to the admission of her statement.

The trial court noted that the objection was untimely and that it was a late objection. The court also noted that defendant's statement was a confession, and that no motion to suppress had been filed. Defendant's objection to her statement was overruled by the trial court as being late and therefore waived.

Our plain error standard of review requires that defendant bear the heavy burden of establishing plain error. *Lawrence*, 365 at 518, 723 S.E.2d at 334. In order to meet her burden on plain error review, defendant had to show there was sufficient evidence before the jury to enable them to find that she did not know she was on educational property. No such evidence was presented in this trial. On the contrary, there was substantial and sufficient evidence for a jury to find not just that defendant was on educational property but that defendant *knew* she was on educational property. Therefore, defendant has failed to establish that but for the trial court's alleged error in its jury instructions, the jury probably would not have found her guilty of felony possession of a weapon on campus or other educational property, in violation of N.C.G.S. § 14-269.2(b). Thus, defendant has failed to establish fundamental error and, therefore, plain error. *See id.*

Because defendant cannot establish plain error, defendant is not entitled to a new trial. Accordingly, I would overrule defendant's argument, acknowledge the verdict of the jury, and affirm the judgment of the trial court.

**STATE v. LEAKS**

[240 N.C. App. 573 (2015)]

STATE OF NORTH CAROLINA
v.
CLAY DEWAYNE LEAKS, JR.

No. COA14-1141

Filed 21 April 2015

**1. Indictment and Information—sex offender's failure to register change of address—indictment sufficient**

The indictment charging defendant with violating N.C.G.S. § 14-208.11(a)(2) was sufficient to confer subject matter jurisdiction upon the trial court. While defendant argued that the language of the indictment did not provide that he failed to notify the sheriff's office in writing, defendant's indictment sufficiently alleged that defendant was a person required to register as a sex offender; that he changed his address; and that he failed to notify the appropriate agency within three business days after moving.

**2. Sentencing—sex offender's failure to register change of address—variance between written judgment and announcement in defendant's presence**

The trial court violated defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court had announced in defendant's presence during the sentencing hearing. There was no indication in the record that defendant was present at the time the written judgment was entered.

Appeal by defendant from judgments entered 10 June 2014 by Judge John O. Craig in Forsyth County Superior Court. Heard in the Court of Appeals 4 March 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Richard Croutharmel for defendant.*

ELMORE, Judge.

On 11 February 2013, Clay Leaks, Jr. (defendant) was indicted by a Forsyth County Grand Jury pursuant to N.C. Gen. Stat. § 14-208.11(a)(2) for failing to report a change of address as a registered sex offender

from 21 November 2012 through 30 January 2013 (case number 13 CRS 50995). Defendant was subsequently indicted for an additional charge of failing to report a change of address as a registered sex offender from 22 April through 20 May 2013 (case number 13 CRS 54822), and attaining the status of habitual felon (case number 13 CRS 121). The matter in case number 13 CRS 50995 was called for trial on 9 June 2014 in the Criminal Session of Forsyth County Superior Court. The jury found defendant guilty of the charge.

The additional charge of failing to report a change of address as a registered sex offender from 22 April through 20 May 2013 (case number 13 CRS 54822) was not before the jury at defendant's trial. However, defendant entered a plea bargain on this charge prior to sentencing in case number 13 CRS 50995. In exchange for his plea to the additional charge and stipulation to his status as a habitual felon, the State agreed to consolidate defendant's convictions. The trial court determined that defendant was a prior record Level V offender for felony sentencing purposes. The trial court entered a consolidated judgment, imposing a minimum term of 114 months to a maximum 149 months imprisonment. Defendant entered notice of appeal in open court.

## I. Background

At defendant's trial for failing to comply with the sex offender registration program, the State presented evidence that tended to show the following: On 4 June 2001, defendant was convicted of a sex offense that required him to register as a sex offender pursuant to the sex offender registration requirements. Defendant is required to verify his address every six months and report any change of address within three business days. On 17 March 2012, defendant executed a one-year lease agreement for a residence located at 669 Old Hollow Road in Winston-Salem. Defendant timely notified the Forsyth County Sheriff's Office of his change of address.

The rental residence was a single-family home with a detached shed and a detached garage in the rear of the house. After occupying the residence for one to two months, defendant ceased making the monthly rental payment to his landlord, Homer Shockley (Shockley). In November 2012, Shockley and a Forsyth County Sheriff's Deputy went to the residence to serve defendant with eviction papers. The residence was empty and the electricity and water had been turned off. Padlocks were placed on the garage and storage building. Shockley testified that he drove by the residence approximately three times per week throughout

November and December 2012, but he neither saw defendant on the property nor did he notice any activity at the residence.

During the week of 27 November 2012, the Forsyth County Sheriff's Office sent defendant an address verification letter to 669 Old Hollow Road. The letter was returned to the Sheriff's Office as "undeliverable." Ronald Lewis, a Forsyth County Sheriff's Deputy who worked in the sex offender unit, went to 669 Old Hollow Road in search of defendant. Deputy Lewis noticed that the house was vacant. Deputy Lewis did not look for defendant in the garage or shed.

On 31 January 2013, defendant went to the Forsyth County Sheriff's Office to report that his address had changed from 669 Old Hollow Road. Deputy Chris Davenport arrested defendant and charged him with failing to report a change of address as a registered sex offender.

Defendant testified on his own behalf at trial. Defendant explained that on 13 November 2012, he removed his personal belongings from the residence and stored them in a warehouse because he knew that he would be evicted from the residence. Defendant claimed that he subsequently moved into the storage shed on the property and resided there until 31 January 2013. The shed had minimal furnishings and electricity, but no water. Defendant testified that he would enter and exit the shed by using a ladder to climb through an air conditioning vent. Defendant alleged that he would rise early to work as a self-employed handyman. If he had no work, he would shower and eat at his wife's house while she was gone. Defendant testified that he would wait until nightfall before returning to the shed, hoping to go unnoticed. Given this, defendant argued that he had not, in fact, failed to report a change in his address because he had continued to reside on the property until 31 January 2013.

Despite defendant's testimony, the jury found defendant guilty of the charge. Defendant appeals.

## II. Analysis

### A. Sufficiency of Indictment

**[1]** Defendant contends that the indictment charging him with violating N.C. Gen. Stat. § 14-208.11(a)(2) was insufficient to confer subject matter jurisdiction upon the trial court, as it failed to allege all of the essential elements of the offense. Specifically, defendant argues that the indictment failed to allege that he was required to provide "written notice" of

a change of address, a prerequisite for the offense as described in N.C. Gen. Stat. § 14-208.9. As such, defendant insists that this error rendered his indictment fatally defective and requires that we vacate his conviction. We disagree.

On appeal, we review the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). In order to be valid and thus confer jurisdiction upon the trial court, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). The indictment "is sufficient if it charges the offense in a plain, intelligible and explicit manner." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). "[I]ndictments need only allege the ultimate facts constituting each element of the criminal offense," *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995), and "[a]n indictment couched in the language of the statute is generally sufficient to charge the statutory offense[.]" *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987). " [W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (quotation and citation omitted).

N.C. Gen. Stat. § 14-208.11(a)(2) provides that a person who willfully "[f]ails to notify the last registering sheriff of a change of address" is guilty of a class F felony. In addition, N.C. Gen. Stat. § 14-208.9(a) provides: "If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered."

While the language of defendant's indictment largely tracks the operative language of N.C. Gen. Stat. § 14-208.9(a), it does not provide that defendant failed to notify the sheriff's office in writing. Defendant's indictment provides that defendant:

> unlawfully, willfully and feloniously did as a person required by Article 27A of Chapter 14 of the North Carolina General Statutes to register as a sex offender, knowingly and with the intent to violate the provision of that article fail to register as a sex offender by failing to notify the Forsyth County Sheriff's Office of his change of address with in [sic] three business days after moving from his last registered address.

Defendant argues that the indictment is fatally flawed because it omits the requirement that he provides "written notice" of a change of address. In advancing his argument, defendant solely relies on a recent unpublished opinion from this Court, *State v. Osborne*, ___ N.C. App. ___, ___, 763 S.E.2d 16, ___, 2014 N.C. App. LEXIS 700, 2014 WL 2993855 (July 1, 2014) (unpublished). We note that unpublished decisions are not controlling precedent. *State v. Beltran-Ponce*, 203 N.C. App. 373, 692 S.E.2d 487 (2010). Nonetheless, in *Osborne*, this Court acknowledged that the three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9(a) had previously been determined: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change. *Osborne*, ___ N.C. App. at ___, 763 S.E.2d at ___, 2014 N.C. App. LEXIS 700, at *2, 2014 WL 2993855, at *6 (quoting *State v. Barnett*, ___ N.C. App. ___, ___, 733 S.E.2d 95, 98 (2012)). However, in reviewing the defendant's indictment *sua sponte*, the *Osborn*e Court held that the indictment was fatally defective because it failed to allege that (1) defendant did not provide "*written notice*" of his move, and (2) did not specify the time requirements as within "three *business* days" of the defendant's move to a new address. In effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14-208.9(a)—the "written notice" requirement and the "three *business* days" requirement. *Osborne*, ___ N.C. App. at ___, 763 S.E.2d at ___, 2014 N.C. App. LEXIS 700, at *7–9, 2014 WL 2993855, at *3. Given the holding in *Osborn*e, defendant contends that his indictment was fatally defective because it too did not include the "written notice" requirement. We are not persuaded.

In *State v. Abshire*, our Supreme Court analyzed the 2005 version of N.C. Gen. Stat. § 14-208.11(a)(2) and N.C. Gen. Stat. § 14-208.9(a) and expressly limited N.C. Gen. Stat. § 14-208.9(a) to the three essential elements set forth above. *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009). Although N.C. Gen. Stat. § 14-208.9(a) has been amended since *Abshire* was published, the requirement that a sex offender report his or her change of address *in writing* has remained part of the statute since its enactment in 1995. *See* Act of July 29, 1995, ch. 545, sec. 1, 1995 N.C. Sess. Laws 2046, 2048. Notably, our Supreme Court declined to include the manner of the notice—"in writing"—in the essential elements of the offense. *See Abshire*, 363 N.C. at 328, 677 S.E.2d at 449. Because "[t]his Court is bound to follow the precedent of our Supreme Court," *State v. Scott*, 180 N.C. App. 462, 465, 637 S.E.2d

292, 294 (2006), we are unable to agree with defendant that his indictment is fatally defective merely because it fails to provide that notice must be made "in writing." Instead, we consider the manner of notice, in person or in writing, to be an evidentiary matter necessary to be proven at trial, but not required to be alleged in the indictment. *See* N.C. Gen. Stat. § 15A-924(a)(5) (evidentiary matters as to the means and manner in which a crime was committed need not be alleged in an indictment). Facts tending to show that defendant did not furnish the sheriff's office with "written notice" merely illustrate that defendant failed to comply with the requirements of N.C. Gen. Stat. § 14-208.9(a).

In sum, defendant's indictment in the instant case sufficiently alleged that defendant (1) was a person required to register as a sex offender; (2) changed his address; and (3) failed to notify the appropriate agency within three business days after moving. As such, the indictment was valid as a matter of law and sufficient to confer subject matter jurisdiction upon the trial court. We overrule defendant's argument.

**B. Sentencing Error**

**[2]** In his second argument on appeal, defendant contends that the trial court violated defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court announced in his presence during the sentencing hearing. We agree.

It is well-settled that a defendant has a right to be present at the time that his sentence is imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999).

The facts of the instant case show that the trial court, in the presence of defendant, sentenced defendant as a Level V offender to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time. The sentence actually imposed on defendant was the sentence contained in the written judgment. Given that there is no indication in the record that defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment. *See id.*

In so holding, this Court looks to *Crumbley*, wherein we held that the trial court erred in converting the defendant's sentence in the written judgment to run consecutively when the defendant was not present given that it orally rendered judgment in the defendant's presence to

concurrent terms of imprisonment. *See State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008) (vacating the defendant's sentencing judgments when the trial court sentenced the defendant outside of his presence to consecutive terms of imprisonment after it orally imposed concurrent sentences before the defendant in open court.).

Under the North Carolina structured sentencing chart, if the trial court intended to sentence defendant to 114 months minimum incarceration, it was required to impose the 149 month maximum term. However, if the trial court intended to impose a maximum term of 146 months, it was required to impose the corresponding minimum term of 111 months imprisonment. Regardless, there is no evidence that defendant was present when the trial court entered its written judgments. Because the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment. *See Crumbly* and *Hanner*, *supra*.

## III. Conclusion

Defendant's indictment was sufficient to confer subject matter jurisdiction on the trial court such that the trial court did not err in hearing defendant's case. However, the trial court erred in entering a written judgment that altered the sentence it initially imposed on defendant because defendant was not before the trial court and able to be heard when the new sentence was entered. Accordingly, we hold that defendant received a trial free from error. However, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment.

No error, in part; reversed and remanded, in part; new sentencing hearing.

Judges GEER and INMAN concur.

**STATE OF N.C. v. OAKES**

[240 N.C. App. 580 (2015)]

THE STATE OF NORTH CAROLINA AND FORSYTH COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, ON BEHALF OF CHERRI L. JORDAN, PLAINTIFF
v.
BRYANT OAKES, SR., DEFENDANT

No. COA14-990

Filed 21 April 2015

**Appeal and Error—interlocutory appeals and orders—substantial rights doctrine—underlying show cause order dismissed—no appellate jurisdiction**

An appeal was dismissed for lack of appellate jurisdiction where the underlying show cause order was dismissed and defendant no longer faced any threat of contempt or incarceration. The Court of Appeals cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order does not affect a substantial right. When this occurs, the proper course for the appellant is to petition for a writ of certiorari.

Appeal by defendant from order entered 5 March 2014 by Judge Denise Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 21 January 2015.

*Forsyth County Attorney Office, by Assistant County Attorney Twanda M. Staley, for plaintiff-appellee.*

*Mary McCullers Reece for defendant-appellant.*

DIETZ, Judge.

Defendant Bryant Oakes appeals from the trial court's denial of his motion to dismiss an order to show cause. Oakes contends that the trial court entered the show cause order, which stems from unpaid child support, without first receiving an appropriate motion from Forsyth County. Oakes concedes that his appeal is interlocutory because there is more to be done in the trial court. But he contends that the trial court's order, which could expose him to civil contempt and possible incarceration, affects a substantial right and thus is immediately appealable.

Importantly, Oakes concedes on appeal (and Forsyth County agrees) that circumstances have changed, the show cause order was dismissed, and Oakes no longer faces any threat of contempt or incarceration. This

Court cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order no longer affects a substantial right. Accordingly, we dismiss this appeal for lack of appellate jurisdiction.

**Facts and Procedural History**

On 25 September 2002, the Forsyth County Child Support Enforcement Unit filed a civil summons and complaint against Defendant Bryant Oakes to establish paternity and child support for two minor children. Oakes admitted paternity of the minor children, and on 14 November 2002, the trial court entered an order directing Oakes to pay $410 a month in child support and $25 a month in arrearages.

On 29 August 2011, the County filed a motion for order to show cause alleging that Oakes failed to make a child support payment since 25 May 2010. That same day, the trial court issued an order to appear and show cause. The Forsyth County Sheriff's Office was unable to serve Oakes with notice of the hearing, and on 22 December 2011, the trial court dismissed the show cause order.

The trial court entered another order to show cause on 7 November 2012, ordering Oakes to appear in court and show why he should not be found in civil contempt. Oakes failed to appear at the hearing held 16 January 2013, and the court issued an order for arrest. The court set Oakes's purge payment—the amount he must pay to avoid being sent to jail for contempt—at $20,000.

Oakes was arrested on 6 February 2013 and sent to jail. On 12 February 2013, the trial court found that he was in arrears of his child support payments by $59,531.98. The court also found that Oakes was unable to pay his existing $20,000 purge payment and reduced the amount to $700. Oakes remained in jail.

On 13 March 2013, Oakes again went before the trial court. The court found that he was unable to purge his child support arrearage by paying $700 and reduced the amount to $500. Oakes was unable to pay at that time and returned to jail. On 3 April 2013, the court again reduced the purge amount from $500 to $100. Shortly after, Oakes paid $100 and was released from jail.

On 31 July 2013, the court again reduced Oakes's purge payment from $100 to $50 and Oakes paid the $50 at the hearing. The trial court ordered Oakes "to purge $50.00 today and the temporary amount of $100.00 on August 13, 2013 September 13, 2013 and October 13, 2013 to

be applied to the arrears in this matter." The Court also ordered Oakes to appear at a hearing on 30 October 2013.

At the 30 October 2013 hearing, Oakes, through counsel, moved to dismiss the 7 November 2012 order to show cause on the grounds that no supporting motion for the order was found in the court file. After a hearing, the trial court denied Oakes's motion to dismiss and found that he "failed to make the ordered purge payments of $100.00 on August 13, 2013, September 13, 2013 and October 13, 2013." The court made the following conclusions of law:

> 4. The court takes judicial notice of the process used by the county attorney office and department of social services and that procedurally each order to show cause presented to a Judge for signature has a motion with it.
>
> 5. As long as an arrearage exists, the show cause will continue until dismissed by the county attorney or judge.

The court then ordered Oakes "to purge $40.00 today and $60.00 on November 1, 2013, $100 on November 8, 2013, November 15, 2013 and November 22, 2013." The court did not enter its order until 5 March 2014, and Oakes timely appealed on 18 March 2014. On 5 August 2014, after Oakes filed his notice of appeal but before the appeal was docketed in this Court, the trial court entered an order granting the county attorney's request to dismiss the show cause order because Oakes was in substantial compliance.

**Analysis**

Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court. *See Steele v. Moore-Flesher Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963). Oakes concedes that the trial court's 5 March 2014 order is not a final order and that there is more to be done in the trial court. However, Oakes argues that his appeal is permissible under the substantial rights doctrine. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2013). Specifically, Oakes argues that the denial of his motion to dismiss the order to show cause affects a substantial right because failure to comply with the show cause order could expose Oakes to the possibility of civil contempt and incarceration. This Court previously has held that the threat of imprisonment or similar deprivations of liberty as a result of a contempt finding affects a substantial right and is immediately appealable. *See Hamilton v. Johnson*, ___ N.C. App. ___, ___, 747 S.E.2d 158, 162 (2013); *Guerrier v. Guerrier*, 155 N.C. App. 154, 157-58, 574 S.E.2d 69, 71 (2002).

The flaw in this argument is that Oakes no longer faces the threat of incarceration or other deprivation of liberty. After Oakes filed his appeal, but before the record was docketed in this Court, Forsyth County asked the court to dismiss the show cause order on the ground that Oakes was now in substantial compliance with his child support payment obligations. In response, the trial court dismissed the show cause order. Oakes concedes all of these facts in his reply brief.

This Court's analysis under the substantial rights test permits review of otherwise unappealable orders to prevent the injustice that would result from the inability to seek immediate appellate review. *See*, *e.g.*, *Little v. Stogner*, 140 N.C. App. 380, 382-83, 536 S.E.2d 334, 336 (2000); *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000); *Blackwelder v. State Dep't of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). This Court cannot exercise appellate jurisdiction under the substantial rights doctrine if, at the time the Court hears the case, the parties concede that the challenged order does not affect a substantial right. In the rare case where this occurs, the proper course for the appellant is to petition for a writ of certiorari. This Court can then determine whether the issue is sufficiently important to warrant review although no right of appeal from the interlocutory order exists. *See* N.C. R. App. P. 21 (2013).

Because the parties concede that the order appealed from here does not affect a substantial right, and there is no pending petition for a writ of certiorari, we dismiss this appeal.

**Conclusion**

The order from which Defendant Bryant Oakes appealed does not affect a substantial right. Accordingly, we dismiss the appeal.

DISMISSED.

Judges STEELMAN and INMAN concur.

TOWN OF MATTHEWS, A NORTH CAROLINA MUNICIPAL CORPORATION, PLAINTIFF
v.
LESTER E. WRIGHT AND WIFE, VIRGINIA J. WRIGHT, DEFENDANTS

No. COA14-943

Filed 21 April 2015

**Eminent Domain—private road—no public benefit**

The Court of Appeals affirmed the trial court's order dismissing the Town of Matthews' condemnation action on property owned by defendants, who met their burden of showing that the taking would not accomplish any public benefit. The Town already had an easement on the private road at issue, and defendants never blocked access to it. Further, the Town did not attempt to condemn any other property owners' portions of the private road. The Court's conclusion was bolstered by the Town's history of unsuccessful attempts to take the property and the evidence of the Town's questionable motives.

Appeal by Plaintiff from judgment entered on 11 March 2014 by Judge F. Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals on 20 January 2015.

*Benjamin R. Sullivan*, *Parker Poe Adams & Bernstein*, *for plaintiff-appellant.*

*Peter J. Juran*, *for defendant-appellees.*

HUNTER, JR., Robert N., Judge.

The Town of Matthews appeals from a judgment dismissing its condemnation claim taking the road fronting Lester and Virginia Wright's home. The Town contends the trial court misapplied the "public use or benefit" test set forth in N.C. Gen. Stat. § 40A-3(b). We affirm the dismissal.

## I. Factual & Procedural History

The Wrights own a home in a subdivision in Matthews. Their 1984 warranty deed contains a thirty-foot street easement known as "Home Place" which extends the full length of the North side and a part of the East side of their lot. One end of the street is a dead end. The Wrights'

lot is near the dead end. At the other end of the street is an outlet which all landowners use to connect to Reveredy Lane. The Wrights and five other landowners have built homes along Home Place.

**Who Owns Home Place?**

*A. Wright v. Town of Matthews* (*"Wright III"*), 177 N.C. App. 1, 627 S.E.2d 650 (2006).

In 2004, the Wrights challenged the Town's Zoning Board of Adjustment's ("Zoning Board") determination that Home Place was a public street. The Zoning Board's 2004 decision was based upon a 1985 resolution declaring Home Place to be a public street, and the fact that in 1991 the town paved the street. The Wrights appealed by petition for writ of certiorari the determination to the superior court, which affirmed the decision of the Board. The Wrights appealed to this Court.

On 4 April 2006, in *Wright I*, this Court held that "the findings made by the Board and the trial court do not support the conclusion that Home Place is a public street." *Wright I*, 177 N.C. App. at 16, 627 S.E.2d at 661. A private street or right-of-way may only become a public street by one of three methods: "(1) in regular proceedings before a proper tribunal . . . ; (2) by prescription; or (3) through action by the owner, such as a dedication, gift, or sale." *Id.* at 10, 627 S.E.2d at 658. This Court held that there was no evidence that Home Place was adjudicated a public street through a condemnation proceeding or before a proper tribunal. *Id.* at 10–11, 627 S.E.2d at 658. Additionally, there was no evidence that Home Place was ever the subject of a gift or sale by the property owners. *Id.* at 11, 627 S.E.2d at 658. Therefore, "Home Place could only have become a public street by way of dedication or prescription." *Id.* Because the Town had not maintained Home Place for the requisite twenty-year time period to establish prescription, we held that the only way Home Place could have become a public street would be through prior dedication—either express or implied. *Id.* at 15, 627 S.E.2d at 661. We reversed the order of the trial court, and remanded for "further findings detailing whether or not Home Place became a public street by means of implied dedication." *Id.* at 14, 627 S.E.2d at 661.

Based on the decision of this Court in *Wright I*, the trial court vacated its order, and remanded the case back to the Zoning Board. *Town of Matthews v. Wright*, 194 N.C. App. 552, 553, 669 S.E.2d 841, 842 (2008). At a subsequent hearing on 10 August 2006, the Zoning Board determined "the issue of Implied Dedication was no longer an issue." *Id.*

*B. Town of Matthews v. Wright* (*"Wright III"*), 194 N.C. App. 552, 669 S.E.2d 841 (2008).

On 9 October 2006, without notice to the Wrights, the Town Board of Commissioners ("the Board") adopted a "Resolution Adding Streets To The Matthews Street System (*NUNC PRO TUNC*[1] [25 March 1985])." *Id.* at 554, 669 S.E.2d at 842. This resolution purportedly transformed Home Place into a "public street" retroactively, effective as of 1985. *Id.*

On 19 April 2007, the Town filed a complaint alleging the Wrights had erected two signs and a fence on a public street. *Id.* at 553, 669 S.E.2d at 841. The complaint alleged the Town ordered the Wrights to remove the obstructions within twenty days and they failed to comply. *Id.* The Wrights counterclaimed alleging trespass and raised, *inter alia*, the defense of *res judicata*. *Id.* at 553, 669 S.E.2d at 841–42. The trial court granted summary judgment in favor of the Wrights, finding that "Home Place is a private road," and dismissing the Town's complaint. *Id.* at 842, 669 S.E.2d at 554. The Town appealed that decision of the trial court to this Court, arguing that the *nunc pro tunc* resolution by the Board precluded the trial court's finding that Home Place is a private street. *Id.* at 555, 669 S.E.2d at 843.

In *Wright II*, this Court invalidated the Board's *nunc pro tunc* resolution. *Id.* at 556, 669 S.E.2d at 843. However, we declined to agree with the trial court's finding that "Home Place is a private road" without the requisite findings which we ordered in *Wright I*. *Id.* Therefore, in *Wright II*, we again reversed the trial court and remanded the matter for further findings to determine if Home Place was impliedly dedicated as a public street. *Id.* at 556, 669 S.E.2d at 844.

*C. Town of Matthews v. Wright* (*"Wright III"*), 214 N.C. App. 563, 714 S.E.2d 867, 2011 WL 3570212 (2011) (unpublished).

On remand, a hearing was held on 21 July 2010. *Wright III*, at *3. On 4 August 2010, the trial court issued an order with the following findings:

> 11. This Court finds that on March 25, 1985, at a duly constituted regular meeting of the Town of Matthews Board of Commissioners that a resolution adding streets to the Town of Matthews street system was passed by the Board and that this resolution included Home Place.

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1. *Nunc pro tunc* is "[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, *i.e.*, with the same effect as if regularly done." Black's Law Dictionary 1069 (6th ed. 1990).

. . . .

> 14. At no time subsequent to 1985, did the Defendants bring an action for inverse condemnation or refuse services provided by the Town of Matthews with respect to the upkeep and maintenance of Home Place and, as a fact, Home Place is a public street and has been such since [a] regularly constituted proceeding before a proper tribunal in March 1985.

*Id.* at *4. The Wrights appealed that order. *Id.* at *1. For a third time, on 16 August 2011, this Court reversed the decision of the trial court and remanded for findings on implied dedication in accordance with *Wright I* and *Wright II*. *Id.* at *4. In *Wright III*, we agreed with the Wrights' assertion that "[the Town] has twice now ignored the directive of the Court[,]" *id.* at *3, and we noted that despite our holdings in *Wright I* and *Wright II*, "no findings of fact were made as to whether Home Place was impliedly dedicated as a public street." *Id.*

On remand, on 17 September 2012, the issue of implied dedication was heard by a bench trial before Judge Beverly T. Beal. On 30 November 2012, the trial court issued a judgment ("the Beal judgment"), deciding the Wrights' interest in Home Place was a private right of way and not a public street. The trial court made the following relevant conclusions of law:

> 9. The language used in the deeds of conveyance constituting the Defendants' chain of title, in all of the variations, did not except from the land described as conveyed the portion contained within Home Place; rather, it only excepted from the description a *right of way* for the street. The particular language used in each instance does not imply the owner's intent to offer a dedication of the street to any governmental entity at the time of the conveyances.
>
> . . . .
>
> 11. There was no intent to dedicate Home Place as a public street, either real or apparent. There was no implied dedication of Home Place as a public street.

After finding that the Wrights' easement had never been dedicated to the Town, the trial court dismissed the Town's cause of action against the Wrights.

The Beal judgment analyzed *only* the Wrights' easement in Home Place by examining their chain of title. The Beal judgment did not reference any of the Wrights' neighbors' chains of title. At oral argument, counsel for the parties stated that one landowner has granted the Town an easement to his portion of Home Place, but admitted that the legal status of the four other neighbors' easements has not been established.

*D. Current Litigation*

During the months following the issuance of the Beal judgment and leading up to the Town's filing of the present condemnation action, the Wrights constructed a fence on their property—bordering Home Place but not blocking its access. The evidence shows that the Wrights have never erected any structure that would prevent access to Home Place.

Nevertheless, the Wrights' neighbors expressed concerns to Town of Matthews Mayor Jim Taylor ("Mayor Taylor"), and to the Town Commissioners, that the Wrights *might eventually* block access to Home Place. In the spring of 2013, the Board held meetings to discuss the possibility of condemning the Wrights' portion of Home Place. The minutes of those meetings, as well as emails between the Wrights' neighbors, Mayor Taylor, and the Town Commissioners shed light on the decision-making process that led to the present condemnation action.

On 11 February 2013, the Board held a closed meeting during which the condemnation action was discussed. The meeting minutes reveal a desire by the Board to "permanently close the issue" of the Wrights' ownership of their easement in Home Place. The minutes also reveal that the Board members disagreed as to whether condemnation of the Wrights' property was appropriate. Commissioner Miller indicated that "it should be up to the neighbors to come to the Town with their concerns rather than having the Town step in before something actually happens."

Immediately following the 11 February 2013 closed Board meeting, Mayor Taylor emailed the Wrights' neighbors and others, encouraging them to "voice [their] concerns" about the Wrights to the Board. Mayor Taylor's email said "[t]his might help swing some members of council to see the need to act sooner rather than waiting for the Wrights to actually block the street or do something else that could limit access to emergency traffic if it was needed." Mayor Taylor indicated that he was "sending this from [his] personal email and not [his] town email in order to protect the privacy of [the] communication."

On 27 February 2013, Commissioner Moore stated in an email to one of the Wrights' neighbors that she is "a very good friend" of neighbor

Paul Jamison[2], and that she "fully support[s] moving forward with whatever action the Town must take to ensure . . . access, security, and safety – before anything happens." On the same day, Commissioner Gulley sent an email to another one of the Wrights' neighbors, indicating that she "personally believe[s] that we should 'take' the street now but not all council members agree. This has gone on much too long."

During the next public Board meeting, on 11 March 2013, Marty Kelso, one of the Wrights' neighbors, spoke during the public comment portion of the meeting, asking for "the Board's assistance in ensuring that Home Place remains a public street owned by the Town of Matthews." George Young also spoke at the meeting in support of the Wrights. He stated "the taxpayers should [not] be paying any more money for litigation to deal with Home Place. Any additional litigation should be between the parcels involved and the Town should stay out of it."

Nevertheless, on 25 March 2013, the Board discussed the condemnation in closed session and decided to "move forward with [the] condemnation action and place it on the agenda for discussion in the public meeting on April 8, 2013." During the 8 April 2013 public session, the Board, at the urging of Mayor Taylor,[3] unanimously approved a resolution stating the Town's intent to condemn the Wrights' property.

On 17 May 2013, the Town filed a complaint pursuant to N.C. Gen. Stat. § 40A, giving notice of the Town's intent to condemn a portion of the Wrights' land through eminent domain. The complaint included a description of the land to be condemned:

> Being a portion of the Lester and Virginia Wright property as recorded in said Deed Book 4850 . . . : BEGINNING at a point at or near the certerline of a roadway designated as Home Place. The aforesaid point of beginning being the northwesterly corner of the Lester E. Wright and Virginia J. Wright property as recorded in Book 4850 . . . containing 20,071 sq. ft. (0.461 acres) more or less.

The complaint also stated the purpose of the condemnation: "for the opening, widening, extending, or improving roads, streets, alleys, and

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2. Mr. Jamison owns property near but not abutting Home Place.

3. The meeting minutes describe Mayor Taylor's statement to the Board as follows: "Minutes or hours, even seconds, can be the difference between life and death and he doesn't want anything like that to occur and have the Board look back and say it could have done something to prevent a tragedy."

sidewalks and more particularly described as Home Place." The Town estimated that the just compensation value of the property to be condemned was $1,500. The Town has not moved to condemn any portion of Home Place other than that portion which lies in front of the Wrights' property.

In the Wrights' response, they asserted numerous affirmative defenses including, *inter alia*, the defenses that the Town's condemnation serves no public use or benefit, inadequate compensation, and unclean hands.

On 21 January 2014, Judge F. Donald Bridges reviewed the condemnation action pursuant to N.C. Gen. Stat. § 40A-47, which provides that

> [t]he judge, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, hear and determine any and all issues raised by the pleadings other than the issue of compensation, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 40A-47 (2014). Upon agreement between the parties, the trial court issued a judgment on this matter without further hearing, based on affidavits submitted by the parties. In its judgment, signed on 11 March 2014, the trial court made the following relevant finding of fact:

> 9. Given [the] factual context, I conclude that the action of the Plaintiff's Board of Commissioners on April 8, 2013 is simply an attempt to accomplish, through other means, what was originally intended by its actions on March 25, 1985, February 5, 2004, and October 9, 2006, rather than constituting a taking of property for some recently realized new need for a public purpose or benefit.

The trial court made the following relevant conclusions of law:

> 4. When the proposed taking of property is "for the opening, widening, extending or improving roads, streets, alleys and sidewalks . . ." such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private property cannot be considered in a vacuum and without regard to its factual history.
>
> 5. [T]he Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United

> States require more than the Plaintiff simply reiterating its previous position, without any plans whatsoever for construction, improvements or alterations to the property being taken.
>
> 6. Based upon the evidence before the Court, the Court finds that Plaintiff's purported taking is an arbitrary and capricious exercise by the Plaintiff of its powers of eminent domain.

The trial court concluded "[t]he Plaintiff's claim to the [Wrights'] Property by Eminent Domain is null and void." The Town filed timely notice of appeal.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27 (2014), which provides for an appeal of right to the Court of Appeals from any final judgment of a superior court.

## III. Standard of Review

Our Supreme Court has held *de novo* review is appropriate when reviewing decisions of the trial court on all issues other than damages in eminent domain cases. *See Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001). We review eminent domain issues *de novo* because of the well-settled principle that *de novo* review is required where constitutional rights are implicated. *See id.* Both the United States and North Carolina Constitutions provide that citizens shall not be deprived of their property without due process of law. *See* U.S. Const. amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"); N.C. Const. art. I, § 19 ("No person shall be . . . deprived of his . . . property, but by the law of the land."). Constitutional rights are necessarily implicated in eminent domain cases because they involve a taking of private property. Thus, we review the trial court's judgment in this case *de novo*. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

## IV. Analysis

N.C. Gen. Stat. § 40A-3(b) gives municipalities the power of eminent domain. The statute allows municipalities to "acquire by purchase, gift, or condemnation any property" as long as the acquisition is "[f]or the

public use or benefit," and fulfills one of the statute's enumerated purposes. N.C. Gen. Stat. § 40A-3(b) (2014). Section (1) of the statute allows public condemnors to condemn land for the purpose of "[o]pening, widening, extending, or improving roads, streets, alleys, and sidewalks." N.C. Gen. Stat. § 40A-3(b)(1). For the following reasons, we hold that the Town's condemnation action against the Wrights should be dismissed as serving no public use or benefit, in violation of N.C. Gen. Stat. § 40A-3.

"[T]he determination of whether the condemnor's intended use of the land is for 'the public use or benefit' is a question of law for the courts." *Carolina Tel. & Tel. Co. v. McLeod*, 321 N.C. 426, 429, 364 S.E.2d 399, 401 (1988). If a municipality's condemnation action purports to serve one of the statutorily enumerated purposes for public condemnation, then the burden shifts to the property owner to refute the municipality's showing of a "public use or benefit." *See City of Burlington v. Isley Place Condominium Ass'n*, 105 N.C. App. 713, 714–15, 414 S.E.2d 385, 386 (1992); *see also* N.C. Gen. Stat. § 40A-3(b) (2014). Because the Town's condemnation action purports to be for the purpose of "opening" Home Place in accordance with section (1) of the statute, the burden is on the Wrights to show that the condemnation serves no public use or benefit.

Our Supreme Court uses two tests to determine whether a condemnation is for the public use or benefit: "The first approach—the public *use* test—asks whether the public has a right to a definite use of the condemned property. The second approach—the public *benefit* test—asks whether some benefit accrues to the public as a result of the desired condemnation." *Id.* at 430, 364 S.E.2d at 401 (internal citations omitted). North Carolina courts have held that a condemnation must satisfy both the "public use" *and* the "public benefit" test. *See id.* at 432, 364 S.E.2d at 402. Under the "public use" test, the dispositive determination is "whether the general public has a right to a definite use of the property sought to be condemned." *Id.* at 430, 364 S.E.2d at 401. It is the "public's *right* to use, not the public's actual use" that is the key factor in making the "public use" determination. *Id.* Under the "public benefit" test, the dispositive determination is "whether some benefit accrues to the public as a result of the desired condemnation." *Id.* However, "not just any benefit to the general public will suffice under this test. Rather, the taking must furnish the public with some necessity or convenience which cannot readily be furnished without the aid of some governmental power." *Id.* at 432, 364 S.E.2d at 402 (citation and quotation marks omitted).

Here, the Wrights have met their burden of showing that no public use or benefit is achieved from this condemnation of their property. The

Wrights have shown that the condemnation fails the "public benefit" test. We reject the Town's consistent characterization that this condemnation will "open" Home Place for public benefits. The predicate to "opening" Home Place is that it must have previously been "closed" in some way. We see two ways in which Home Place could have been "closed": (1) if the Wrights blocked access to Home Place by placing a barricade on their property, or (2) if the entire street was public except for the Wrights' thirty-foot private portion of the street. The evidence presented here supports neither circumstance. Instead, the evidence shows that the Wrights have never blocked access to Home Place. Furthermore, although the Wrights' portion of Home Place is private land, with a right of way to the public for ingress and egress, most of the other landowners' portions of Home Place have never been dedicated to the Town. It defies reason that the Town would need to condemn only the Wrights' portion of Home Place in order to "open" the street.

The Town asserts that the condemnation serves the following public benefits: (1) neighbors' access to their land, (2) utility service provider access, (3) fire fighters' access to water, and (4) general community interconnectedness. Condemnation of the Wrights' portion of Home Place furthers none of these goals. Rather, condemnation of the Wrights' portion of Home Place would only allow for those public benefits on *the Wrights' portion* of Home Place, which is at a dead end and landlocked by other individuals' portions of Home Place. Most of the other portions of Home Place have neither been dedicated to the Town as public land nor condemned by the Town. Thus, opening the Wrights' thirty-foot portion of Home Place to the public through condemnation will have no effect on the present ability of fire fighters or utility providers to access Home Place as a whole. Similarly, community interconnectedness is not served by opening a small portion of a larger, dead-end street. Finally, regardless of the result in this condemnation case, the Wrights' neighbors will retain the right to access their properties through the easement in the Wrights' deed. Because the Wrights have shown that the condemnation fails the "public benefit" test, we do not address whether the condemnation satisfies the "public use" test.

The sequence of events leading up to the condemnation bolsters our conclusion that no public use or benefit is served by the condemnation. The evidence shows that the Town was motivated by considerations irrelevant to the public benefit.[4] The evidence shows that Mayor Taylor

4. In *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, the United States Supreme Court listed four types of evidence that can show an improper motive

and some of the Commissioners considered personal conflicts between the Town and the Wrights in making the decision to condemn—rather than considering the public use or benefit of the condemnation.

We need not reach the issue of whether the Town's decision to condemn was arbitrary or capricious because the Wrights have met their burden of showing that the Town's condemnation action does not serve the public use or benefit. Therefore, the Town's condemnation action should be dismissed.

## V. Conclusion

For the reasons stated above, the judgment of the trial court dismissing the Town's condemnation action is affirmed.

AFFIRMED.

Judges BRYANT and STROUD concur.

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was employed by a legislative or administrative decision: "(1) the historical background of the decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedural sequence; and (4) the legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. 555, 565 (1977).

**YOUNG v. BAILEY**

[240 N.C. App. 595 (2015)]

TERRI YOUNG, PLAINTIFF
v.
DANIEL BAILEY, IN HIS OFFICIAL CAPACITY AS SHERIFF OF MECKLENBURG COUNTY, AND OHIO CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA14-966

Filed 21 April 2015

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

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

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

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

Appeal by plaintiff from judgment entered 25 April 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 February 2015.

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

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

STEELMAN, Judge.

Plaintiff, a deputy sheriff, was not a county employee as defined in N.C. Gen. Stat. § 153A-99, and could be discharged based upon political conduct without violating her free speech rights under the North Carolina Constitution.

## I. Factual and Procedural Background

Terri Young (plaintiff) was a deputy sheriff employed by former Mecklenburg County Sheriff Daniel Bailey (defendant, with Ohio Casualty Insurance Company, collectively, defendants). In June 2009 defendant sent a letter to approximately 1,350 of his employees, announcing his candidacy for reelection and stating that he would appreciate campaign contributions. Plaintiff did not contribute to defendant's reelection campaign or volunteer for his campaign. Defendant was reelected in November 2010. On 6 December 2010 plaintiff was terminated from her position.

On 23 May 2013 plaintiff filed a complaint, asserting claims against defendants for wrongful termination of employment in violation of the public policy under N.C. Gen. Stat. § 153A-99 and wrongful termination in violation of her rights under the Constitution of North Carolina, Article 1, § § 14 and 36. Plaintiff alleged that she was an "outstanding employee" between 1990 and 2007; that she was harassed by her superior during defendant's political campaign, and that she had been terminated "for refusing to make contributions to [defendant's] re-election campaign and for refusing to volunteer to work on his campaign." Defendants filed answers denying the material allegations of plaintiff's complaint and asserting the defense of sovereign immunity. On 3 March 2014 defendants filed a joint motion for summary judgment, asserting that there were no genuine issues of material fact regarding plaintiff's claim for wrongful discharge in violation of N.C. Gen. Stat. § 153A-99; that defendant was entitled to sovereign immunity on the wrongful discharge claim up to the amount of the surety bond; and that plaintiff's constitutional claim was barred by the existence of an adequate state law remedy. On 25 April 2014 the trial court granted summary judgment for defendants and dismissed plaintiff's complaint.

Plaintiff appeals.

## II. Standard of Review

Under N.C. Gen. Stat. § 1A-1, Rule 56(a), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is

entitled to a judgment as a matter of law." " 'In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.' " *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, __ N.C. __, 758 S.E.2d 874 (2014).

III. Termination in Violation of Public Policy

**[1]** In plaintiff's first argument she contends that she was wrongfully terminated in violation of the public policy under N.C. Gen. Stat. § 153A-99. Plaintiff asserts that she was a "county employee" as defined in § 153A-99, and that her termination from employment was in violation of this statute. We disagree.

In this case, plaintiff argues that she was terminated in violation of the public policy set forth in N.C. Gen. Stat. § 153A-99, which states that:

> (a) The purpose of this section is to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, [and] to ensure that employees are not restricted from political activities while off duty[.] . . .
>
> (b) Definitions. For the purposes of this section: (1) "County employee" or "employee" means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds[.] . . .

"The express purpose of N.C. Gen. Stat. § 153A-99 is 'to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]' . . . [I]f a county employee was fired due to his political affiliations and activities, 'this would contravene . . . the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99,' hence violating North Carolina public policy." *Venable v. Vernon*, 162 N.C. App. 702, 705-06, 592 S.E.2d 256, 258 (2004) (quoting *Vereen v. Holden*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 474 (1996) (internal citations omitted)).

Plaintiff argues that she was an employee of the "sheriff's department," which is supported by county funds, and thus is entitled to the protections of N.C. Gen. Stat. § 153A-99. In support of this contention,

plaintiff relies primarily on a 1998 advisory opinion of the North Carolina Attorney General, which opined that the statute was "applicable to elected officials of counties," and on a case cited in the advisory opinion, *Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *reversed and remanded*, 145 F.3d 1323 (4th Cir. N.C. 1998) (unpublished). Plaintiff also asserts that a close analysis of the word "thereof" in the statute tends to show that she was a county employee. However, we recently addressed these same arguments in *McLaughlin v. Bailey*, __ N.C. App. __, __ S.E.2d __ (2015), a case that is identical to the instant case. In *McLaughlin*, the plaintiffs were a deputy and another employee of the Mecklenburg County Sheriff who were discharged by the sheriff, the same defendant as in the instant case. We held that:

> The employees of a county sheriff, including deputies and others hired by the sheriff, are directly employed by the sheriff and not by the county or by a county department. Sheriff's employees are not "county employees" as defined in N.C. Gen. Stat. § 153A-99 and are not entitled to the protections of that statute.

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

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

*Sims-Campbell*, __ N.C. App. at __, __ S.E.2d at __ (emphasis added). *McLaughlin* is indistinguishable from the present case and controls the outcome. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37

(1989). As a deputy sheriff, plaintiff was not a county employee within the meaning of N.C. Gen. Stat. § 153A-99, and cannot assert a claim for wrongful termination in violation of that statute. This argument is without merit.

IV. Violation of State Constitutional Rights

**[2]** Plaintiff next argues that her termination violated her right to freedom of speech guaranteed by Art. 1, § 14 of the North Carolina Constitution. We disagree, and again conclude that plaintiff's arguments on this issue are foreclosed by our decision in *McLaughlin*.

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

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

*Bland*, 730 F.3d at 376 (quoting Jenkins, 119 F.3d at 1164). "In [*Jenkins*] the majority explained that it was the deputies' role as sworn law enforcement officers that was dispositive[.]" *Bland* at 377. In *McLaughlin*, we noted that the "reasoning of *Jenkins* and *Bland* was adopted by this Court in *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007), *review denied*, 362 N.C. 175, 658 S.E.2d 271 (2008), and explained:

> The plaintiffs in *Carter* were former deputy clerks of court who claimed that they had been terminated from their employment for political reasons, in violation of their rights to free speech under the North Carolina Constitution. On appeal, [the *Carter* opinion] . . . discussed the holding of *Jenkins* that "deputies actually sworn to engage in law enforcement activities on behalf of the sheriff" could be lawfully terminated for political reasons, and noted that *Jenkins* based its holding on the facts that:
>
> "[D]eputy sheriffs (1) implement the sheriff's policies; (2) are likely part of the sheriff's core group of advisors; (3) exercise significant discretion; (4) foster public confidence in law enforcement; (5) are expected to provide the sheriff with truthful and accurate information; and (6) are general agents of the sheriff, and the sheriff is civilly liable for the acts of his deputy."

*McLaughlin*, __ N.C. App. at __, __ S.E.2d at __. (quoting *Carter* at 454, 654 S.E.2d at 131 (citing *Jenkins* at 1162-63)). *Carte*r thus held that "political affiliation is an appropriate requirement for deputy clerks of superior court." *Id.* This issue was also discussed in *Sims-Campbell*:

> [T]his Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss's opponents during an election.

*Sims-Campbell*, __ N.C. App. at __, __ S.E.2d at __ (citing *Carter*, *Jenkins*, *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), and *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989)). In *McLaughlin* we held that *Carter* was "controlling on the issue of whether [plaintiff] could lawfully be fired based on political considerations" and that the plaintiff's "termination did not violate his free speech rights under the North Carolina Constitution." *McLaughlin* at __, __ S.E.2d at __.

We conclude, based upon the prior opinions in *McLaughlin*, *Sims-Campbell*, and *Carter*, that, even assuming *arguendo* that plaintiff was terminated based on her political views, this did not violate her right to free speech under the North Carolina Constitution. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). Because plaintiff's substantive

arguments lack merit, we have no need to reach the parties' arguments regarding defendants' defense of sovereign immunity.

V. Conclusion

The trial court did not err in granting defendants' motion for summary judgment.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 APRIL 2015)

| | | |
|---|---|---|
| BELL v. LOCKLEAR<br>No. 14-1256 | Robeson<br>(14CVD1042) | Dismissed |
| CHENETTE v. METOKOTE CORP.<br>No. 14-1156 | N.C. Industrial Commission<br>(100731)<br>(X50759) | Affirmed |
| COLLINS v. SEATON CORP.<br>No. 14-642 | N.C. Industrial Commission<br>(X54689) | Affirmed |
| CRUMP v. CITY OF HICKORY<br>No. 14-569 | Catawba<br>(12CVS3212) | Affirmed |
| FOWLER v. RIDDLE<br>No. 14-945 | Buncombe<br>(14CVS336) | Affirmed |
| GLEN WILDE, LLC v. FLETCHER<br>No. 14-1171 | Watauga<br>(13CVD538) | No Error |
| GRUB, INC. v. SAMMY'S SEAFOOD HOUSE & OYSTER BAR, LLC<br>No. 14-861 | Carteret<br>(12CVS201) | Affirmed in part; vacated and remanded in part. |
| IN RE C.B.<br>No. 14-1365 | New Hanover<br>(14JA76) | Affirmed |
| IN RE D.F.<br>No. 14-1063 | Madison<br>(05JA45) | Affirmed |
| IN RE FORECLOSURE OF CLARK<br>No. 14-1231 | Buncombe<br>(12SP489) | Affirmed |
| IN RE J.T.M.<br>No. 14-1241 | Burke<br>(04JT121) | Affirmed |
| IN RE S.A.O.<br>No. 14-1226 | Cabarrus<br>(13JT144-145) | Affirmed |
| KIELL v. KIELL<br>No. 14-630 | Catawba<br>(04CVD2494) | Vacated and Affirmed in part; Remanded in part. |
| LLOYD v. BAILEY<br>No. 14-935 | Mecklenburg<br>(13CVS14121) | Reversed and Remanded |

| | | |
|---|---|---|
| N.C. STATE BAR v. BATCHELOR<br>No. 14-1196 | N.C. State Bar<br>(13DHC25) | Affirmed |
| RASBERRY v. JACOBS<br>No. 14-1077 | Martin<br>(13CVS341) | Affirmed |
| SIMMONS v. WILLIAM E. SMITH TRUCKING, INC.<br>No. 14-1082 | N.C. Industrial Commission<br>(570867) | Affirmed |
| STARK L. GRP., PLLC v. NEWTON<br>No. 14-991 | Durham<br>(13CVS1865) | Affirmed |
| STATE v. BARKLEY<br>No. 14-319 | Durham<br>(12CRS51329) | No Error |
| STATE v. BARNES<br>No. 14-632 | Edgecombe<br>(12CRS53413) | No Error |
| STATE v. CHARLES<br>No. 14-1069 | Cumberland<br>(12CRS57537) | No Error |
| STATE v. EURE<br>No. 14-396 | Pitt<br>(13CRS50496-98)<br>(13CRS50500) | No Error |
| STATE v. HALL<br>No. 14-947 | Cherokee<br>(10CRS50376)<br>(10CRS50377)<br>(10CRS50378) | No plain error |
| STATE v. HARRISON<br>No. 14-859 | Burke<br>(13CRS50052) | No Error |
| STATE v. JONES<br>No. 14-896 | Onslow<br>(13CRS50929-30) | No error in part;<br>no prejudicial error in part. |
| STATE v. PATIN<br>No. 14-926 | Wayne<br>(12CRS50514)<br>(12CRS5176) | Affirmed in part,<br>Vacated in part<br>and Remanded in part. |
| STATE v. PHILLIPS<br>No. 14-1056 | Orange<br>(11CRS51977) | No Error |
| STATE v. ROYAL<br>No. 14-1348 | Gaston<br>(14CRS1864) | Affirmed |

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|---|---|---|
| STATE v. SPEAKMAN<br>No. 14-368 | Forsyth<br>(06CRS63107)<br>(06CRS63144) | No Error |
| STATE v. WILLIAMS<br>No. 14-1100 | Sampson<br>(13CRS50318)<br>(14CRS147) | No Error |
| STATE OF N.C. v. TIMBERLAKE<br>No. 14-1044 | Forsyth<br>(00CVD9749) | Dismissed |

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**PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS**