241 N.C. App.—No. 2 Pages 178-400

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 1, 2017

MAILING ADDRESS: The Judicial Department
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OF

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[4] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 2 JUNE 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Administrative Law—petition for judicial review—North Carolina Innovations Waiver—personal care services—The superior court did not err by affirming the Administrative Law Judge's final decision denying petitioner personal care services in excess of the maximum allowed under the North Carolina Innovations Waiver policy because substantial evidence in the record supported the court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Any purported risk of institutionalization was caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home. **Short v. N.C. Dep't of Health & Human Servs., 338.**

APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—cross-claims pending—failure to show affected substantial right—Defendant's appeal from the trial court's order granting summary judgment in favor of plaintiff bank in an action seeking to enforce a guaranty agreement was from an interlocutory order and was thus dismissed. The trial court's 16 April 2014 order failed to confer jurisdiction upon the Court of Appeals to review the trial court's 5 June 2012 order. Cross-claims between some of the parties were still pending; and defendant Lynch failed to show

non-judicial foreclosures. A foreclosure under power of sale is a type of special proceeding to which the Rules of Civil Procedure apply. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

Mortgages and Deeds of Trust—foreclosure—two voluntary dismissals—res judicata—equity—In a foreclosure where petitioners had twice taken voluntary dismissals, and the issue arose as to whether the Superior Court had jurisdiction to dismiss the action, the dispositive issue was whether each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constituted a separate default, or period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involved claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule in Rule 41(a). While the issue had not been addressed in N.C., there was persuasive reasoning from Florida. The two dismissal rule is based on res judicata, but the unique nature of the mortgage obligations and the continuing relationship of the parties as well as equity required that res judicata not be applied so strictly as to prevent lenders from being able to challenge multiple defaults. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

Mortgages and Deeds of Trust—foreclosure—two voluntary dismissals—res judicata not a bar—different acts of default—In a foreclosure action with two voluntary dismissals, the two dismissal rule of Rule 41(a) did not apply and res judicata did not bar a third power of sale foreclosure action. The claims of default and the particular facts at issue in each action differed, and, as a result of the voluntary dismissals, the claims of acceleration and the alleged acts of default were never adjudicated on their merits. Furthermore, the lender had not lost its right to enforce the note and deed of trust merely because its previous two foreclosure actions were dismissed without prejudice. **In re Foreclosure by Rogers Townsend & Thomas, PC, 247.**

PLEADINGS

Pleadings—failure to use correct name—findings—Findings of fact regarding the name of Duke University Health System, Inc. in plaintiff's two complaints were supported by competent evidence in the record and the trial court did not err by concluding that plaintiff failed to name Duke University Health System, Inc. as a defendant. **Fintchre v. Duke Univ., 232.**

SCHOOLS AND EDUCATION

Schools and Education—repeal of teacher career status law—contract right not yet vested—no standing—In plaintiffs' challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by denying summary judgment to plaintiff Link based on a lack of standing. As a probationary teacher, Link had not yet acquired a vested contractual right to career status protections. **N.C. Ass'n of Educators, Inc. v. State of N.C., 284.**

Schools and Education—repeal of teacher career status law—motion to strike portions of affidavits—any error harmless—In plaintiffs' challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by declining to strike certain portions of plaintiffs' affidavits as not based on the affiants' personal knowledge. Even assuming that the challenged portions should have been excluded, any failure to strike was

harmless. The trial court's findings of fact were supported by the forecasted evidence. **N.C. Ass'n of Educators, Inc. v. State of N.C., 284.**

Schools and Education—repeal of teacher career status law—vested contractual right—Contract Clause violated—The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and career status of public school teachers (Career Status Law) violated the Contract Clause of the United States Constitution for plaintiff teachers who had already earned career status. The Career Status Law created contractual obligations; the State's actions substantially impaired those contractual obligations; and the impairment was not reasonable and necessary to serve an important public purpose. **N.C. Ass'n of Educators, Inc. v. State of N.C., 284.**

Schools and Education—repeal of teacher career status law—vested contractual right—Law of the Land Clause violated—The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and career status of public school teachers (Career Status Law) violated the Law of the Land Clause of the North Carolina Constitution for plaintiff teachers who had already earned career status. The repeal of the Career Status Law abrogated plaintiffs' contracted-for and vested career status protections and constituted an unconstitutional taking of property without just compensation. **N.C. Ass'n of Educators, Inc. v. State of N.C., 284.**

SEARCH AND SEIZURE

Search and Seizure—seizure of license and registration—no reasonable suspicion—violation of Fourth Amendment—Defendant was seized in violation of the Fourth Amendment when a police officer, with no reasonable suspicion, took defendant's vehicle registration and driver's license to his patrol vehicle to conduct a check on his computer. The trial court erred by denying defendant's motion to suppress. **State v. Leak, 359.**

SEXUAL OFFENDERS

Sexual Offenders—registration—actual release date and not paper release date—consecutive prison terms calculated as single term—The trial court did not err by failing to grant defendant's motion to dismiss on the basis that the State failed to prove that he was required to register as a sex offender. It is defendant's actual release date of 24 January 1999 that controls the sentencing outcome of the instant case, not the "on paper" release date of 24 September 1995. When a defendant is sentenced to consecutive prison terms, the sentences are to be calculated as a single term and the effective release date for purposes of parole eligibility and the like is the date on which a defendant is physically released from incarceration. **State v. Surratt, 380.**

Sexual Offenders—registration—falsification of information—executed verification form required—The trial court erred by failing to grant defendant's motion to dismiss on the basis that he falsified information for purposes of being charged with violating N.C.G.S. § 14-208.11. There was no evidence presented by the State that he willfully gave an address he knew to be false when he registered his address in Catawba County. The purpose of the statute cannot be extended to punish offenders for untruths they may tell law enforcement. An executed verification form is required before one can be charged with falsifying or forging the document. **State v. Surratt, 380.**

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.

THOMAS F. ADCOX, EMPLOYEE, MOVANT
v.
CLARKSON BROTHERS CONSTRUCTION COMPANY, EMPLOYER, AND
UTICA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA14-313-2

Filed 2 June 2015

Workers' Compensation—attorney fees—law of the case

A November 2008 opinion and award in a workers' compensation case did not deny plaintiff's attorneys' request for attorney fees. Defendants' contention that the Industrial Commission's sub silentio reversed the deputy commissioner's award of fees was not tenable and was inconsistent with controlling authority.. Defendants bore the burden to appeal that opinion and award to the Court of Appeals. When they failed to do so, the deputy commissioner's approval of an attorney fee became the law of the case. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 opinion and award, the Commission must reconsider its ruling on that motion.

Appeal by plaintiff from order entered 17 September 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 August 2014. Petition for rehearing granted 13 November 2014. The following opinion supersedes and replaces the opinion filed 16 September 2014.

R. James Lore, Attorney at Law, by R. James Lore; and Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, LLP, by Kari L. Schultz and M. Duane Jones, for defendants-appellees.

GEER, Judge.

In a 27 March 2008 Opinion and Award, the deputy commissioner approved an attorneys' fee of 25% of the attendant care compensation awarded to plaintiff Thomas F. Adcox for his wife's services. Although defendants Clarkson Brothers Construction Company and Utica Mutual Insurance Company asked the Full Commission to reverse this award, the Commission, in a 25 November 2008 Opinion and Award, affirmed the deputy commissioner's Opinion and Award with modifications only

as to the amount and rate of pay for the attendant care -- the Commission did not specifically address the 25% attorneys' fee award.

Subsequently, plaintiff filed a motion seeking an order requiring that the 25% be paid directly to plaintiff's counsel in order to alleviate the bookkeeping burden on plaintiff's wife. Defendants contended — and the Commission agreed in an order entered 10 December 2012 — that the Commission's November 2008 Opinion and Award, by not specifically mentioning the attorneys' fees, necessarily denied plaintiff's attorneys' request for approval of a fee. Plaintiff appealed to the superior court, and the trial court dismissed his appeal on the grounds that the Commission had not, in its December 2012 order, denied a request for fees.

We cannot agree with the Commission's and defendants' position that the November 2008 Opinion and Award denied plaintiff's attorneys' request for fees. Defendants' contention that the Commission *sub silentio* reversed the deputy commissioner's award of fees is not tenable and is inconsistent with controlling authority. The Commission's silence in November 2008 on the issue of the deputy commissioner's award of an attorneys' fee can be interpreted in only one of two ways: either the Commission affirmed the deputy commissioner or the Commission did not address the issue.

In either event, defendants bore the burden to appeal that Opinion and Award to this Court. When they failed to do so, the deputy commissioner's approval of an attorneys' fee became the law of the case, and the Commission had no authority to declare, in December 2012, that the original panel had *sub silentio* reversed the deputy commissioner and denied plaintiff's request for approval of an attorneys' fee. Consequently, we reverse and remand to the trial court for further remand to the Commission for reconsideration of plaintiff's motion.

Facts

On 28 February 1983, while employed by defendant Clarkson, plaintiff suffered an admittedly compensable head injury that left him permanently and totally disabled. Defendant Clarkson and defendant Utica National Insurance Group agreed to compensate plaintiff for his disability at a weekly rate of $248.00.

In February 2003, the parties filed a settlement agreement pursuant to which defendants agreed to pay plaintiff a lump sum of $250,000.00 in reimbursement for attendant care services provided by plaintiff's family members, including his wife Joyce Adcox, from 28 February 1983 until

3 February 2003. The Commission approved a 25% attorneys' fee for plaintiff's counsel, which was deducted from the sum due plaintiff and paid directly to plaintiff's counsel. Thereafter, defendants authorized and began providing plaintiff with 60 hours of in-home professional attendant care services per week, provided by Kelly Home Health Services.

In 2007, Mrs. Adcox retired, and plaintiff moved to have defendants pay Mrs. Adcox directly for attendant care services instead of Kelly Services. The matter was heard by Deputy Commissioner John B. DeLuca on 30 August 2007. On 27 March 2008, the deputy commissioner entered an Opinion and Award allowing Mrs. Adcox to assume attendant care responsibilities seven days a week at a rate of $188.00 per day. In his award, the deputy commissioner ordered that "[a]n attorneys' fee of 25% of the attendant care compensation is approved for the Plaintiff's counsel."

Both parties appealed to the Full Commission. On 25 November 2008, the Full Commission entered an Opinion and Award affirming the deputy commissioner's Opinion and Award "with modifications including the amount of attendant care and rate of pay for said care." The Full Commission allowed Mrs. Adcox to assume attendant care responsibilities seven days per week for 16 hours per day at a rate of $10.00 per hour. The Opinion and Award did not mention the 25% attorneys' fee award to plaintiff's counsel. Plaintiff appealed to this Court for reasons unrelated to the 25% attorneys' fee award. Defendants chose not to appeal. On 8 December 2009, this Court affirmed the 25 November 2008 Opinion and Award. *See Adcox v. Clarkson Bros. Constr. Co.*, 201 N.C. App. 446, ___ S.E.2d ___, 2009 WL 4576065, 2009 N.C. App. LEXIS 2308 (2009) (unpublished).

On 12 July 2012, plaintiff filed a motion with the Full Commission requesting that it direct payment of the attorneys' fees to plaintiff's counsel. The motion explained that "Mrs. Adcox is responsible for her own income tax record-keeping and reporting of the attendant care income she receives. For tax purposes the failure by the carrier to direct separate checks makes it appear as though Mrs. Adcox's attendant care income is higher than it actually is." Plaintiff requested that defendants be ordered to deduct 25% of the compensation payable to Mrs. Adcox to be paid directly to plaintiff's counsel because the record keeping "has become burdensome for Mrs. Adcox."

A new panel of commissioners heard plaintiff's 2012 motion. Commissioners Linda Cheatham and Tammy R. Nance replaced Commissioners Dianne C. Sellers and Laura Kranifeld Mavretic from the

original 2008 panel. Commissioner Danny Lee McDonald served on both panels. On 10 December 2012, the Full Commission entered an order denying plaintiff's motion.

The Commission found that both parties had appealed Deputy Commissioner DeLuca's Opinion and Award to the Full Commission. Regarding defendants' appeal, the Commission noted that although defendants had not specifically assigned error to the attorneys' fee award in their form 44, they had generally challenged each paragraph of the deputy commissioner's award and had addressed the 25% attorneys' fee award in their brief to the Commission. The Commission then concluded:

> The Full Commission's Opinion and Award filed on November 25, 2008 directs Defendants to pay Mrs. Adcox for attendant care services from the date of the filing of the Opinion and Award at a rate of $10.00 per hour, 7 days per week, 16 hours per day. The Opinion and Award does not include an award of attorneys' fees for Plaintiff's counsel.
>
> Plaintiff appealed the Full Commission's decision to the North Carolina Court of Appeals. Based upon a review of the Court's Opinion, it does not appear that Plaintiff assigned error to the Full Commission's decision in its Opinion and Award not to award an attorneys' fee to Plaintiff's counsel.
>
> As Plaintiff seeks to have the Full Commission direct Defendants to deduct and pay directly to counsel for Plaintiff attorneys' fees which have not been awarded by the Full Commission, Plaintiff's Motion to Direct Payment of Attorneys' Fees to Plaintiff's Counsel is hereby DENIED.

Commissioner McDonald — the one commissioner who had served on the 25 November 2008 panel — dissented without opinion.

On 12 December 2012, plaintiff appealed the order to superior court pursuant to N.C. Gen. Stat. § 97-90. On 19 June 2013, defendants moved to dismiss plaintiff's appeal pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. On 25 June 2013, plaintiff moved to strike defendants' motion to dismiss for lack of standing.

After a 26 August 2013 hearing, the trial court entered an order dismissing plaintiff's appeal on 17 September 2013. The trial court took

judicial notice of the 25 November 2008 Opinion and Award and the 10 December 2012 order of the Full Commission. It found in pertinent part:

> (2) that the December 10, 2012 Order from which Movant now purportedly appeals did not deny any attorneys fees, but simply clarified that the Commission had not awarded attorneys fees in the November 25, 2008 Order;
>
> (3) that Movant's litigated request for attorney fees was denied on November 25, 2008;
>
> (4) that Movant's current request for attendant care attorney fees per N.C. Gen. Stat. § 9-90 [sic] should be barred by § 97-90 and the doctrine of *res judicata*;
>
> (5) that the November 25, 2008, Order of the North Carolina Industrial Commission and the parties' appeal therefrom to the North Carolina Court of Appeals, represented a final judgment on the merits as to the issue of any attorney fee based on a percentage of attendant care medical benefits provided to Movant pursuant to North Carolina General Statutes § 97-25, which is the only claim at issue in this litigation[.]

The trial court, therefore, dismissed plaintiff's appeal with prejudice. Plaintiff timely appealed to this Court. After this Court filed an opinion on 16 September 2014, defendants petitioned for a rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. The petition for rehearing was granted 13 November 2014. This opinion supersedes and replaces the opinion filed 16 September 2014.

Discussion

Plaintiff first contends that defendants lacked standing to oppose both his motion to the Full Commission and his appeal from the 10 December 2012 decision of the Full Commission to superior court. As explained by this Court in *Diaz v. Smith*, 219 N.C. App. 570, 573-74, 724 S.E.2d 141, 144 (2012) (internal citations and quotation marks omitted):

> The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. Under N.C. Gen. Stat. § 1–271 (2009), "[a]ny party aggrieved" is entitled to appeal in a

> civil action. A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed.

Plaintiff argues that because his motion to direct payments to plaintiff's counsel does not affect the total amount to be paid by defendants, defendants are not an "aggrieved" party. Defendants counter that they are an "aggrieved" party because (1) "if Plaintiff's Counsel is awarded attorney's fees as a result of this appeal, Defendants would either be required to pay an additional 25% in the form of attorneys [sic] fees, or fund Plaintiff's Counsel's attorney's fees by reducing the amount of compensation to Mrs. Adcox, thereby subjecting Defendants to liability for compensation owed to Mrs. Adcox, as mandated in the Opinion and Award" and (2) "allowing a plaintiff's counsel to have a pecuniary interest in an authorized medical provider could create a conflict between his obligations to represent his client and a defendant's obligation to manage medical treatment pursuant to N.C. Gen. Stat. § 97-25."

Because of our resolution of this appeal, we need not decide whether defendants have standing in this case to challenge an award of attorneys' fees to plaintiff's attorney that does not affect the total amount payable by defendants. We express no opinion whether defendants' contentions are sufficient to make them aggrieved parties for purposes of an appeal.

Plaintiff's primary argument on appeal is that the trial court erred in finding that the Full Commission denied his request for attorneys' fees in its 25 November 2008 Opinion and Award and, as a result, erred in dismissing his appeal on the grounds of res judicata. Plaintiff argues that the deputy commissioner's award of attorneys' fees became final when defendants did not specifically assign as error the award of attorneys' fees in their Form 44 as required by Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission. Alternatively, plaintiff argues that the Commission affirmed the award of attorneys' fees. We review these questions of law de novo. *McAllister v. Wellman, Inc.*, 162 N.C. App. 146, 148, 590 S.E.2d 311, 312 (2004).

Rule 701 provides:

> (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.

(Emphasis added.)

This Court has emphasized that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission." *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). "Such notice is required for the appellee to prepare a response to an appeal to the Full Commission." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 252, 652 S.E.2d 713, 717 (2007). Thus, "the penalty for non-compliance with the particularity requirement is waiver of the grounds, and, where no grounds are stated, the appeal is abandoned." *Id.* at 249, 652 S.E.2d at 715.

Defendants argue that they properly appealed the issue of attorneys' fees to the Full Commission because they specifically listed Deputy Commissioner DeLuca's Award, which included the award of attorneys' fees, in the third assignment of error on their Form 44 Application for review:

> Deputy Commissioner John B. DeLuca's Award, dated March 27, 2008, on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, not supported by competent evidence or evidence of record, and are contrary to the competent evidence of record, and are contrary to law: Award Nos. 1-3.

This assignment of error is similar to the appellant's assignment of error in *Walker v. Walker*, 174 N.C. App. 778, 782, 624 S.E.2d 639, 642 (2005), which asserted generally that several rulings of the trial court were " 'erroneous as a matter of law.' " In concluding that this assignment of error was insufficient under the 2005 version of Rule 10 of the

Rules of Appellate Procedure, this Court held that the "assertion that a given finding, conclusion, or ruling was 'erroneous as a matter of law' " violated Rule 10 because it "completely fail[ed] to *identify* the issues actually briefed on appeal." *Walker*, 174 N.C. App. at 782, 624 S.E.2d at 642. Instead, " '[s]uch an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. This assignment — like a hoopskirt — covers everything and touches nothing.' " *Id.* at 783, 624 S.E.2d at 642 (quoting *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005)).

Similarly, here, defendant's assignment of error " 'covers everything and touches nothing.' " *Id.* (quoting *Wetchin*, 167 N.C. App. at 759, 606 S.E.2d at 409). Although it states a general objection to each paragraph of the award (without specifically mentioning the attorneys' fee award), it does not state the basis of any objection to the attorneys' fee award with sufficient particularity to give plaintiff notice of the legal issues that would be addressed by the Full Commission such that he could adequately prepare a response. *See Roberts*, 173 N.C. App. at 744, 619 S.E.2d at 910.

Defendants' third assignment of error also is in stark contrast to defendants' fourth assignment of error: "Deputy Commissioner John B. DeLuca's Award dated March 27, 2008, in that it failed to award attorney fees as requested by Defendants pursuant to §97-88.1." In this assignment of error, defendants indicated specifically which particular aspect of the award they challenged. Significantly, defendants did not include a similar assignment of error for the award of attorneys' fees challenged here.

Defendants nonetheless contend that they met the particularity requirement by addressing the question of attorneys' fees in their brief to the Full Commission, citing *Cooper v. BHT Enters.*, 195 N.C. App. 363, 672 S.E.2d 748 (2009). In *Cooper*, the plaintiff argued that, pursuant to *Roberts*, the defendant's failure to file a Form 44 constituted an abandonment of defendants' grounds for appeal to the Full Commission, and therefore the Commission erred by hearing the appeal. *Id.* at 368, 672 S.E.2d at 753. This Court disagreed, reasoning that

> unlike the appealing plaintiff in *Roberts*, defendants in the present case 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. Additionally, plaintiff does not argue that she did not have adequate notice of defendants' grounds

> for appeal. Plaintiff asserts only that defendants' failure to file a Form 44 should have been deemed an abandonment of defendants' appeal. Since both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission, we overrule these assignments of error.

Id. at 368-69, 672 S.E.2d at 753-54.

In other words, failure to file a Form 44 does not automatically result in a mandatory dismissal of the appeal by the Industrial Commission -- it is within the discretion of the Commission whether to deem the grounds for appeal waived. In determining whether the Commission abused its discretion in deciding not to deem an issue on appeal waived, this Court in *Cooper* considered 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.

Here, unlike in *Cooper*, the Commission did not explicitly address the issue purportedly raised by defendants on appeal in its Opinion and Award. Under *Cooper*, it would not have been an abuse of discretion for the Commission to address the attorneys' fee issue, but it is unclear whether the Commission considered the issue or not. Although defendants contend that the "Full Commission Award removed the appealed prior award of attendant care attorney fees and awarded attendant care compensation to be paid directly to Mrs. Adcox[,]" nothing in the Commission's Opinion and Award indicates that it was "remov[ing]" the attorneys' fee award. Defendants have cited no authority — and we have found none — supporting their position that silence by the Commission regarding a determination by the deputy commissioner can amount to reversal when the Commission is not required to review the issue and there is no other indication that the Commission intended to exercise its discretion to do so.

Indeed, in *Polk v. Nationwide Recyclers, Inc.*, 192 N.C. App. 211, 218, 664 S.E.2d 619, 624 (2008), this Court concluded that the Commission intended to *affirm* certain findings in the deputy commissioner's opinion and award, even though the findings were omitted from the Commission's opinion and award. The Court rejected the plaintiff's argument that the omitted findings indicated that the Commission failed to consider all the evidence presented, reasoning:

> [I]n this case, the Full Commission's opinion states outright that it "affirms the Opinion and Award of Deputy Commissioner Deluca *with modifications*." . . . That is, the Full Commission's opinion is not an order meant to stand on its own, but rather a modification of the deputy commissioner's order. As plaintiff herself states, the facts at issue were included in the deputy commissioner's order. We see no reason to require that such an order restate all the findings of fact and conclusions of law from the original order that need no modification. Considering that defendants filed an appeal containing thirty-two alleged errors, it is not surprising that the Full Commission did not address each individually.

Id. This Court assumed with regard to the omitted findings that the Commission wished to affirm the deputy commissioner's opinion and award, nothing else appearing in the opinion and award to the contrary. *Id.* at 218-19, 664 S.E.2d at 624.

Similarly, here, the Full Commission's Opinion and Award states that it "affirms the Opinion and Award of Deputy Commissioner DeLuca with modifications including the amount of attendant care and rate of pay for said care." As such, *Polk* establishes that the Full Commission's opinion "is not an order meant to stand on its own." *Id.* at 218, 664 S.E.2d at 624. While defendants contend that parties should not be required to look at both Opinions and Awards, that is the case whenever the parties decide not to appeal some aspect of the deputy commissioner's Opinion and Award. Defendants again cite no authority requiring the Full Commission to specifically address issues that were not appealed.

Turning to the question of which portions of the deputy commissioner's Opinion and Award the Commission modified, the Commission only specifically indicated that it intended to modify the amount and rate of pay for attendant care. While we recognize that the plain language of the Opinion and Award does not specifically *limit* the modifications to the attendant care award, all of the modifications to the deputy commissioner's findings of fact were relevant to the attendant care determination and necessary to support the different conclusion of law reached by the Commission with respect to the attendant care award.

In contrast, the Commission did not make any findings of fact that would justify or explain a reversal of the deputy commissioner's approval of a 25% attorney's fee. Indeed, plaintiff correctly notes that under N.C. Gen. Stat. § 97-90(c) (2013), the statute authorizing the award

of attorneys' fees in this instance, any decision by the Commission to *deny* attorneys' fees must be supported by specific findings. N.C. Gen. Stat. § 97-90(c) provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed.

The lack of findings in the November 2008 Opinion and Award to justify a denial of attorneys' fees is contrary to defendants' contention and the Commission's assumption that the Commission in 2008 intended to deny the fee request. Accordingly, we conclude that there is no indication that the Commission intended to modify the deputy commissioner's approval of attorney's fees.

In short, based on a review of the November 2008 Opinion and Award, either the Commission intended to affirm the deputy commissioner's award, or, alternatively, the Full Commission did not consider the issue — whether through inadvertence or because it deemed the matter waived based on defendant's Form 44. Nothing in the Opinion and Award suggests, and no authority exists that we can find, which would permit us to conclude that the Commission silently reversed the deputy commissioner's award in part and denied plaintiff's counsel the 25% attorney's fee.

Defendants argue, however, that this conclusion, and the reasoning in *Polk*, are contrary to the Commission's duties pursuant to N.C. Gen. Stat. § 97-85 (2013). As stated in *Vieregge v. N.C. State Univ.*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992) (quoting *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988)), "when the matter is 'appealed' to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. . . . '[I]nasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission.' "

In *Vieregge*, this Court held that the plaintiff, "having appealed to the full Commission pursuant to G.S. 97-85 and having filed his Form

44 'APPLICATION FOR REVIEW,' [*was*] *entitled to have the full Commission respond to the questions directly raised by his appeal.*" *Id.* at 639, 414 S.E.2d at 774 (emphasis added). The Court held that because the Commission did not specifically address the issues directly raised in the plaintiff's Form 44, but instead simply entered an order stating only that " '[t]he undersigned have reviewed the record in its entirety and find no reversible error,' " the Commission did not satisfy the requirements of N.C. Gen. Stat. § 97-85. *Id. See also Lewis v. N.C. Dep't of Corr.*, 138 N.C. App. 526, 529, 531 S.E.2d 468, 470 (2000) (holding that defendant "having filed a Form 44," was entitled to have Commission respond to questions directly raised by its appeal and Commission violated § 97-85 by failing to do so); *Jauregui v. Carolina Vegetables*, 112 N.C. App. 593, 596, 436 S.E.2d 268, 269 (1993) (holding where Commission entered an order adopting the deputy commissioner's order as its own, "the Commission failed to carry out its statutory duties pursuant to N.C. Gen. Stat. § 97-85 by not making its own findings of fact and conclusions to support its disposition of plaintiff's claim[,]" but additionally finding error not prejudicial).

As we have already determined, however, the issue of plaintiff's attorney's fee was not properly set forth in defendant's Form 44. Accordingly, the Commission did not have a duty to address it. *See Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 613, 723 S.E.2d 794, 797 (2012) (holding Commission did not have authority to address issues not raised by defendant's Form 44, as such issues were not before Commission for review and not "in controversy" on appeal to Full Commission).

Regardless, the question whether the Commission had a duty to address the issue of attorneys' fees is not before this Court. The question before this Court is what did the Commission, in fact, do with respect to the attorney's fee award, and what is the status of the deputy commissioner's approval of the attorney's fee. Defendants have cited no authority even suggesting that complete silence on the part of the Commission on an issue can be deemed a reversal of the deputy commissioner as to that issue, especially when the Commission's Opinion and Award states that it is affirming the deputy commissioner and the Commission's silence could be due to defendants' failure to specifically include the issue in their Form 44.

Assuming, without deciding, that defendants had standing to challenge the deputy commissioner's award of attorneys' fees, the burden was on defendants — as the party appealing the approval of the award — to obtain a ruling from the Full Commission on the issues they appealed. When the Full Commission failed to explicitly reverse the

deputy commissioner's award, defendants could have requested reconsideration and, if the Commission did not rule in their favor, appealed to this Court. *See id.* at 614, 723 S.E.2d at 798 (holding where Commission failed to address defendants' appeal of deputy commissioner's award of attorneys' fees to plaintiff's counsel in its opinion and award, defendants properly appealed to this Court after Commission denied their motion to reconsider).

This Court has held that "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). Here, when defendants failed to appeal the Full Commission's 25 November 2008 Opinion and Award, defendants abandoned any contention that the ruling was erroneous, and the deputy commissioner's award of attorneys' fees became the law of the case.

Under the law of the case doctrine, defendants could not attack and the Commission could not reverse the award of attorneys' fees. *See id.* (holding that "since [defendant] did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident," this finding was the law of the case, and defendant "was barred from relitigating that issue in subsequent proceedings").

Because the November 2008 Opinion and Award did not address the deputy commissioner's award of attorney's fees and defendants did not appeal the Commission's omission, plaintiff's 12 July 2012 motion to direct payment of attorneys' fees to plaintiff's counsel was not, as defendants contend, a motion to re-litigate the substantive issue whether attorneys' fees had been awarded by the Full Commission. Rather, it was simply a procedural motion regarding the way in which the awarded fees would be paid. The Commission's December 2012 order, as a result, had the effect of improperly denying plaintiff's attorneys' fees. Consequently, plaintiff was entitled to appeal the December 2012 order to superior court pursuant to N.C. Gen. Stat. § 97-90, and the superior court erred in dismissing plaintiff's appeal.

Defendants, nevertheless, contend that the Commission and the superior court did not have authority to award plaintiff's counsel fees under the rule set forth in *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003). This argument — addressing the merits of plaintiff's request for attorneys' fees — is not properly before this Court because the award of attorneys' fees is the law of the case. *See Barrington*

v. Emp't Sec. Comm'n, 65 N.C. App. 602, 605, 309 S.E.2d 539, 541 (1983) (declining to consider appellant's legal arguments when bound by law of the case). Defendants' arguments should have been raised in the first appeal to this Court. Nothing in this opinion expresses any view regarding defendants' arguments under *Palmer*.

We, therefore, reverse and remand to the superior court for remand to the Commission. On remand, since the Commission denied plaintiff's motion under a misapprehension of law regarding the effect of its 2008 Opinion and Award, the Commission must reconsider its ruling on that motion.

REVERSED AND REMANDED.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

JOHN WILTON ANDERSON, SR., TRUSTEE FOR THE JOHN WILTON ANDERSON, SR. REVOCABLE TRUST DATED MAY 1990; ROBERT D. ANDERSON AND WIFE, PATRICIA A. ANDERSON; AL ARTALE AND WIFE, DEBBIE ARTALE; BALD EAGLE VENTURES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; ROBERT W. BARBOUR AND WIFE, KATHERINE G. BARBOUR; DOUGLAS R. BARR AND WIFE, KAREN W. BARR; DANIEL T. BARTELL AND WIFE, BARBARA J. BARTELL; MITCHELL W. BECKER; GEORGE D. BEECHAM AND WIFE, JACQUELINE J. BEECHAM; KAREN H. BEIGER; GARY E. BLAIR AND WIFE, KATHLEEN P. BLAIR; ANN M. BOILEAU AND HUSBAND, PAUL BOILEAU; GERARD C. BRADLEY AND WIFE, SUSAN M. BRADLEY; ROBERT WILLIAM BRICKER AND WIFE, PATRICIA ANNE BRICKER; TOBY J. BRONSTEIN; JAMES W. BURNS AND WIFE, CAROL J. BURNS; JOHN T. BUTLER; JOSEPH R. CAPKA AND WIFE, SUSAN J. CAPKA; JOSEPH S. CAPOBIANCO AND WIFE, BARBARA K. CAPOBIANCO; ISAAC H. CHAPPELL AND JEAN M. HANEY AS CO–TRUSTEES OF THE ISAAC H. CHAPPELL TRUST DATED OCTOBER 10, 2000; KENNETH A. CLAGETT AND WIFE, MARY ELLEN CLAGETT; EDWARD EARL CLAY AND WIFE, CHARLENE HOUGH CLAY; GARY E. COLEMAN AND WIFE, HOLLY H. COLEMAN; WALTER N. COLEY AND WIFE, CARROLL M. COLEY; HARRY W. CONE AND WIFE, ELENORE W. CONE; MAURICE C. CONNOLLY AND WIFE, MADELINE S. CONNOLLY; JERRY W. CRIDER AND WIFE, BELINDA W. CRIDER; RICHARD S. CROMLISH, JR. AND WIFE, SANDRA K. CROMLISH; LAURA DEATKINE AND HUSBAND, MICHAEL J. WARMACK; NORVELL B. DEATKINE AND WIFE, THERESA M. DEATKINE; ROBERT E. DEMERS AND WIFE, DONNA L. FOOTE; JAN S. DENEROFF AND KAREN GILL DENEROFF, AS CO–TRUSTEES OF THE DENEROFF FAMILY TRUST DATED NOVEMBER 2, 2006; PAUL A. DENETT AND WIFE, LUCY Q. DENETT; JEROME V. DIEKEMPER AND WIFE, KAREN M. DIEKEMPER; MARK W. DORSET AND WIFE, DEBORAH M. DORSET; MICHAEL R. DUPRE, SR. AND WIFE, MOLLY H. DUPRE; DONALD D. EDWARDS AND BETTY M. EDWARDS AS TRUSTEES OF THE EDWARDS FAMILY TRUST DATED DECEMBER 21, 1992; TROY D. ELLINGTON AND WIFE, BETTY S. ELLINGTON; PETER W. FASTNACHT AND WIFE, CAROLE ANN FASTNACHT; RICK D. FAUTEUX AND WIFE, BRENDA S. FAUTEUX; WILLIAM H. FOERTSCH AND WIFE, PAMELA G. FOERTSCH; LOUIS J. FRATTO, JR. AND WIFE, EILEEN M. FRATTO; ROBERT A. FUNK AND WIFE, BEATRIZ B. FUNK; ROBERT A. MINK AND WIFE, BEATRIZ B. FUNK, AS TRUSTEES OF THE FUNK

LIVING TRUST dated March 22, 1999; JOLANTA T. GAL; JOSEPH GARBARINO and wife, BETTY GARBARINO; ROBERT J. GETTINGS and wife, KATHERINE ANNE GETTINGS; TIM GIBBLE and wife, SUSAN GIBBLE; ROCKLIN E. GMEINER, JR. and MARSHA A. GMEINER, Trustees under THE GMEINER FAMILY TRUST, dated August 21, 2008; HARRY J. GRAHAM and wife, MARYANNE S. GRAHAM; RICHARD A. GRANO and wife, ANGELA M. GRANO; RODNEY LAVERNE GROW and wife, JO ELAINE GROW; RONALD E. GUAY and wife, DORIS M. GUAY; LEON J. HARRISON and wife, MARGARET A. HARRISON; GLEN A. HATZAI and wife, BARBARA A. HATZAI; KJELL HESTVEDT and wife, ANNE T. HESTVEDT; LARRY H. HITES and wife, KARI F. HITES; DENNIS E. HOFFACKER and SUE E. HOFFACKER as Trustees of the SUE E. HOFFACKER REVOCABLE LIVING TRUST dated February 9, 1998; JOHN E. HOWARD and wife, MARYE C. HOWARD; JAMES S. HUTCHISON and wife, PAMELA E. HUTCHISON; CHARLES L. INGRAM and wife, RHONDA M. INGRAM; THOMAS M. INMAN and wife, DIANE M. INMAN; WILLIAM R. JONAS and wife, DIAN M. JONAS; MICHAEL G. KIDD and wife, VIRGINIA G. KIDD; H. WILLIAM KUCHLER and wife, PATRICIA A. KUCHLER; SCOTT C. LEE and wife, CYNTHIA A. LEE; PETER J. LEWIS and wife, JANET L. LEWIS; JAMES R. LITTLE and wife, BONITA S. LITTLE; PATRICK M. LOONAM and wife, PATRICIA E. LOONAM; DONALD G. LUFF and wife, JUDITH A. LUFF; MARK E. MAINARDI and FRANCES B. MAINARDI, as Trustees of the MAINARDI LIVING TRUST dated January 23, 1997; ANTHONY MARGLIANO and wife, ERIN MARGLIANO; JOSEPH E. McDERMOTT and wife, MARY M. McDERMOTT; JOHN O. McELROY and wife, KETHLEEN A. McELROY; GEORGE J. McQUILLEN and wife, BARBARA J. McQUILLEN; STEVEN J. MEADOW and BRENDA K. MEADOW, trustees of the MEADOW REVOCABLE TRUST dated January 12, 2010; GEORGE EDWARD MERTENS, III and wife, NANCY MERTENS; MICHAEL A. MICKIEWICZ, Trustee of the MICHAEL A. MICKIEWICZ TRUST dated April 21, 2011; JACQUELINE A. MICKIEWICZ, Trustee of the JACQUELINE A. MICKIEWICZ TRUST dated April 21, 2011; TERRY LEE MILLER and wife, JOAN C. MILLER; TERRY STEPHEN MOLNAR; MARIAN E. CARLUCCI; MICHAEL R. MONETTI and wife, IRENE A. MONETTI; MIMA S. NEDELCOVYCH and wife, SALLY NEDELCOVYCH; WILLIAM W. NIGHTINGALE and wife, BONNIE NIGHTINGALE; KEITH OKOLICHANY and wife, LINDA A. OKOLICHANY; RICHARD L. PASTORIUS and wife, BONNIE L. PASTORIUS; JOHN J. PATRONE and wife, LINDA D. PATRONE; LOUIS M. PACELLI and wife, MARLEEN S. PACELLI; LAURENCE F. PIAZZA and wife, CHERYL ANN PIAZZA; JACK L. RAIDIGER and wife, JUDY K. RAIDIGER; FRANK RINALDI and wife, ROSEMARIE RINALDI; TIMOTHY T. ROSEBERRY and wife, SUZANNE ROSEBERRY; EILEEN ROSENFELD and ROBERT W. ROSENFELD, as Trustees under the EILEEN ROSENFELD LIVING TRUST dated August 9, 2000; GEORGE M. SAVELL and wife, MARIA VIOLET SAVELL; DENNIS J. SCHARF and wife, CHERYL H. SCHARF; FRANCIS G. SCHAROUN and wife, DEBORAH M. SCHAROUN; ROBERT L. SCHORR; JOHN FRANCIS SEELY and wife, JANET CAVE SEELY; ERNEST J. SEWELL and wife, ROWENA P. SEWELL; WILLIAM M. SHOOK and wife, SUSAN M. SHOOK; CRAIG A. SKAJA and wife, CHRISTINE C. SKAJA; CHARLES M. SMITH and wife, LOIS S. SMITH; HELGA SMITH; THOMAS W. SMITH and wife, MARTHA B. SMITH; ALAN H. SPIRO and wife, RHONDA B. SPIRO; KENNETH STEEPLES and wife, EILEEN P. STEEPLES; RICHARD L. STEINBERG and wife, BARBARA J. STEINBERG; THOMAS STURGILL and wife, LINDA STURGILL; SCOTT SULLIVAN and wife, LORETTA F. SULLIVAN; JOHN M. SWOBODA as Trustee of the JOHN M. SWOBODA REVOCABLE LIVING TRUST dated November 29, 2002; CAROL L. SWOBODA as Trustee of the CAROL L. SWOBODA REVOCABLE LIVING TRUST dated October 28, 2002; ROBERT C. THERRIEN and wife, JANE A. THERRIEN; HARVEY L. THOMPSON and wife, ROSALYN THOMPSON; PAULINE TOMPKINS; DERRAIL

ANDERSON v. SEASCAPE AT HOLDEN PLANTATION, LLC

[241 N.C. App. 191 (2015)]

TURNER AND WIFE, PANSEY TURNER; WILLIAM E. WILKINSON AND WIFE, BETTY R. WILKINSON; JAMES M. WILLIAMS AND WIFE, PATRICIA E. WILLIAMS; THOMAS P. WOLFE AND WIFE, JULIA T. WOLFE; JAMES J. YORIO AND WIFE, DEBORAH L. YORIO; JOSEPH ZALMAN AND WIFE, VALERIE ZALMAN; EUGENE E. ZIELINSKI AND WIFE, REBECCA R. ZIELINSKI, PLAINTIFFS

v.

SEASCAPE AT HOLDEN PLANTATION, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A SEASCAPE AT HOLDEN PLANTATION, INC.; THE COASTAL COMPANIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, D/B/A MARK SAUNDERS LUXURY HOMES; EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A EASTERN CAROLINAS' CONSTRUCTION & DEVELOPMENT CORPORATION; COASTAL CONSTRUCTION OF EASTERN NC, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, F/K/A COASTAL DEVELOPMENT & REALTY BUILDER, INC.; MAS PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY; MARK A. SAUNDERS; CAPE FEAR ENGINEERING, INC., A NORTH CAROLINA CORPORATION; EXECUTIVE BOARD OF SEASCAPE AT HOLDEN PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; ERIC JOHNSON; CURT BOLDEN; HELEN STEAD; TONY BRADFORD CHEERS; CARROLL LIPSCOMBE; SEAN D. SCANLON; DANIEL H. WEEKS; RICHARD GENOVA; SUSAN LAWING; DEAN SATRAPE; GRACE WRIGLEY; BRUNSWICK COUNTY; BRUNSWICK COUNTY INSPECTION DEPARTMENT; ELMER DELANEY AYCOCK; HAROLD DOUGLAS MORRISON; ANTHONY SION WICKER; DAVID MEACHAM STANLEY, DEFENDANTS

No. COA14-1088

Filed 2 June 2015

1. Appeal and Error—interlocutory orders and appeals—derivative action—some claims dismissed

There was appellate jurisdiction in an action involving a derivative action by members of a property owner's association where claims remained pending, the trial court did not certify its orders for immediate appeal, and there was the potential for multiple trials on the same issues.

2. Jurisdiction—standing—derivative claims—property owners association

The trial court did not err by concluding the plaintiffs lacked standing to bring derivative claims against third parties or by denying plaintiffs' motion to dismiss a property owners association (POA) intervenor complaint. All of plaintiffs' claims were derivative pursuant to N.C.G.S. § 55A-7-40 in the North Carolina Nonprofit Corporation Act. Although the POA contended that plaintiffs failed to comply with the pleading requirements of N.C.G.S. § 55A-7-40(b), there was no need to resolve the issue because a prior decision rendered it the law of the case that the POA had the right to intervene

in this litigation. The POA did so by filing an intervenor complaint alleging substantially the same claims against the third parties that plaintiffs brought derivatively.

3. Jurisdiction—standing—derivative claims—property owners association and members bringing same claims

No prior North Carolina appellate court decision has applied the principles of standing where both a corporation and its shareholders attempted to bring the same claims against third parties. The determination must be (1) whether the steps taken by the property owners association (POA) to institute the litigation were valid and (2) what legal effect the POA's filing of the intervenor complaint had on plaintiffs' derivative action.

4. Corporations—derivative claims—property owners association and members—claim initiated by POA—members lacked standing

In an action in which property owners and, eventually, the property owners association (POA) asserted the same claims against third parties, the decision to initiate litigation against the third parties was a valid act of the Executive Board for the POA under the By-Laws and taken in a Special Meeting at which two directors constituted a quorum and the majority of disinterested directors. The "real party in interest" for the derivative claims brought by plaintiffs was the POA. The requirement that a shareholder exhaust all intracorporate remedies and make a demand on the corporation in order to acquire standing, unless such demand would be futile, was consistent with the principle that standing will not be conferred to the shareholder if the corporation chooses to assert claims for itself. Because the POA elected to bring its own claims against the third parties, it must be concluded that plaintiffs did not have standing to bring those same claims on the POA's behalf.

5. Statutes of Limitation and Repose—derivative claims—property owners association

In an action involving derivative claims against third parties by the members of a property owners association (POA), the statute of limitations was an insurmountable bar to recovery against five Executive Board members and plaintiffs failed to raise arguments on appeal relating to the dismissal of any of the other claims against the Executive Board members or any claims against the Executive Board as an entity.

6. Fraud—constructive—claim against property owners association board members—properly dismissed

A complaint failed to state a valid claim of constructive fraud against the dismissed property owners association (POA) Board members where it alleged that the POA knew or should have known of a defective bulkhead at least two years after the dismissed Executive Board members had stepped down from the board. There was similarly no allegation that the dismissed Executive Board members knew about the developers' installation of the perforated pipe.

Judge Robert N. HUNTER, JR., concurring.

Appeal by plaintiffs from orders entered 9, 12, and 22 May 2014 by Judge W. David Lee in Brunswick County Superior Court. Heard in the Court of Appeals 18 March 2015.

Whitfield Bryson & Mason LLP, by Daniel K. Bryson and Matthew E. Lee, for plaintiffs-appellants.

Ward and Smith, P.A., by Ryal W. Tayloe and Allen N. Trask, III, for intervenor-appellee SeaScape at Holden Plantation Property Owners Association, Inc.

Wall Templeton & Haldrup, P.A., by Mark Langdon and William W. Silverman, for defendants-appellees SeaScape at Holden Plantation LLC, The Coastal Companies LLC, and Eastern Carolinas Construction and Development LLC.

Hamlet & Associates, PLLC, by H. Mark Hamlet and Rebecca A. Scherrer, for defendant-appellee Coastal Construction of Eastern NC, LLC.

Young Moore and Henderson, P.A., by Robert C. deRosset, and Graebe Hanna & Sullivan, PLLC, by Christopher T. Graebe, for defendants-appellees Mark A. Saunders and MAS Properties, LLC.

Cranfill Sumner & Hartzog LLP, by John D. Martin and Patrick M. Mincey, for defendant-appellee Cape Fear Engineering, Inc.

Chesnutt, Clemmons & Peacock, P.A., by Gary H. Clemmons, for defendants-appellees Daniel Weeks, Susan Lawing, Richard Genova, Sean Scanlon, Dean Satrape, and the Executive Board of

SeaScape at Holden Plantation Property Owners Association, Inc.

INMAN, Judge.

Plaintiffs are 262 property owners in SeaScape at Holden Plantation ("SeaScape"), a residential subdivision near Holden Beach, North Carolina. They appeal from the trial court's orders: (1) dismissing plaintiffs' derivative claims brought on behalf of SeaScape at Holden Plantation Property Owners Association, Inc. ("the POA") against third parties involved in the development and construction of SeaScape[1]; (2) dismissing plaintiffs' derivative claims against certain members of the POA's Executive Board and the Executive Board itself[2]; and (3) denying plaintiffs' motion to dismiss the POA's intervenor complaint. After careful review, we affirm the trial court's orders.

Although the facts of this case are unique, the legal issues presented are characteristic of corporate governance disputes between homeowners and managing bodies of planned communities. Among other things, this Court must consider the principles of derivative litigation as well as the statutory framework for intracorporate governance under the North Carolina Planned Community Act and the North Carolina Nonprofit Corporation Act.

Background

Plaintiffs allege the following in their Fourth Amended Verified Complaint filed 31 March 2014: In 1999, Mark Saunders (together with related LLCs[3], "the Developers") began developing SeaScape, an upscale 542-lot coastal residential subdivision. The SeaScape plans provided for

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1. As property owners at SeaScape, plaintiffs are members of the POA. The third partie.s that they sued derivatively are: Mark Saunders; MAS Properties, LLC; Coastal Construction of Eastern NC, LLC; SeaScape at Holden Plantation, LLC; The Coastal Companies, LLC; Eastern Carolinas' Construction & Development, LLC; Cape Fear Engineering, Inc.; Brunswick County; Brunswick County Inspection Department; Elmer Delaney Aycock; Harold Douglas Morrison; Anthony Sion Wicker; and David Heacham Stanley (collectively "the third parties").

2. The Executive Board members dismissed from the suit are Daniel H. Weeks; Susan Lawing; Sean Scanlon; Richard Genova; and Dean Satrape.

3. Saunders is alleged to be the founder, chief executive officer, and/or principal member/owner of SeaScape LLC; MAS Properties, LLC; The Coastal Companies, LLC; Eastern Carolinas' Construction & Development, LLC; and Coastal Construction of Eastern NC, LLC.

a 75-slip marina, a concrete bulkhead to protect the shore from natural erosion, and the preservation of existing natural ponds.

The Developers drafted the POA's Master Declaration, reserving the power to veto any action of the POA and to appoint and dismiss Executive Board members until 31 December 2020. Under the Master Declaration, the POA has no right to remove, revoke, or modify any right or privilege of the Developers. Plaintiffs allege that the majority of the members appointed to the Executive Board since SeaScape's creation have been employees of the Developers, and therefore, the Executive Board has an inherent conflict of interest in holding the Developers liable for the defective construction of the SeaScape common areas.

Construction on the bulkhead began in or about 2001, almost two years before the Developers applied for a building permit from Brunswick County. On plaintiffs' information and belief, Brunswick County building inspectors knew or should have known that the marina and bulkhead were being constructed without required permits or inspections but ignored the ongoing construction.

Defects in the bulkhead became apparent in 2005, when two major storms hit the area. Although it should have withstood maximum flood conditions, the SeaScape bulkhead was damaged and moved approximately six inches. On or around 19 October 2006, the Developers asked Cape Fear Engineering, which initially oversaw construction and engineering, to determine the cause of the damages and repair the bulkhead. Cape Fear made no repairs over the following three years.

On 21 December 2009, four years after the first damage to the bulkhead was discovered, Saunders conveyed the marina and bulkhead to the POA. After another storm hit in September 2010, the bulkhead moved an additional six inches.

Plaintiffs also allege that the Developers improperly installed perforated storm sewer pipes around two natural ponds at SeaScape, despite warnings from hydrogeological investigators that such pipes could drain the ponds. Since the installation of the perforated pipes, both of the ponds have completely drained. Plaintiffs complained about the ponds, and although the Developers made assurances that the ponds would be restored, they never informed plaintiffs that improper piping had been installed. In June 2009, plaintiffs discovered the perforated piping.

Plaintiffs allege they demanded that the Executive Board require the Developers to correct the defects in the SeaScape common areas. Plaintiffs claim that, because it is essentially controlled by the

Developers, the Executive Board has taken no action adverse to those parties and instead attempted to pass the cost of repairs to the POA members.

In 2012, two of the five members on the POA Executive Board—Helen Stead ("Stead") and Curt Bolden ("Bolden")—had no employment relationship with the Developers or any of the third parties. At a Special Meeting on 21 September 2012, Stead and Bolden voted to initiate litigation against the third parties seeking repair or to recover costs for damages to the common areas. The three other Executive Board members at that time—Eric Johnson ("Johnson"), Brad Cheers ("Cheers"), and Carroll Lipscombe ("Lipscombe")—abstained from voting, presumably due to their status as employees of the Developers.

Plaintiffs filed their first complaint on 5 October 2012, almost two weeks after the Special Meeting vote. In addition to various individual claims, plaintiffs brought claims derivatively on behalf the POA against members of the Executive Board and the third parties involved in the development and construction of the common areas. The POA moved to intervene as a party-plaintiff on 27 November 2012. Attached to its motion to intervene was a draft complaint which included essentially the same claims against the third parties as did plaintiffs' complaint, but omitted claims against Executive Board members. The trial court's denial of the POA's motion to intervene was reversed by this Court on 21 January 2014. *See Anderson v. Seascape at Holden Plantation, LLC*, __ N.C. App. __, 753 S.E.2d 691 (2014) ("*Anderson I*").

On 14 February 2014, less than one month after this Court's reversal, the POA filed its Amended Intervenor Complaint, alleging the same claims against the third parties that plaintiffs initially pursued derivatively. Plaintiffs filed their Fourth Amended Verified Complaint on 31 March 2014, adding the POA as a nominal defendant. The Fourth Amended Verified Complaint contained no mention of the POA's Intervenor Complaint or the Special Meeting vote in 2012 to pursue litigation against the third parties.

Shortly after plaintiffs filed the Fourth Amended Verified Complaint, the POA, the third parties, and Executive Board members moved to dismiss the derivative claims brought by plaintiffs, and plaintiffs moved to dismiss the POA's intervenor complaint. The trial court granted the motions to dismiss plaintiffs' derivative claims against the third parties, against five of eleven Executive Board members, and against the Executive Board as an entity. The trial court also denied plaintiffs'

motion to dismiss the POA's intervenor complaint. Plaintiffs filed timely notice of appeal from these orders.

Grounds for Appellate Review

[1] We must first address the issue of appellate jurisdiction. Because outstanding individual and derivative claims remain pending before the trial court, the orders from which plaintiffs appeal are interlocutory. *See, e.g.*, *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). We note that the trial court here did not certify its orders for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (2013). However, appeal from an interlocutory order is proper where the order deprives the appellant of a substantial right which would be lost without immediate review. N.C. Gen. Stat. § 1-277(a) (2013); *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995).

The avoidance of two trials on the same issues can constitute a substantial right and therefore would warrant immediate appeal. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). This Court has previously held that a substantial right was affected where an order dismissed claims against one of several "collusive" defendants, thus raising the possibility of multiple trials against different members of the same group where the same issues would be in contention. *See Jenkins v. Wheeler*, 69 N.C. App. 140, 142, 316 S.E.2d 354, 356 (1984).

The potential for multiple trials on the same issues exists in this case. Plaintiffs and the POA are wrestling to bring substantially the same claims against the third parties, so that if the dismissal of plaintiffs' derivative claims were reversed after entry of final judgment on the POA's claims, certain issues would have to be relitigated. Plaintiffs also risk multiple trials against two groups of Executive Board members—those who remain at this stage and those who were dismissed by the trial court—based on the same factual allegations. Accordingly, we conclude that plaintiffs have demonstrated that a substantial right would be lost without immediate appellate review of the trial court's orders, and we will reach the merits of their arguments here. *See Jenkins*, 69 N.C. App. at 142, 316 S.E.2d at 356; *see also Green*, 305 N.C. at 608, 290 S.E.2d at 596.

I. Derivative Claims Against Third Parties

[2] Plaintiffs first argue that the trial court erred by concluding that they did not have standing to bring derivative claims against the third parties. They also contend that the trial court erred by denying their motion to dismiss the POA's intervenor complaint. We disagree with both contentions.

The third parties and the POA moved to dismiss plaintiffs' derivative claims pursuant to Rule 12(b)(6) and/or Rule 12(c) of the North Carolina Rules of Civil Procedure. "Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Meadows v. Iredell County*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (internal quotation marks omitted). "One such bar to recovery is a lack of standing, which may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted." *Id.* "The purpose of Rule 12(c) is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390, 617 S.E.2d 306, 309 (2005) (quotation marks omitted). For purposes of review on either ground, this Court conducts a *de novo* review of the pleadings to assess their legal sufficiency, *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007), and treats the factual allegations in the complaint as true, *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000); *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995).

All of plaintiffs' claims at issue in this appeal are derivative. In general terms, "[a] derivative proceeding is a civil action brought by a shareholder in the right of a corporation, while an individual action is one a shareholder brings to enforce a right which belongs to him personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citation and quotation marks omitted). As members of the POA, a nonprofit corporation, plaintiffs brought their derivative claims pursuant to N.C. Gen. Stat. § 55A-7-40 (2013) under the North Carolina Nonprofit Corporation Act.

In the first instance, the POA contends plaintiffs failed to comply with the pleading requirements of section 55A-7-40(b). Section 55A-7-40(b) provides that a complaint brought in the right of a nonprofit corporation by its members "shall allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." Plaintiffs argue

that they were not required to make a demand on the POA prior to filing suit because the words "if any" in section 55A-7-40(b) demonstrate the General Assembly's intention to allow for the equitable exception of futility to the demand requirement.[4] In the alternative, plaintiffs contend that they satisfied the demand requirement and sufficiently pled their demand attempts in the Fourth Amended Verified Complaint.

In this case, we need not resolve the parties' dispute regarding the potential pleading requirements of demand and futility in section 55A-7-40 . This Court's prior decision renders it the law of the case that the POA has the right to intervene in this litigation, *Anderson I*, __ N.C. App. at __, 753 S.E.2d at 698, and the POA has done so by filing an intervenor complaint alleging substantially the same claims against the third parties that plaintiffs brought derivatively.

Even if we assume that all pleading requirements have been met, we cannot conclude that plaintiffs therefore automatically prevail on the issue of standing. The dispositive issue is who — the POA, plaintiffs, or both — has standing to bring these claims where both groups seek the exclusive right to do so.

No prior North Carolina appellate court decision has applied the principles of standing where both a corporation and its shareholders attempt to bring the same claims against third parties. This appears to be the first case to reach our appellate courts that features corporate assent to demand. *See Cox*, *Heroes in the Law: Alford v. Shaw*, 66 N.C. L. Rev. 565, 577 (1988) ("In no reported case has a special litigation committee recommended continuance of the suit against a colleague. Even more telling is the absence of any reported instance in which the directors have approved a suit's continuance in response to the plaintiff's demand."). In order to resolve this issue, we must determine: (1) whether the steps taken by the POA to institute this litigation were valid; and (2) what legal effect the POA's filing of the intervenor complaint had on plaintiffs' derivative claims.

Here, in deciding to take action against the third parties, the POA availed itself of the statutory procedure set out in N.C. Gen. Stat. § 55A-8-31 (2013) under the Nonprofit Corporation Act for conducting

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4. Plaintiffs cite for support of this argument section 55A-7-40's predecessor in the business corporation context—N.C. Gen. Stat. § 55-7-40—which contains nearly identical language. *See* N.C. Gen. Stat. § 55-7-40(b) (1990) (repealed); *see also Allen ex rel. Allen & Brock Const. Co., Inc. v. Ferrera*, 141 N.C. App. 284, 288, 540 S.E.2d 761, 765 (2000) (noting that section 55-7-40(b) allowed for a futility exception to the demand requirement where the directors in control of the corporation were alleged of wrongdoing).

a "conflict of interest transaction." Section 55A-8-31 provides that a transaction by the corporation is not voidable solely on the ground that one or more directors has a direct or indirect conflict of interest where one of the following is true:

> (1) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved, or ratified the transaction;
>
> (2) The material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or
>
> (3) The transaction was fair to the corporation.

N.C. Gen. Stat. § 55A-8-31(a)(1)-(3). Additionally, section 55A-8-31 alters the requirement for achieving a quorum to vote on a conflict of interest transaction:

> [A] conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction shall not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section.

N.C. Gen. Stat. § 55A-8-31(c).

It is undisputed that two of the five members on the Executive Board in 2012—Stead and Bolden—had no employment relationship with the Developers or any of the third parties. At a Special Meeting on 21 September 2012, convened nearly two weeks before plaintiffs filed their first complaint, Stead and Bolden voted to initiate litigation against the third parties seeking to hold them to account for damages to the common areas. Johnson, Cheers, and Lipscombe abstained from voting.

The parties dispute the legal effect of the Special Meeting vote. Plaintiffs contend that N.C. Gen. Stat. § 47F-3-108(c) (2013) of the North Carolina Planned Community Act requires that meetings of the Executive Board be held in accordance with *Robert's Rules of Order*

Newly Revised ("*Robert's Rules*") unless the POA's Bylaws state otherwise. Because the Bylaws are silent on the effect of an abstention vote, plaintiffs argue *Robert's Rules* dictate that an abstention has the same effect as a vote of "no." Thus, they argue that the abstentions of Johnson, Cheers, and Lipscombe outnumbered the two votes in favor of initiating litigation at the Special Meeting and rendered the two votes of Stead and Bolden ineffective to constitute an act of the Executive Board. We are unpersuaded.

N.C. Gen. Stat. § 47F-3-102 provides that the POA may "[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community," thus granting the POA authority to sue the third parties. Article VII, Section 4 of the Bylaws states: "Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Executive Board." As discussed above, Stead and Bolden comprised a majority of disinterested directors when they decided to initiate litigation; therefore, as defined in section 55A-8-31(c), a quorum was present at the Special Meeting. Subsection (c) provides explicitly that "[t]he presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any action taken" under section 55A-8-31. Therefore, a plain reading of Article VII, Section 4 of the Bylaws, section 47F-3-102, and section 55A-8-31 leaves no doubt that: (1) the POA had authority to sue the third parties or intervene in ongoing litigation against them; (2) Stead and Bolden voted to sue the third parties in a Special Meeting at which they constituted a quorum and the majority of disinterested directors; and therefore (3) the decision to initiate litigation against the third parties was a valid act of the Executive Board for the POA.

[3] Having determined that the POA was properly authorized by a quorum of disinterested directors to file the intervenor complaint, we must now turn to the issue of standing.

"By its very nature, a derivative action requires that the shareholder bringing such an action have proper standing to bring the action." *Robbins v. Tweetsie R.R., Inc.*, 126 N.C. App. 572, 577, 486 S.E.2d 453, 455 (1997). "As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007). There are certain procedural and pleading requirements necessary to confer standing on shareholders in a derivative action, such as exhaustion of intra-corporate remedies, prior demand on directors, and contemporaneous ownership. *See Alford v. Shaw*, 320 N.C. 465, 471, 358 S.E.2d 323, 327 (1987);

Swenson v. Thibaut, 39 N.C. App. 77, 100, 250 S.E.2d 279, 294 (1978). Due to the unique circumstances of this case, the procedural aspects of standing alone are insufficient to resolve this dispute. We must examine standing in light of the broader principles of corporate governance.

Generally, the proper plaintiff to bring a civil action is a "real party in interest." N.C. Gen. Stat. § 1-57 (2013). "A real party in interest . . . is benefited or injured by the judgment in the case, . . . [and] has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E.2d 206, 209 (1977) (citations and quotation marks omitted); *see also Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008) ("As a general matter, the North Carolina Constitution confers standing on those who suffer harm[.]").

In the context of derivative litigation, the corporation is the real party in interest, because it is the corporation that has suffered the alleged harm, not the individual shareholders. *See Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23, 91 L. Ed. 1067, 1073 (1947) ("The [derivative action] which such a plaintiff brings before the court is not his own but the corporation's. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself."); *see also Ashburn v. Wicker*, 95 N.C. App. 162, 166, 381 S.E.2d 876, 879 (1989), *abrogated on other grounds*, *Alford*, 327 N.C. at 534, 398 S.E.2d at 449.

Given that the corporation is the real party in interest, it follows that derivative actions are typically appropriate only when a corporation is unwilling or unable to litigate its claims for itself. "[Derivative suits] are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause *declines to take the proper and necessary steps to assert the rights which the corporation has.*" *See Meyer v. Fleming*, 327 U.S. 161, 167, 90 L. Ed. 595, 600 (1946) (emphasis added).

> It is important to remember the true nature of a suit of this character. The stockholders, suing and intervening, do not prosecute the cause in their own right and for their own benefit but in the right of the corporation and for its benefit. While nominally the company is named as a defendant, actually and realistically it is the true complainant, for any avails realized from the litigation belong to it and it alone. *The only circumstance under which the individual stockholder is permitted to bring the suit is either the*

> *refusal of those in control of the company to bring the proceeding or the fact that their relation to the subject of the complaint is such that demand upon those in control to bring the suit would be futile.*

Swenson, 39 N.C. App. at 99, 250 S.E.2d at 293 (emphasis added) (citation omitted).

The POA is a nonprofit corporation organized in a typical manner, with its affairs managed by a group of directors.

> The quintessential characteristic of corporate governance is private decision-making by directors as the appointed delegates of shareholders. Shareholders commit themselves to having their commercial affairs controlled by a board of directors when they make the decision to put their investment capital at risk in a corporation. In instituting derivative actions, shareholders seek to be released from this commitment which they have made to rule by directors. Shareholders are attempting to substitute their litigation decisions for those of their directors. This is the dilemma which shareholders derivative litigation presents to the courts. By entertaining such litigation, courts are required to sanction a fundamental change in the most basic of intra-corporate relationships. Derivative litigation is predicated upon the willingness of the court to reverse the roles of the directors and shareholders in corporate decision-making. . . . The courts wish to accommodate meritorious derivative litigation while at the same time preserving, to the greatest extent possible, the traditional intra-corporate relationship between shareholders and directors.

Brown, *Shareholder Derivative Litigation and the Special Litigation Committee*, 43 U. PITT. L. REV. 601, 644 (1982).

Based on the foregoing principles and the facts specific to this case, we hold that the POA, not plaintiffs, has standing to sue the third parties. This conclusion is dependent upon the evolution of respective actions taken by plaintiffs and the POA and the status of those actions at this juncture. Nothing in this opinion should be construed to preclude homeowners from bringing derivative claims in the absence of proper corporate action.

As discussed above, the "real party in interest" for the derivative claims brought by plaintiffs is the POA. *See Ashburn*, 95 N.C. App. at 166,

381 S.E.2d at 879. The requirement that a shareholder exhaust all intra-corporate remedies and make a demand on the corporation in order to acquire standing, unless such demand would be futile, is consistent with the principle that standing will not be conferred to the shareholder if the corporation chooses to assert claims for itself. *See Fleming*, 327 U.S. at 167, 90 L. Ed. at 600; *Swensen*, 39 N.C. App. at 99, 250 S.E.2d at 293. Because the POA has elected to bring its own claims against the third parties, we must conclude that plaintiffs do not have standing to bring those same claims on the POA's behalf.

Nevertheless, plaintiffs cite two New Jersey decisions for the proposition that members of a property owners' association can bring derivative claims on behalf of the association whenever it is under the control of the developer, *regardless* of the association's willingness to bring the claims for itself. *See Siller v. Hartz Mountain Associates*, 461 A.2d 568, 574 (N.J. 1983) (noting in *obiter dictum* that under New Jersey law homeowners may sue a developer on behalf of a homeowners' association "irrespective of its governing board's willingness to sue during the period of time that the association remains under the control of the developer"); *Harbor View Condominium Ass'n, Inc. v. Manhattan Skyline III*, 2011 WL 3207956 (N.J. Super. Court 2011) (unpublished) (citing *Siller* for the same proposition). These decisions are not binding on this Court. *Morton Buildings, Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005).

Furthermore, neither of the New Jersey decisions applied the rule relied upon by plaintiffs. In *Siller*, the court concluded that because the dispute was "confined to the common areas and facilities, [it] agree[d] with the trial court and the Appellate Division that the Association had exclusive standing to maintain the action." *Siller*, 461 A.2d at 575. The *Harbor View* decision, which was unpublished and focused on the doctrine of laches, merely noted *Siller's dicta* in its own *dicta*. Neither *Siller* nor *Harbor View* applied this reasoning to allow homeowners to bring derivative claims.

In any event, we do not find the rule alluded to in the New Jersey decisions persuasive here. This bright-line rule would reverse the relationship between a property owners' association's members and directors regarding litigation decisions whenever the developer has control over the board. Such a rule alters the traditional principles of corporate governance in the context of property owners' association litigation, and its application here would usurp the role of our legislature in striking the appropriate balance of power among members and directors of a property owners association.

The relationships between the parties here is not unique to this case, but were clearly authorized by our General Assembly in the North Carolina Planned Community Act. *See* 1998 N.C. Sess. Laws § 199. Under N.C. Gen. Stat. § 47F-3-103(d) (2013), a planned community declaration "may provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board." The Developers, as the declarants, were therefore well within their statutory rights to include a period of control over the Executive Board into the terms of Master Declaration, which plaintiffs assented to when they purchased their homes subject to the conditions in the property management agreement. This arrangement is specifically authorized under both the Uniform Planned Community Act, approved by the national Conference of Commissioners on Uniform State Laws in 1980, and the North Carolina Condominium Act, which sets out similar rules for North Carolina condominium developers. *See* Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 Campbell L. Rev. 1, 60-61 (1999) (noting that "[i]t is typical with planned communities that the declarant controls the association in the early stages of the development"); *see also* N.C. Gen. Stat. § 47C-3-103 cmt. 3 (2013) (referring to declarant control over a condominium owners' association during initial stages of development as a "practical necessity").

We acknowledge plaintiffs' concern that, given the declarant's statutory right to appoint and remove members of a property owners' association's executive board, the association itself may be prone to "give away the store" rather than pursue litigation against the developer as vigorously as property owners believe necessary. However, the fact that the declarant has the ability to appoint the members of an executive board does not mean that the board will always refuse to take adverse action against the declarant. We are satisfied that the statutory frameworks in both the Planned Community Act and the Nonprofit Corporation Act utilized here contain sufficient safeguards to prevent that type of abuse.

The members of the Executive Board are required by N.C. Gen. Stat. § 55A-8-30 to discharge their duties in good faith and in the manner reasonably believed to be in the best interests of the POA. The Special Meeting vote to initiate litigation against the third parties would not have been effective pursuant to section 55A-8-31 without at least two disinterested members of the Executive Board, demonstrating at the very least a threshold structural safeguard. Plaintiffs could have challenged whether the Special Meeting vote fit into one of the three categories

in section 55A-8-31(a), but there is no indication in the record or their briefs that they did so. Plaintiffs also contend that the POA's delay in initiating litigation demonstrates a refusal of plaintiffs' demands, but they overlook the fact that the Special Meeting vote took place almost two weeks before plaintiffs initiated this lawsuit.

Finally, we note that plaintiffs' derivative claims for breach of fiduciary duty, constructive fraud, actual fraud, and civil conspiracy against certain Executive Board members are still viable. Defendants Stead, Bolden, Johnson, Cheers, Lipscombe, and Wrigley have not appealed the trial court's denial of their motion to dismiss these claims. More importantly, plaintiffs have not been deprived of standing to bring derivative claims against the Executive Board members because the POA *has* refused to bring those claims, and it would be futile to ask the Executive Board members to sue themselves.

In sum, without more, plaintiffs' bare assertion that the POA cannot be trusted to litigate its own claims against the third parties is premature and at this stage of the proceedings cannot overcome: (1) the POA's decision was made by disinterested directors through a valid act of the Executive Board, and (2) well-settled law and principles of corporate governance requiring refusal by the corporation or futility before members may litigate claims on its behalf. *See Fleming*, 327 U.S. at 167, 90 L. Ed. at 600; *Swensen*, 39 N.C. App. at 99, 250 S.E.2d at 293. Accordingly, we conclude that the POA, not plaintiffs, had standing to sue the third parties for the alleged harm done to the corporation. Accordingly, we affirm the trial court's dismissal of plaintiffs' derivative claims against the third parties for lack of standing, and we affirm the trial court's denial of plaintiffs' motion to dismiss the POA's intervenor complaint.[5]

II. Derivative Claims Against Five Executive Board Members

[5] Plaintiffs next argue that the trial court erred by dismissing their derivative claims against five of the eleven Executive Board members named as defendants in the Fourth Amended Verified Complaint and the Executive Board itself. The trial court concluded that the statute of limitations was an insurmountable bar to recovery against the five Executive Board members, and that the complaint otherwise failed to

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5. Given our ruling that the POA, and not plaintiffs, has standing to pursue these claims against the third parties because of the POA's actions following plaintiffs' demands, we need not address: (1) whether plaintiffs' derivative claims were rendered moot upon the filing of the POA's intervenor complaint; (2) the Developers' argument that some plaintiffs were not members of the POA at the time of the alleged wrongdoing; or (3) arguments pertaining to the rule in *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997).

state a claim upon which relief could be granted against the Executive Board. We affirm the trial court's order.

We review an order granting a 12(b)(6) motion for whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. *Country Club of Johnston County, Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

It appears from the record that the derivative claims dismissed by the trial court against the Executive Board members were for: (1) breach of fiduciary duty; (2) constructive fraud; (3) actual fraud; and (4) civil conspiracy. The only arguments plaintiffs have raised on appeal regarding their derivative claims against the Executive Board members is that the trial court improperly applied a three-year statute of limitations for the claim of constructive fraud when it should have instead applied the ten-year limitation under N.C. Gen. Stat. § 1-56 (2013) and that the claim of constructive fraud was sufficiently pled.

Plaintiffs failed to raise arguments on appeal relating to the dismissal of any of the other claims against the Executive Board members or any claims against the Executive Board as an entity. Accordingly, any such arguments are deemed abandoned. *See* N.C. R. App. P. 28(a) (2013) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *see also Tyll v. Berry*, __ N.C. App. __, __, 758 S.E.2d 411, 423 (2014).

[6] Turning to plaintiffs' sole remaining argument on appeal in this context, we conclude that even under a ten-year statute of limitations, plaintiffs' derivative claims of constructive fraud against former Executive Board members Weeks, Lawing, Scanlon, Genova, and Satrape were properly dismissed.

The elements of constructive fraud are: "(1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004).

Plaintiffs allege that these Executive Board members served to benefit the Developers (and by extension themselves) and harm the POA in

the following ways: (1) by concealing or failing to disclose the defects to the common areas; (2) failing to remedy the defects; (3) accepting ownership of defective common areas; (4) paying for maintenance and repair work to the common areas while they were owned by the Developers; and (5) failing to take adverse action against the Developers.

However, none of the five dismissed Executive Board members served in the capacity of board member later than 2006. The Developers conveyed the ponds and the bulkhead to the POA in December 2008 and December 2009, respectively. The complaint alleges that "the Board knew, or should have known, of the defective condition of the bulkhead *at that time*"—after December 2008 and 2009—at least two years after the dismissed Executive Board members had stepped down from the board. There are no facts alleged in the complaint indicating when the perforated pipes were installed or when the ponds began to drain. There is similarly no allegation that the dismissed Executive Board members knew about the Developers' installation of the perforated pipes. All other allegations regarding the bulkhead took place at least two years after the dismissed Executive Board members had left the board.

In short, the Fourth Amended Verified Complaint contains no allegation that the five dismissed Executive Board members took advantage of their positions of trust to benefit themselves and harm the corporation—two essential elements of the claim of constructive fraud—during their years of service on the board when they owed a duty to the corporation. *See White*, 166 N.C. App. at 294, 603 S.E.2d at 156; *see also Trillium Ridge Condominium Ass'n, Inc. v. Trillium Links & Village, LLC*, __ N.C. App. __, __, 764 S.E.2d 203, 220 (2014) (affirming summary judgment for the defendants on a claim of constructive fraud where the plaintiff adduced no evidence "tending to show that [the defendants] sought to benefit themselves in the transaction").

Accordingly, the Fourth Amended Verified Complaint failed to state a valid claim of constructive fraud against the dismissed Executive Board members. We therefore affirm the trial court's order, albeit for a reason other than the statute of limitations. *See Manpower of Guilford County, Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979) ("A correct ruling by a trial court will not be set aside merely because the court gives a wrong or insufficient reason for its ruling. The ruling must be upheld if it is correct upon any theory of law." (citation omitted)).

Conclusion

For the foregoing reasons, we affirm the trial court's orders: (1) dismissing plaintiffs' derivative claims against the third parties;

(2) dismissing plaintiffs' derivative claims against Weeks, Lawing, Scanlon, Genova, Satrape, and the Executive Board; and (3) denying plaintiffs' motion to dismiss the POA's intervenor complaint.

AFFIRMED.

Judge ELMORE concurs.

Judge HUNTER, JR. concurs in result only by separate opinion.

HUNTER, JR., Robert N., Judge, concurring.

I join the opinion of the majority because I concur the trial court's decisions were correct under our current statues as discussed in detail in the majority opinion.

I write separately to discuss the "exclusive standing" issue. The majority opinion, in its analysis, relies very heavily upon analogies to shareholders and corporate governance of stock companies. In my opinion this metaphor is imperfect. In the corporate world, shareholders invest money and purchase share certificates which may be a voting share and if so, it gives them the right to elect directors to guide their investments. The risk of loss of the initial investment is the limitation of monetary liability. In a homeowner's association, a purchaser buys a home and has a right to participate in the management of the association which has the ability to assess each homeowner with common expenses to cover common areas, maintenance, and litigation costs. The risk of loss is an ongoing concern to the homeowner.

Here, unlike the corporate structure, homeowners within the residential subdivision SeaScape at Holden Plantation do not enjoy the right to replace the management. Indeed they are estopped by agreement (the Master Agreement) and our prior precedent from complaining about this issue because they have agreed to these conditions upon purchase. I would hold they have "standing" but cannot meet the preconditions of demand or exhaustion of pre-corporate remedies to bring their derivative actions. I realize that our precedents discuss this issue as a standing issue, however I would not hold that the homeowner's association has "exclusive standing" even if such demand is made. Such a holding may prevent the ability of all parties with interests in a legal dispute to join in and have all claims determined efficiently. In my view, these homeowners have standing as intervenors under N.C. Gen. Stat. § 1A-1, Rule 24, which provides for intervention of right and permissive intervention,

should the trial court in its discretion decide that such intervention would be meritorious. N.C. Gen. Stat. § 1A-1, Rule 24 (2013). Relevant to this action, N.C. Gen. Stat. § 1A-1, Rule 24 provides:

> (a) Intervention of right.—Upon timely application anyone shall be permitted to intervene in an action:
>
> . . . .
>
> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.[1]
>
> (b) Permissive intervention.—Upon timely application anyone may be permitted to intervene in an action.
>
> . . . .
>
> (2) When an applicant's claim or defense and the main action have a question of law or fact in common.

Allowing intervention under N.C. Gen. Stat. § 1A-1, Rule 24[2] and subsequent judicial determination at a fairness hearing on any settlement would, in my opinion, make unnecessary the New Jersey solution to this kind of litigation. In this matter however, I realize my concurrence is merely advisory and not directory.

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1. This Court has held that "a party is entitled to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) in the event that he or she can demonstrate (1) an interest relating to the property or transaction, (2) practical impairment of the protection of that interest, and (3) inadequate representation of the interest by existing parties." *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjustmen*t, 202 N.C. App. 177, 185, 689 S.E.2d 576, 583 (2010).

2. A few federal cases have supported the notion that where the shareholder's interest may not be adequately represented, the shareholders can intervene under a "watchdog principle." *See Shareholder Intervention in Corporate Litigation.*, 63 Harv. L. Rev. 1426, 1431 (1950); *see also Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988-89 (2d Cir. 1947); *Twentieth Century-Fox Film Corp. v. Jenkins*, 7 F.R.D. 197 (S.D.N.Y. 1947).

BRANCH BANKING AND TRUST COMPANY, PLAINTIFF
v.
PEACOCK FARM, INC., RODOLPHE T. LYNCH AND WILLARD A. RHODES, DEFENDANTS

No. COA14-889

Filed 2 June 2015

Appeal and Error—interlocutory orders and appeals—cross-claims pending—failure to show affected substantial right

Defendant's appeal from the trial court's order granting summary judgment in favor of plaintiff bank in an action seeking to enforce a guaranty agreement was from an interlocutory order and was thus dismissed. The trial court's 16 April 2014 order failed to confer jurisdiction upon the Court of Appeals to review the trial court's 5 June 2012 order. Cross-claims between some of the parties were still pending; and defendant Lynch failed to show that the 5 June 2012 order affected a substantial right. Further, the 5 June 2012 order did not contain a Rule 54(b) certification.

TYSON, Judge, dissenting.

Appeal by defendant Rodolphe T. Lynch from order entered 5 June 2012 by Judge Anderson D. Cromer in Moore County Superior Court. Heard in the Court of Appeals 21 January 2015.

Howard, Stallings, From & Hutson, P.A., by Matthew M. Lawless and John N. Hutson, Jr., for plaintiff-appellee.

Van Camp, Meacham & Newman, PLLC, by William M. Van O'Linda, Jr. and Michael J. Newman, for defendant-appellant Rodolphe T. Lynch.

DAVIS, Judge.

Defendant Rodolphe T. Lynch ("Lynch") appeals from the trial court's order granting summary judgment in favor of plaintiff Branch Banking & Trust Company ("BB&T") in this action seeking to enforce a guaranty agreement. After careful review, we dismiss the appeal for lack of appellate jurisdiction.

Factual Background

Willard A. Rhodes ("Rhodes") is a developer and the sole owner of Peacock Farm, Inc. ("Peacock Farm"). Lynch operates a business that specializes in farm management and field preparation of horse farms. In spring 2007, Lynch and Rhodes began discussing development of a residential horse farm in Southern Pines, North Carolina to be called Pelham Farms. The two men entered into a Memorandum of Understanding, which provided that Lynch would do the site work for the development at cost and receive 50% of the net profits from the development.

According to Lynch, he understood that Peacock Farm would initially own the Pelham Farms property, but that it would ultimately transfer the property to a separate partnership between Lynch and Rhodes. The Memorandum of Understanding, however, provided that Peacock Farm would hold title to the land and that Lynch's interest would be limited to receiving 50% of the net profits from the sale of the property.

On 15 May 2007, Peacock Farm and Lynch executed a loan agreement with BB&T, which provided that BB&T would loan Peacock Farm $2,250,000.00 and that Lynch and Rhodes would each personally guarantee Peacock Farm's promissory note. On the same day, Lynch signed an agreement guaranteeing the loan. The guaranty agreement provided, in part, that Lynch guaranteed the debts of Peacock Farm absolutely and unconditionally "at any time, now or hereafter" acquired and that his obligation would be a primary rather than a secondary obligation.

On 9 August 2007, when BB&T made three additional loans to Peacock Farm, Lynch signed three corresponding personal guaranty agreements with virtually identical language. The loans were also secured by a deed of trust encumbering Pelham Farms.

Sometime in early 2008, Lynch realized that he did not own half of the property that made up Pelham Farms and had no control over the development. He contacted a loan officer with BB&T to inform him that it had been Lynch's understanding that he would ultimately have an ownership interest in Pelham Farms. On 24 April 2009, Lynch, through counsel, wrote BB&T a letter conveying this same information. Lynch indicated to BB&T that he would not participate in the renewal of the loan or execute any other notes.

On 12 June 2009, an employee of BB&T inadvertently emailed Lynch a document prepared by BB&T's in house counsel entitled "Problem Loan Review for Peacock Farm, Inc." This document reviewed the file materials concerning the loans and addressed possible concerns with

the documentation, including concerns regarding what benefit Lynch was receiving as consideration for him serving as a guarantor, and ultimately recommended that BB&T confirm that proper consideration actually existed.

Peacock Farm defaulted on the BB&T notes, and BB&T filed suit against Peacock Farm, Rhodes, and Lynch, seeking to hold them jointly and severally liable. Lynch filed a motion to dismiss, an answer, various counterclaims, and cross-claims against Rhodes and Peacock Farm seeking indemnity and contribution. Peacock Farm and Rhodes also asserted cross-claims against Lynch for contribution.

On 27 January 2012, BB&T filed a notice of voluntary dismissal with prejudice of its claims against Rhodes and Peacock Farm. On 23 February 2012, BB&T moved for summary judgment with respect to its claims against Lynch and Lynch's counterclaims against BB&T.

Lynch moved to amend his answer on 30 May 2012 to add the defense of release. Lynch alleged in the motion that BB&T had settled its claims with Peacock Farm and Rhodes and released their obligations under the notes and guaranty agreements. Lynch contended that "BB&T's release of Defendants [sic] Peacock Farm, Inc. operates as a discharge of Defendant's [sic] Lynch's obligations under his guaranty . . . ."

The trial court entered an order on 5 June 2012 (1) granting Lynch's motion to amend his answer; and (2) granting BB&T's motion for summary judgment. The order entered judgment in favor of BB&T and against Lynch in the amount of $3,749,255.85. Lynch filed a notice of appeal and moved for a stay pending appeal. On 12 July 2012, the trial court granted Lynch's motion for a stay on the condition that Lynch post an appeal bond in the amount of $25,000.00. BB&T filed a notice of cross-appeal from the order granting the stay.

On 6 August 2013, this Court issued an opinion dismissing Lynch's appeal on the grounds that (1) it was interlocutory due to the fact that cross-claims between Lynch, Peacock Farm, and Rhodes were still pending; and (2) Lynch had failed to show that the 5 June 2012 order affected a substantial right. *Branch Banking & Trust Co. v. Peacock Farm, Inc.*, __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished).[1]

Over eight months later, Lynch obtained an order from the trial court on 16 April 2014 purporting to certify its 5 June 2012 judgment in

1. This Court also dismissed BB&T's cross-appeal. *Branch Banking & Trust Co.*, __ N.C. App. __, 749 S.E.2d 111, slip op. at 10-11.

favor of BB&T for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.[2] On 8 May 2014, Lynch filed a new notice of appeal seeking once again to appeal the trial court's 5 June 2012 order.

Analysis

It is undisputed by the parties that the current appeal remains interlocutory given that the cross-claims between Lynch, Peacock Farms, and Rhodes remain unresolved. Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, __ N.C. App. __, __, 745 S.E.2d 69, 72 (2013).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

In dismissing Lynch's initial appeal, we held that

> the [5 June 2012] summary judgment order contained no Rule 54(b) certification. . . . Lynch was, therefore, required to set forth sufficient facts and argument to show that the order affected a substantial right. However, . . . Lynch's statement of grounds for appellate review asserted in its entirety:
>
> > This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A–27(b) as the 5 June 2012 Judgment is a final judgment in favor of BB&T and against Defendant Lynch on his affirmative defenses and counterclaims.

2. In its 16 April 2014 order, the trial court also lifted the stay it had previously entered, thereby allowing BB&T to proceed with execution on its judgment within 30 days.

> Thus, . . . Lynch's brief implicitly acknowledged that the summary judgment order resolved only the claims pending between BB&T and . . . Lynch and not the other claims pending among the co-defendants. Nonetheless, the brief does not argue and makes no showing that this order would affect a substantial right in the absence of an immediate appeal.

Branch Banking & Trust Co., __ N.C. App. __, 749 S.E.2d 111, slip op. at 8 (emphasis omitted).

After our dismissal of the appeal, over eight months passed before Lynch obtained the 16 April 2014 order from the trial court, which stated, in pertinent part, as follows:

> [T]his Court finds that a money judgment in the amount of Three Million Seven Hundred Forty-Nine Thousand Two Hundred Fifty-Five Dollars and Eighty-Five Cents ($3,749,255.85) affects a substantial right under North Carolina law. Wachovia Realty Inv. Housing, Inc., 292 NC 93, 99 (N.C. 1977). Further, the only remaining claims in this case are cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity. However, these cross-claims cannot be finally resolved until there is a determination of (a) the validity of BB&T's judgment against Mr. Lynch, and (b) the amount BB&T is actually able to recover from Mr. Lynch. Thus, pursuant to Rule 54(b) this Court finds, in its discretion, that there is no just reason for the Defendant Lynch to delay appealing BB&T's judgment herein.

The 16 April 2014 order was not an amended judgment regarding BB&T's claim against Lynch. It did not set out the substantive basis for ruling that the granting of BB&T's motion was proper under Rule 56. Instead, it served as a "stand-alone" order, simply making reference to its prior judgment in favor of BB&T and stating its belief that "in its discretion" an immediate appeal as to that judgment was appropriate.

Rule 54(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay *and it is so determined in the judgment*. Such judgment shall then be subject to review by appeal or as otherwise provided by these

rules or other statutes." N.C.R. Civ. P. 54(b) (emphasis added). However, "the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal citations and quotation marks omitted); *see Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (affirming dismissal of interlocutory appeal where trial court's use of certification language under Rule 54(b) was insufficient to establish appellate jurisdiction; "That the trial court declared it to be a final . . . judgment does not make it so.").

We conclude here that the trial court's 16 April 2014 order fails to confer jurisdiction upon this Court to review the trial court's 5 June 2012 order. Had Lynch desired to take a proper appeal of the trial court's 5 June 2012 interlocutory order, he had two options. First, he could have noticed an appeal and then demonstrated in his appellate brief how the trial court's order deprived him of a substantial right. Instead, while he did notice an appeal within 30 days of the 5 June 2012 order, he failed to even argue — much less make a valid showing — in his brief that he would be deprived of a substantial right absent an immediate appeal. As a result, his appeal was dismissed by this Court.[3] Lynch has failed to cite any caselaw suggesting that litigants are entitled to multiple "bites at the apple" to establish the existence of appellate jurisdiction over an interlocutory appeal based on the "substantial right" doctrine.

Alternatively, he could have obtained from the trial court the inclusion of appropriate language *in the 5 June 2012 order itself* certifying the case for immediate review pursuant to Rule 54(b) on the ground that there was no just reason to delay the appeal. *See Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985) ("Rule 54(b) expressly requires that this determination be stated *in the judgment itself*." (emphasis added)), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986); *see also Tridyn Indus.*, 296 N.C. at 490, 251 S.E.2d at 447 (holding that "Rule 54(b) permits the trial judge *by determining in such a judgment* that 'there is no just reason for delay' to release it for immediate appeal before the litigation is complete as to all claims or all parties."

3. In the event Lynch believed that this Court erred in dismissing his initial appeal, he could have filed a petition for discretionary review with our Supreme Court. However, he failed to do so.

(emphasis added)). However, Lynch either did not seek the inclusion of such certification language in the order or was unsuccessful in persuading the trial court to add such language. In any event, the 5 June 2012 order did not contain a Rule 54(b) certification.

While, as explained above, Lynch ultimately obtained a *separate* order from the trial court on 16 April 2014 purporting to certify for immediate appeal the 5 June 2012 order it had issued almost two full years earlier, the 16 April 2014 order is not the order from which Lynch seeks to appeal. Neither Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal in this fashion. Therefore, because Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought, dismissal of Lynch's appeal is, once again, appropriate.

In reaching a contrary conclusion, the dissent neither cites any North Carolina caselaw supporting its interpretation of Rule 54(b) nor acknowledges the express language contained in the rule itself that certification language must be included "in the judgment." Notably, while the dissent cites our decision in *Newcomb v. Cty. of Carteret*, 207 N.C. App 527, 701 S.E.2d 325 (2010), *disc. review denied*, 365 N.C. 212, 710 S.E.2d 26 (2011), this Court held in *Newcomb* that it *lacked* appellate jurisdiction pursuant to Rule 54(b) where — as here — the trial court's attempt to retroactively certify its prior order failed to comply with the Rules of Civil Procedure.

> The trial court did not certify the issue of Carteret County's right to control permanent structures in Marshallberg Harbor for immediate review in its initial summary judgment order. However, in its amended summary judgment order, the trial court attempted to add a certification relating to this issue in apparent reliance on its authority to correct clerical errors under N.C. Gen. Stat. § 1A–1, Rule 60(a). A careful review of the relevant authorities establishes that the trial court lacked the authority to amend its summary judgment order in this fashion.

Id. at 543, 701 S.E.2d at 337.

This Court concluded that "the trial court lacked the authority to amend the original summary judgment order for the purpose of certifying additional issues for immediate appeal pursuant to Rule 54(b)." *Id.*

at 545, 701 S.E.2d at 338[4]; *see also Pratt v. Staton*, 147 N.C. App. 771, 774-75, 556 S.E.2d 621, 624 (2001) ("[B]y adding the trial court's Rule 54(b) certification and establishing grounds for immediate appellate review of an otherwise interlocutory order, the trial court's 10 October 2000 amended order . . . altered the substantive rights of the parties. . . . [T]he amended order in the instant case allowed plaintiffs to circumvent the established procedural rules governing the bringing of an appeal and secure appellate review of an otherwise unappealable order [pursuant to Rule 54(b)]." (internal citation and quotation marks omitted)).

Nor do we agree with the dissent's alternative suggestion that we treat Lynch's appeal as a petition for certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, thereby granting a petition that Lynch did not actually file. "[O]ur courts have frequently observed that a writ of certiorari is an extraordinary remedial writ." *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997).

In our view, Lynch's appeal fails to present a compelling basis for such extraordinary relief here. Lynch has now failed on two separate occasions to properly bring an interlocutory appeal that complies with the rules governing the appealability of such orders. *See generally Tridyn Indus.*, 296 N.C. at 494, 251 S.E.2d at 449 (declining to exercise certiorari powers under Appellate Rule 21 where appeal was properly dismissed as interlocutory despite trial court's inclusion of language purporting to certify it for immediate appeal).

Indeed, it is appropriate to note that this case involves a straightforward commercial dispute that is unremarkable either factually or legally. Neither the dissent nor the trial court's 16 April 2014 order explain precisely *why* the pending cross-claims cannot be resolved in the trial court absent immediate appellate review of the 5 June 2012 order. Lynch has failed to cite any North Carolina case for the proposition that cross-claims between a debtor and a guarantor are unable to be litigated until there has been final appellate review of a judgment in favor of the creditor on the guarantor's liability for the underlying debt. Moreover, the eight-month delay between the dismissal of Lynch's first appeal and the 16 April 2014 order — a delay the dissent ignores — belies the notion that there is an urgent need for immediate appellate review over the

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4. While the *Newcomb* court deemed it appropriate to treat the record and briefs as a petition for the issuance of a writ of certiorari and to grant the "petition" *sua sponte*, *see Newcomb*, 207 N.C. App. at 545, 701 S.E.2d at 338-39, we decline to do so here for the reasons set out below.

trial court's 5 June 2012 order. As such, we do not discern any basis for excusing Lynch from compliance with the same rules which every other appellant in this Court is bound to follow.

Rather than deciding on an *ad hoc* basis whether or not an appellant should be held to strict compliance with the laws governing appellate jurisdiction over interlocutory appeals, we believe instead that consistent enforcement of the existing jurisdictional rules is more in keeping with the goal of North Carolina's appellate courts to ensure the uniform application of the laws to all similarly situated litigants. As our Supreme Court has long held, "[w]hen litigants resort to the judiciary for the settlement of their disputes, they . . . should not forget that rules of procedure are necessary, and must be observed . . . ." *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930).

Conclusion

For the reasons stated above, Lynch's appeal is dismissed.

DISMISSED.

Judge ELMORE concurs.

TYSON, Judge, dissenting.

As the majority's opinion notes, this is the second time this case has been brought before this Court. In the previous appeal, this Court did not address the merits due to the following grounds: (1) the 5 June 2012 order from which he appealed was interlocutory and did not contain the trial court's Rule 54(b) certification; and, (2) Lynch failed to argue or show the 5 June 2012 order affected a substantial right. *Branch Banking & Trust Co. v. Peacock Farms, Inc.*, __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished).

I respectfully dissent from the majority's holding to dismiss Lynch's appeal for lack of appellate jurisdiction. I vote to address the merits pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. In the alternative, I vote to treat this notice of appeal and briefs as a petition for the issuance of a writ of *certiorari* pursuant to N.C.R. App. P. 21(a)(1) (2013) and to grant that petition for judicial economy.

The trial court's 16 April 2014 order stated the "cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity . . . cannot be finally resolved until there is a determination of . . . the validity of BB&T's judgment against Mr. Lynch." Upon review of the merits

of Lynch's appeal, the trial court's order granting summary judgment in favor of BB&T should be affirmed.

I. Interlocutory Appeal

A. Standard of Review

Our Supreme Court has stated:

> Generally, a party cannot appeal from an interlocutory order unless failure to grant immediate review would affect a substantial right pursuant to N.C.G.S. sections 1-277 and 7A-27(d).
>
> A party may appeal an interlocutory order under two circumstances. First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work injury to him if not correct before an appeal from the final judgment.

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (citations and internal quotation marks omitted).

B. Analysis

The majority's opinion holds "[n]either Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a *prior* order for immediate appeal." I disagree.

Rule 54(b) of the North Carolina Rules of Civil Procedure enables review of interlocutory orders and judgments "when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999) (citation omitted). The final sentence of Rule 54(b) further provides "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision *at any time before the entry of judgment adjudicating all the claims* and the rights and liabilities of all the parties." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013) (emphasis supplied). Our Supreme Court held "[c]ertification under Rule 54(b) permits an interlocutory appeal from orders that are final as to specific portion of the case, but which do not dispose of all claims as to all parties." *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013).

The majority's opinion notes this Court dismissed Lynch's prior appeal because the trial court's summary judgment order did not contain a Rule 54(b) certification, nor did Lynch argue this order affected a substantial right which would be lost without immediate review. *Branch Banking & Trust Co. v. Peacock Farms, Inc.*, __ N.C. App. __, 749 S.E.2d 111 (2013) (unpublished).

After dismissal of the prior appeal, the trial court entered an order, which lifted the stay on enforcement of its 5 June 2012 judgment and granted Lynch's motion to certify BB&T's judgment as immediately appealable pursuant to Rule 54(b) on 16 April 2014. The trial court's order states

> the only remaining claims in this case are cross-claims between the Defendants Lynch and Rhodes for contribution or indemnity. However, *these cross-claims cannot be finally resolved until there is a determination of (a) the validity of BB&T's judgment against Mr. Lynch*, and (b) *the amount BB&T is actually able to recover from Mr. Lynch*. Thus, *pursuant to Rule 54(b)* this Court finds, in its discretion, that *there is no just reason for the Defendant Lynch to delay appealing BB&T's judgment herein.*

(emphasis supplied).

Based on the last sentence of Rule 54(b), and the absence of any case law to the contrary, the trial court properly certified its 5 June 2012 order as immediately appealable pursuant to Rule 54(b). This Court has jurisdiction to address the merits of Lynch's appeal.

The parties at bar have been entangled in litigation since March 2011. Unless and until this Court reaches the merits of this appeal, the parties cannot move forward or obtain any final resolution on their respective claims.

Under judicial economy, this Court should resolve this issue on the merits. Our decision will not only expedite the ultimate resolution of this case and, as the trial court stated in its order, doing so is *essential* for the parties to reach any finality in the case. *Wilkins v. Safran*, 185 N.C. App. 668, 671, 649 S.E.2d 658, 661 (2007) (electing to review interlocutory appeal "because there is no just reason for delay and our review will avoid both piece-meal litigation and the risk of inconsistent verdicts").

In addition, and in the alternative, I would treat Lynch's notice of appeal and brief as a petition for the issuance of a writ of *certiorari*

directed toward the issue of the validity of BB&T's judgment against him pursuant to Rule 21(a)(1) and grant the petition. N.C.R. App. P. 21(a); *see Newcomb v. Cty. of Carteret*, 207 N.C. App. 527, 545, 701 S.E.2d 325, 339 (2010) (electing to treat the record and briefs as a petition for the issuance of a writ of *certiorari* where consideration of the issue on the merits would expedite the ultimate disposition of case).

II. Summary Judgment in Favor of BB&T

A. Issues

Lynch argues the trial court erred by granting summary judgment in favor of BB&T. He asserts genuine issues of material facts exist concerning whether (1) the parties involved mistakenly believed Lynch was a 50/50 owner and partner in Peacock Farms; and (2) BB&T's release from further liability of defendants Rhodes and Peacock Farms also released Lynch from his absolute guaranty.

B. 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. R. Civ. P. 56(c); *see Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 208, 211, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

A party moving for summary judgment may prevail by "(1) proving that an essential element of the [nonmoving party's] case is nonexistent, or (2) showing through discovery that the [nonmoving party] cannot produce evidence to support an essential element of his or her claim, or (3) showing that the [nonmoving party] cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

"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).

"Once 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."

Draughon, 158 N.C. App. at 212, 580 S.E.2d at 735 (citation and quotation marks 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).

C. Guaranty

> A Guaranty of payment is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor. The obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity.

EAC Credit Corp. v. Wilson, 281 N.C. 140, 145, 187 S.E.2d 752, 755 (1972) (citation omitted).

Lynch argues BB&T should be estopped from enforcing the guaranties because they were obtained without consideration. This argument misstates the well-settled law in North Carolina and does not present a genuine issue of material fact.

This Court held "in a guaranty contract, a consideration moving directly to the guarantor is not necessary. The promise is enforceable if a benefit to the principal debtor is shown or if a detriment or inconvenience to the promisee is disclosed." *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 196, 188 S.E.2d 342, 345 (1972) (citation omitted).

The evidence Lynch proffered tends to show: (1) BB&T had a longstanding prior relationship with Rhodes and Peacock Farms; (2) BB&T loaned more than 100% of the appraised value of the project; (3) Lynch and Rhodes signed a Memorandum of Understanding, in which the parties allegedly agreed to a 50/50 share of net profits; (4) BB&T settled with and released Peacock Farms and Rhodes for $100,000.00; (5) Lynch was not a party to the settlement and release; and, (6) the property was conveyed by a quit-claim deed to a third party, purportedly leaving Lynch with no recourse on the original collateral.

The arguments raised by Lynch are issues between Lynch and Rhodes, not Lynch and BB&T. No genuine issue of material fact exists between Lynch and BB&T on his liability under the guarantees. Lynch was unable to proffer any evidence to show BB&T was mistaken about whether Lynch had any ownership interest in Peacock Farms.

The record also shows no proffer of evidence that BB&T extended the payment terms or issued any additional credit to Peacock Farms after Lynch gave notice to BB&T he would not participate in and guarantee further extensions of credit. The trial court properly granted summary judgment to BB&T.

This record evidence suggests Lynch may have entered into an unfavorable business arrangement with Peacock Farms and Rhodes. The evidence does not, however, raise genuine issues of material facts of whether BB&T had the right to enforce Lynch's guaranties, even when viewed in the light most favorable to Lynch.

N.C. Gen. Stat. § 26-3.1 provides where a guarantor pays the debt of his principal, the guarantor has a right to "either sue his principal for reimbursement or sue his principal on the instrument and may maintain any action or avail himself of any remedy which the creditor himself might have had against the principal debtor." N.C. Gen. Stat. § 26-3.1 (2013).

Lynch's loan agreements and his guaranty agreements with BB&T expressly incorporated the terms of Peacock Farms' promissory notes. Lynch agreed BB&T "shall have the unlimited right to release any person who might be liable hereon, and such release shall not affect or discharge the liability of any other person who is or might be liable hereon."

The remaining issues left for resolution concern Lynch's rights of indemnity and contribution from Peacock Farms and Rhodes. The trial court properly granted summary judgment on BB&T's action to enforce Lynch's guaranties.

Conclusion

This Court has jurisdiction to address the merits of Lynch's interlocutory appeal. The trial court certified its 5 June 2012 order for immediate appeal under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2013). The trial court also stated the case could not proceed further until Lynch's liability to BB&T was resolved. Alternatively, this Court should treat the notice of appeal and briefs as a petition for writ of *certiorari*, and grant that petition to address the merits. *Newcomb*, 207 N.C. App. at 545, 701 S.E.2d at 339.

Lynch did not proffer any evidence BB&T mistakenly believed he had an ownership interest in Peacock, or that BB&T extended any additional credit to Peacock Farms after Lynch notified BB&T he would not participate in further extensions of credit.

The trial court correctly found no genuine issue of material fact exists and properly granted summary judgment in favor of BB&T. The uncontroverted evidence showed BB&T did not release Lynch when it settled and released defendants Rhodes and Peacock Farms. I vote to affirm the decision of the trial court, which granted summary judgment to BB&T. I respectfully dissent.

PATRICK JOSEPH CAMPBELL, Plaintiff
v.
VIRGINIA QUINN CAMPBELL, Defendant

No. COA14-1155

Filed 2 June 2015

1. Appeal and Error—interlocutory orders and appeals—substantial right

Defendant's interlocutory appeal in an equitable distribution action could be heard by the Court of Appeals where the appeal involved a preliminary injunction that concerned a business that was marital property. There was a business plan devised by plaintiff that would involve the company spending all of the money in its operating account to implement a new product. Defendant, an owner of the company, had a substantial right affected when the trial court exerted significant control over the company.

2. Divorce—equitable distribution—corporation owned by husband and wife—corporation not a party to action

The trial court in an equitable distribution action did not have the authority to order that certain actions be taken by a corporation owned by the parties where the corporation was not a party to the action. The courts are not free to completely ignore the existence of a legal entity.

Appeal by Defendant from preliminary injunction entered 23 April 2014 by Judge Michael Denning in District Court, Wake County. Heard in the Court of Appeals 6 April 2015.

Wake Family Law Group, by Marc W. Sokol, for Plaintiff-Appellee.

Gailor, Hunt, Jenkins, Davis, & Taylor P.L.L.C., by Cathy C. Hunt and Jonathan S. Melton, for Defendant-Appellant.

McGEE, Chief Judge.

Virginia Quinn Campbell ("Defendant") appeals from a preliminary injunction, entered by the trial court on 23 April 2014 ("the 23 April 2014 order"), as part of the equitable distribution action filed by her husband, Patrick Joseph Campbell ("Plaintiff"). The preliminary injunction ordered: (1) Defendant to transfer assets belonging to Triangle Strategy Group, LLC ("TSG"), a company owned by the parties; (2) ordered the parties to act on behalf of TSG to hire an interim controlling manager during the pendency of their equitable distribution action; and (3) ordered TSG to pay and indemnify the interim manager, post an unsecured bond, and implement a six- to-twelve month business plan, which would deplete all of TSG's finances in an effort to expand the business. The trial court also found that Defendant was not a manager of TSG. Because TSG was not a party to the equitable distribution action, the trial court did not have jurisdiction to exercise control over TSG's assets, operations, and management structure, and Defendant, an owner of TSG, had a substantial right affected thereby. Therefore, we must vacate the order of the trial court.

I. Background

Plaintiff and Defendant were married on 24 July 1999. In June 2007, they incorporated TSG in Delaware and established its principal office in Wake County. Plaintiff owns a fifty-one percent share of TSG, and Defendant owns the remaining forty-nine percent. TSG has been the parties' sole source of income since 2007, and it is uncontested that TSG is a marital asset.

TSG operates mainly as a consulting firm that focuses on "impulse marketing" for large corporations. Plaintiff is the primary operator of TSG, although Defendant has authority to sign checks, transfer funds, and conduct some transactions for TSG in the ordinary course of business. Plaintiff also has been developing and seeking patents for a new type of sensor technology for TSG over the last several years, which reportedly would allow companies to collect data on how consumers interact with their products in actual stores ("Shelf Lab").

The parties separated on 18 October 2013, after Plaintiff was arrested for assaulting Defendant and their two children. An *ex parte* domestic violence protective order was entered against Plaintiff on 21 October 2013. The parties signed a consent domestic violence protective order in January 2014.

At the time of Plaintiff's 18 October 2013 arrest, the TSG operating account contained approximately $751,000.00. Defendant transferred $350,000.00 of those funds into a separate account that same night, shortly after Plaintiff was taken into custody. Defendant did not spend any of the $350,000.00 and, at the time of the hearing on the present action, that money was held in a corporate account to which only Defendant had access. Defendant also took a $75,000.00 "owner's draw" from the TSG operating account within several days of Plaintiff's arrest.[1] Finally, between 25 and 30 October 2013, Defendant transferred all of the funds from the parties' private Fidelity investment account, totaling approximately $226,727.00, into another private account to which only Defendant had access.

Plaintiff originally attempted to recover the $350,000.00 of TSG funds by filing an action on behalf of TSG in Wake County Superior Court. However, Plaintiff dismissed that action and filed the present one because he felt he could have the issue adjudicated more quickly as part of an equitable distribution action in district court. Specifically, in the present action, Plaintiff sought, *inter alia*, equitable distribution, an interim distribution, and injunctive relief requiring Defendant to return the $350,000.00 of TSG funds to TSG. Defendant's response, *inter alia*, sought to join TSG as a party and to have a receiver appointed to run TSG during the pendency of the present action. Defendant also moved for the imposition of a constructive trust for Defendant's benefit for her share of the proceeds and property of TSG. The trial court held a hearing on these matters on 10 March 2014, during which counsel for Defendant argued that "the only issues that can be decided by [the trial court] are the Chapter 50 domestic issues" because TSG was not a party to the action.

The trial court, in an order entered 18 March 2014, made an interim distribution to the parties and directed Defendant to return to Plaintiff half of the approximately $226,727.00 that Defendant had removed from the parties' private investment account. That order has not been appealed by either party.

In the 23 April 2014 order that is the subject of the present appeal, the trial court issued a preliminary injunction and ordered Defendant to return the $350,000.00 of TSG funds to TSG, declared that Defendant was not a manager of TSG, ordered her to not interfere with the operations

1. In response, pursuant to the TSG operating agreement, Plaintiff was later required to take an owner's draw of approximately $78,000.00, in proportion to his ownership interest in TSG.

of TSG, declined to impose a constructive trust for Defendant's benefit on any of TSG's assets, and declined to add TSG as a party to the action. The trial court also declined to appoint a receiver to run TSG; however, at Plaintiff's request, the trial court did order the parties to appoint Dr. Alan L. Tharp ("Dr. Tharp") to serve as an interim controlling manager of TSG. The trial court also ordered TSG specifically to indemnify Dr. Tharp for his management of TSG, pay him $110.00 per hour, and ordered the company to post a $500.00 unsecured bond during the pendency of the preliminary injunction.

The trial court further ordered that "Dr. Tharp's powers and duties as interim-manager of TSG shall be consistent and in furtherance of the current [six-to-twelve] month business plan" of TSG. This business plan was devised by Plaintiff and reportedly would involve TSG spending all of the money in its operating account by March 2015 in order to implement Shelf Lab, in the hope that this investment would bring about a "significant" financial payoff thereafter. This business plan also reportedly called for no shareholder distributions during the plan's implementation.

II. Appealability

[1] We first must determine whether Defendant's interlocutory appeal may be reviewed by this Court.

> An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level. Ordinarily, when an order is interlocutory, it is not immediately appealable. However, we will review the trial court's order if it affects some substantial right claimed by the appellant and will work an injury to [her] if not corrected before an appeal from the final judgment.

Mecklenburg Cnty. v. Simply Fashion Stores, Ltd., 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (citations and internal quotation marks omitted). "The decision as to whether to grant [a preliminary] injunction [in an equitable distribution action] for the purpose of preserving the *status quo* pending trial is left to the discretion of the trial judge, and generally no appeal lies from the issuance of such an injunction." *Dixon v. Dixon*, 62 N.C. App. 744, 745, 303 S.E.2d 606, 607 (1983) (citations omitted). Nonetheless, "[w]hether an interlocutory appeal affects a substantial right is determined on a case-by-case basis." *Grant v. High Point Reg'l Health Sys.*, 172 N.C. App. 852, 853, 616 S.E.2d 688, 689 (2005).

In the present action, Defendant contends that the trial court's preliminary injunction did not preserve the *status quo* during the parties' equitable distribution action, but instead would allow Plaintiff to entirely deplete the cash reserves of TSG as part of a new business plan. Defendant also maintains that the injunction hindered her ability to protect her interest in TSG because the trial court exerted significant control over TSG's assets and operations, declared that Defendant was not a manager of TSG, and ordered Defendant to not interfere with TSG's operations – even though the trial court denied Defendant's motion to add TSG as a party to the present action. In light of the business plan's goal of spending all of TSG's funds, Defendant, an owner of TSG, did have a substantial right affected when the trial court exerted significant control over TSG's assets, operations, and management structure in order to effectuate the business plan while TSG was not a party to the present action. Therefore, Defendant's interlocutory appeal may be heard by this Court. *See Mecklenburg Cnty.*, 208 N.C. App. at 667, 704 S.E.2d at 51.

III. Analysis

[2] Defendant's brief raises a number of jurisdictional challenges to the 23 April 2014 order. Specifically, Defendant objects to the trial court (1) ordering Defendant to transfer $350,000.00 in TSG assets; (2) ordering the parties, as members of TSG, to appoint Dr. Tharp as an interim controlling manager; (3) ordering TSG to indemnify and pay Dr. Tharp, and to post an unsecured bond during the pendency of the preliminary injunction; and (4) declaring that Defendant was not a manager of TSG. Defendant contends that the trial court did not have the authority to take these actions because TSG was not a party to the present action. We agree.

"The courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC." *Keith v. Wallerich*, 201 N.C. App. 550, 558, 687 S.E.2d 299, 304 (2009). "A corporation, even one closely held, is recognized as a separate legal entity . . . [even when its members are] engaged in litigation which is personal in nature[.]" *See Quick v. Quick*, 305 N.C. 446, 460, 290 S.E.2d 653, 662 (1982). More specifically, where a separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. *See Southern Athletic/Bike v. House of Sports, Inc.*, 53 N.C. App. 804, 806, 281 S.E.2d 698, 699 (1981). Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which are contested in a pending equitable distribution action,

"[t]he trial court exceed[s] its authority when it order[s] [that named party] to transfer the assets of the LLC" without first adding the LLC as a party to the action. *See Keith*, 201 N.C. App. at 552, 558, 687 S.E.2d at 300, 304.

In the present case, the trial court ordered Defendant to transfer $350,000.00 of TSG assets without first adding TSG as a party. The trial court also effectively ordered TSG to act by ordering the parties, as the only members of TSG, to appoint Dr. Tharp as an interim controlling manager of TSG, and it specifically ordered TSG to act by ordering TSG to indemnify and pay Dr. Tharp and to post an unsecured bond during the pendency of the preliminary injunction. Finally, the trial court affected the management structure of TSG by finding that Defendant was not a manager of TSG, even though TSG's filings consistently listed Defendant as a manager of TSG and TSG's attorney repeatedly testified that Defendant was a manager, albeit not one "necessary to the function of the company." Because TSG was not made a party to the present action, the trial court did not have the authority to exercise control over TSG. *See id.; Southern Athletic/Bike*, 53 N.C. App. at 806, 281 S.E.2d at 699. Therefore, we must vacate the 23 April 2014 order of the trial court.

VACATED.

Judges HUNTER, JR. and DIETZ concur.

BRANDIE FINTCHRE, PLAINTIFF
v.
DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEMS, JANE DOE, R.N., AND HARDEE KLITZMAN, R.N., IN THEIR INDIVIDUAL CAPACITIES, DEFENDANTS

No. COA14-1096

Filed 2 June 2015

1. Medical Malpractice—Rule 9(j)—second complaint—motion to amend

A trial court order granting defendants' motion to dismiss pursuant to Rule 9(j) was affirmed where the trial court denied plaintiff's motion to amend her second complaint in order that it comply with N.C.G.S. § 1A-1, Rule 9(j). Granting plaintiff's motion to amend her second complaint would have been futile where she failed to

file a complaint with a valid Rule 9(j) certification within the statute of limitations.

2. Pleadings—failure to use correct name—findings

Findings of fact regarding the name of Duke University Health System, Inc. in plaintiff's two complaints were supported by competent evidence in the record and the trial court did not err by concluding that plaintiff failed to name Duke University Health System, Inc. as a defendant.

3. Costs—interests—Rule 41(d)

The trial court erred by awarding interest on costs incurred by defendants in the first of two medical malpractice actions filed from the same event. N.C.G.S. § 1A-1, Rule 41(d) did not allow the trial court to award interest on the costs assessed.

Judge STEPHENS concurs by a separate written opinion.

Appeal by plaintiff from order entered 24 June 2014 by Judge W. Osmond Smith, III, in Durham County Superior Court. Heard in the Court of Appeals 8 April 2015.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Ekstrand & Ekstrand, LLP, by Robert Ekstrand, for plaintiff-appellant.

McGuire Woods, LLP, by Mark E. Anderson, Heather R. Wilson, and Justin T. Yedor, for defendant-appellees.

McCULLOUGH, Judge.

Plaintiff Brandie Fintchre appeals from an order dismissing her action with prejudice against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N., in their individual capacities. For the reasons stated herein, we affirm in part and reverse and remand in part.

I. Background

On 6 October 2011, plaintiff Brandie Fintchre filed a complaint against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N. ("first complaint"). The first complaint set forth claims of medical negligence against Jane Doe, R.N. in her individual and official capacities; medical negligence against

Hardee Klitzman, R.N. in her individual and official capacities; negligence against Duke University, Duke University Health Systems, and Duke University Medical Center; negligent and intentional infliction of emotional distress against all defendants; and punitive damages. The first complaint also contained a Rule 9(j) certification pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(j) and provided that "the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care."

On 14 December 2011, defendants filed an "Answer and Defenses." Defendants argued, *inter alia*, that plaintiff had failed to comply with the requirements pursuant to Rule 9(j). Defendants also made a motion to dismiss all "punitive damages claims" pursuant to provisions of N.C. Gen. Stat. §§ 1D-15 *et seq.* and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 19 December 2012, defendants filed a "Motion to Dismiss, or For Other Relief." Defendants argued that plaintiff had failed to comply with the trial court's discovery scheduling order entered 10 January 2012 and that defendants were thereby prejudiced.

On 3 January 2013, plaintiff voluntarily dismissed her first action against defendants without prejudice.

On 20 December 2013, plaintiff filed a complaint against defendants Duke University, Duke University Health Systems, Jane Doe, R.N., and Hardee Klitzman, R.N., in their individual and official capacities. ("second complaint"). Plaintiff's causes of action included the following: medical negligence against Jane Doe, R.N. and Hardee Klitzman, R.N., in their individual and official capacities and against Duke University and Duke University Health Systems; negligence against Duke University, Duke University Health Systems, and Duke University Medical Center; negligent infliction of emotional distress against defendants and Duke University Medical Center; intentional infliction of emotional distress against defendants and Duke University Medical Center; and, punitive damages. The second complaint contained the following Rule 9(j) certification:

> 82. Pursuant to North Carolina General Statute Section 1A-1, Rule 9(j), the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care.

Plaintiff alleged that on 15 October 2008, plaintiff underwent a hysterectomy after being diagnosed with adenocarcinoma of the cervix. Following surgery, she was transferred to the Post Anesthesia Care Unit where she was evaluated by defendant Jane Doe, a nurse. Defendant Doe, disregarding plaintiff's physician's orders that required plaintiff to be catheterized indefinitely, removed plaintiff's catheter. Plaintiff alleged that defendant's actions resulted in a stretched bladder, abdominal pain, damage to her bladder, and loss of normal bladder functioning. Throughout 2008 and 2009, plaintiff suffered multiple urinary tract infections and ongoing inability to completely void her bladder. On 22 April 2010, plaintiff underwent a vaginal biopsy to determine if her cancer had returned. Defendant Hardee Klitzman provided postoperative nursing care. Plaintiff alleged that defendant Klitzman incorrectly evaluated plaintiff's bladder as "not distended" multiple times and authorized plaintiff's release from the hospital. Following discharge, plaintiff went to the emergency department of Duke University Medical Center complaining of severe pain in her abdomen.

Plaintiff was hospitalized for five (5) days and diagnosed with an infection caused by "a large amount of urine that . . . was released into the intraperitoneal cavity when plaintiff's bladder tore due to over-distention." Plaintiff was required to undergo a surgery to drain the urine from her abdomen. From October 2008 until February 2011, plaintiff had not been able to void the entire contents of her bladder without assistance. Plaintiff alleged that she suffered from incontinence, recurring pain and infections, and a reduced quality of life.

On 31 January 2014, defendants filed a "Response to Complaint." Defendants argued that "Duke University Health System" is not an existing entity and that plaintiff was provided notice in 2012 for the correct name of the entity that provided healthcare to plaintiff, Duke University Health System, Inc. Defendants also argued that in 2012, plaintiff was provided notice regarding the identity of defendant Jane Doe, Kimberly Emory, R.N. Based on the foregoing, defendants moved to dismiss the second complaint on behalf of defendant Jane Doe and Duke University Health System for insufficiency of process, insufficiency of service of process, lack of personal jurisdiction, and failure to state a claim pursuant to Rules 4, 12(b)(2), and 12(b)(4-6) of the North Carolina Rules of Civil Procedure. Defendants also moved to dismiss plaintiff's second complaint as to Duke University, pursuant to Rule 12(b)(6). Defendants argued that Duke University was not a healthcare provider to plaintiff nor employed anyone who provided healthcare to plaintiff. Defendants moved to dismiss plaintiff's action in its entirety pursuant to Rule 41(d)

of the North Carolina Rules of Civil Procedure for failure to pay the costs of plaintiff's first action. In addition, defendants moved to dismiss plaintiff's action for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Defendants also presented the following defenses, *inter alia*: expiration of the applicable statute of limitations and/or repose; punitive damages claims are unconstitutional; compliance with standards of care; lack of proximate cause; and, contributory negligence and other affirmative defenses.

On 4 March 2014, defendants filed a motion for costs and fees pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 6-20, and N.C. Gen. Stat. § 7A-305(d).

On 24 March 2014, plaintiff filed a "Motion to Amend the Pleadings" pursuant to N.C. Gen. Stat. § 1A-1, Rule 15. Plaintiff sought to amend paragraph 82 of the second complaint which dealt with the Rule 9(j) certification.

A hearing was held on 24 March 2014 in Durham County Superior Court, Judge W. Osmond Smith, presiding. The trial court considered defendants' motion to dismiss plaintiff's second complaint, plaintiff's motion to amend the second complaint, and defendants' motion for costs. On 24 June 2014, the trial court entered an "Order Dismissing Action with Prejudice and Taxing Costs to Plaintiff." The trial court entered the following findings of fact, in pertinent part:

> 3. Plaintiff filed an action against Defendants on October 6, 2011, captioned *Brandie Fintchre v. Duke University, et al.*, No. 11 CVS 5194 (referred to herein as the "First Lawsuit" or the "First Complaint").
>
> 4. The First Lawsuit named as defendants Duke University, Duke University Health Systems, Jane Doe, RN, and Hardee Klitzman, RN.
>
> . . . .
>
> 6. On December 12, 2011, through counsel, all named Defendants answered the First Complaint. The Answer set forth that Plaintiff's healthcare that is the subject of the action was provided by Duke University Health System, Inc. Plaintiff did not name Duke University Health System, Inc. as a Defendant in the First Lawsuit, or attempt to amend to add Duke University Health System Inc. to that Lawsuit.

7. On March 16, 2012, Defendants responded to Plaintiff's Interrogatories, and identified "Jane Doe, RN" as Kimberly Emory, RN, a registered nurse employed by Duke University Hospital. Plaintiff did not move to amend to add Ms. Emory as a defendant or to substitute her for Jane Doe.

. . . .

10. The First Complaint does not allege, as required under Rule 9(j), that a person reasonably expected to qualify as an expert reviewed the medi[c]al records pertaining to the alleged negligence that were available to Plaintiff at the time she filed the First Complaint.

11. On January 3, 2013, Plaintiff Brandie Fintchre filed a voluntary dismissal, without prejudice, of her claims against Duke, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

. . . .

13. On December 20, 2013, Plaintiff refiled the present action (the "Second Lawsuit" or the "Second Complaint").

14. The Second Complaint asserts the same causes of action against the same Defendants as the First Complaint.

15. The Second Complaint does not name Duke University Health System, Inc. or Ms. Emory as Defendants.

16. Plaintiff did not serve Duke University Health System, Inc. or Ms. Emory with the Second Complaint.

. . . .

18. The Second Complaint, like the First Complaint, does not allege that a person reasonably expected to qualify as an expert reviewed the medi[c]al records pertaining to the alleged negligence that were available to Plaintiff at the time she filed the Second Complaint.

. . . .

21. On March 24, 2014, Plaintiff moved to amend the Complaint to change the name of Defendant Duke University Health Systems to Duke University Health System, Inc. in the caption and Summons.

> 22. Plaintiff also moved to amend Paragraph 82 of the Complaint to include a certification that a person expected to qualify as an expert witness had reviewed all medical records pertaining to the alleged negligence that were available to Plaintiff at the time she filed the Complaint.

The trial court concluded that plaintiff's naming of Duke University Health Systems instead of Duke University Health System, Inc. was a misnomer and granted plaintiff's motion to amend the second complaint and summons to name defendant Duke University Health System, Inc. Defendants' motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), insufficiency of process under Rule 12(b)(4), and insufficiency of service of process under Rule 12(b)(5) was denied. The trial court concluded that despite defendants informing plaintiff of defendant Jane Doe's true identity, plaintiff failed to name the correct defendant in both of her suits prior to the lapse of the statute of limitations, in violation of N.C. Gen. Stat. § 1-166, and failed to serve Ms. Emory with either complaint. Plaintiff's claims as to Jane Doe/Emory were dismissed with prejudice pursuant to Rule 12(b)(2) for lack of jurisdiction. The trial court concluded that plaintiff failed to file a complaint containing the required Rule 9(j) certification required within three (3) years of her alleged injuries. Furthermore, the trial court concluded that plaintiff's motion to amend was futile because the statute of limitations has elapsed. Thereby, defendants' motion to dismiss pursuant to Rule 9(j), Rule 12(b)(6), and the applicable statute of limitations was granted. The trial court taxed plaintiff with costs pursuant to Rule 41(d) and N.C. Gen. Stat § 7A-305.

Plaintiff appeals.

II. Discussion

Plaintiff advances three issues on appeal. Plaintiff argues that the trial court erred by (A) denying her motion to amend the second complaint in order that it comply with Rule 9(j) of the North Carolina Rules of Civil Procedure; (B) entering findings of fact and conclusions of law that were not supported by the evidence; and, (C) taxing interest on costs awarded pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure.

A. Rule 9(j)

[1] Plaintiff argues that the trial court erred by denying her motion to amend the second complaint in order that it comply with N.C. Gen. Stat. § 1A-1, Rule 9(j). We disagree.

Motions to amend are governed by N.C. Gen. Stat. § 1A-1, Rule 15. Rule 15(a) provides that:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

N.C.G.S. § 1A-1, Rule 15(a) (2014).

> Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced. . . . [O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

Delta Envtl. Consultants, Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694 (1999) (internal citations omitted).

The North Carolina Rules of Civil Procedure address pleadings in medical malpractice suits and Rule 9(j) mandates as follows:

> Medical malpractice. – Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 *shall be dismissed unless:*
>
> (1) The pleading *specifically asserts* that the medical care and *all medical records pertaining to the alleged negligence* that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert

> witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014) (emphasis added). "We [] review the trial court's ruling on Rule 9(j) compliance *de novo*." *McKoy v. Beasley*, 213 N.C. App. 258, 262, 712 S.E.2d 712, 715 (2011) (citation omitted).

In its 16 June 2014 order, the trial court concluded that plaintiff had "failed to file a complaint containing the required Rule 9(j) certification within three years of the acts that caused her alleged injuries" based on plaintiff's failure to allege that all medical records pertaining to the alleged negligence were reviewed by a person who plaintiff reasonably expected to qualify as an expert witness. The trial court further concluded that plaintiff's motion to amend the 9(j) certification in her second complaint, filed 24 March 2014, was "futile because the statute of limitations elapsed."

On appeal, plaintiff concedes that her "counsel inadvertently failed to expressly state [that] this pre-filing evaluation included a review of 'all medical records pertaining to the alleged negligence.' " Nonetheless, plaintiff argues that although the language of her complaints was deficient, because she complied with the substantive requirements of Rule 9(j) before she filed her first action, filed her first action within the statute of limitations, and filed her second action within one year of taking a voluntary dismissal of her first action, the trial court should have granted her motion to amend the Rule 9(j) certification in her second complaint. Plaintiff's contentions are not convincing.

Plaintiff relies on the holding in *Brisson v. Santoriello*, 351 N.C. 589, 528 S.E.2d 568 (2000), for her argument. First, we note that *Brisson* was "overruled by the Supreme Court in *Bass* [*v. Durham County Hospital Corp.*, 358 N.C. 144, 592 S.E.2d 687 (2004)]." *McKoy*, 213 N.C. App. at 263, 712 S.E.2d at 716. Second, the circumstances in *Brisson* are distinguishable from those found in the case *sub judice*. In *Brisson*, the plaintiffs' first complaint failed to comply with Rule 9(j). *Brisson*, 351 N.C. at 591-92, 528 S.E.2d at 569. The plaintiffs voluntarily dismissed their claims against the defendants pursuant to Rule 41(a)(1)[1] and subsequently filed

1. Rule 41(a)(1) provides that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time." N.C. Gen. Stat. § 1A-1, Rule 41(a) (2014).

a second complaint that included the appropriate Rule 9(j) certification. *Id.* at 592, 528 S.E.2d at 570. The second complaint was filed beyond the applicable three year statute of limitations. The trial court granted the defendants' motion for judgment on the pleadings, stating that the first complaint did not extend the statute of limitations because the first complaint did not comply with Rule 9(j). *Id.* Our Court reversed the trial court and reinstated the plaintiffs' action. *Id.* at 593, 528 S.E.2d at 570. Upon review, the North Carolina Supreme Court stated that the only issue before it was whether the plaintiffs' voluntary dismissal pursuant to Rule 41 effectively extended the statute of limitations by allowing the plaintiffs to refile their complaint against the defendants within one year and concluded that it does. *Id.* The *Brisson* Court stated that the purpose of the one-year extension of Rule 41 was to "provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit." *Id.* at 597, 528 S.E.2d at 573. Unlike in *Brisson*, plaintiff in the present case failed to file a proper Rule 9(j) certification in either of her two complaints. In addition, the issue before our Court is not whether Rule 41 provided a one-year extension from the voluntary dismissal of the first complaint, but whether the trial court should have granted plaintiff's motion to amend the second complaint.

We find our holding in *McKoy v. Beasley*, 213 N.C. App. 258, 712 S.E.2d 712 (2011), to be instructive. In *McKoy*, the plaintiff filed a wrongful death action on 7 April 2007, within two years of the decedent's death on 30 April 2005. *Id.* at 260, 712 S.E.2d at 713. The trial court dismissed the plaintiff's action without prejudice, pursuant to Rule 41(b), for failure to comply with Rule 9(j). Our Court reasoned that the trial court's dismissal pursuant to Rule 41(b) was the functional equivalent of the plaintiff taking a voluntary dismissal under Rule 41(a)(1) for purposes of the analysis. *Id.* at 263, 712 S.E.2d at 716. The plaintiff then filed the second action on 20 December 2007 and an amended action on 20 March 2009. *Id.* at 260, 712 S.E.2d at 714. Our Court stated that because the second action was filed more than two years following the decedent's death, the plaintiff must rely on the 7 April 2007 action in order to have timely filed her action for wrongful death. *Id.* at 263, 712 S.E.2d at 715. "Since the original complaint, that was filed within the two year limitations period was defective, the subsequent complaint must be dismissed." *Id.* Our Court relied on the case of *Bass v. Durham Cty. Hosp. Corp.*, 158 N.C. App. 217, 580 S.E.2d 738 (2003), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 144, 592 S.E.2d 687 (2004), which held as follows:

> A Rule 41(a) voluntary dismissal would salvage the action and provide another year for re-filing had plaintiff filed a

> complaint complying with Rule 9(j) before the limitations period expired. Plaintiff's complaint was untimely filed beyond the expiration of the applicable statute of limitations and the Rule 9(j) extension.

Id. at 263, 712 S.E.2d at 716 (citation omitted). Accordingly, our Court held that "the defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations." *Id.*

In the present case, the alleged medical malpractice occurred in October 2008 and April 2010. The first complaint was filed on 6 October 2011, within the three year statute of limitations[2]. Plaintiff subsequently filed a voluntary dismissal without prejudice on 3 January 2013 pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. The second complaint was filed on 20 December 2013. Both the first and second complaints included the following language in its 9(j) certification:

> Pursuant to North Carolina General Statute Section 1A-1, Rule 9(j), the medical care provided to Plaintiff was reviewed by persons who Plaintiff reasonably expects to qualify as expert witnesses under N.C. R. Evid. 702 who are willing to testify that the medical care at issue in this action failed to comply with the standard of care.

Both complaints failed to allege that a person reasonably expected to qualify as an expert had reviewed all available medical records pertaining to the alleged negligence. Because the second complaint was filed following the expiration of the statute of limitations, plaintiff must rely on the first complaint in order to have timely filed her medical malpractice action. We hold that where plaintiff failed to file a complaint including a valid Rule 9(j) certification within the statute of limitations, granting plaintiff's motion to amend her second complaint would have been futile, as the trial court found. Therefore, we affirm the order of the trial court, granting defendants' motion to dismiss pursuant to Rule 9(j).

B. Findings of Fact and Conclusions of Law

[2] In her second argument on appeal, plaintiff asserts that the trial court erred by entering findings of fact and conclusions of law that were unnecessary and not supported by the evidence.

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2. *See* N.C. Gen. Stat. § 1-15 (2014).

"The standard of review for this Court is whether the findings of fact by the trial court are supported by competent evidence in the record[.]" *Embark, LLC v. 1105 Media, Inc.*, ___ N.C. App.___, ___, 753 S.E.2d 166, 170 (2014) (citation and quotation marks omitted). Findings of fact are conclusive on appeal if supported by competent evidence, "even though the evidence might sustain a finding to the contrary." *In re Foreclosure of a Deed of Trust Executed by Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation omitted). "A trial court's unchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal." *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012) (citation and internal quotation marks omitted). Conclusions of law are reviewable *de novo*. *Ge Betz, Inc. v. Conrad*, __ N.C. App. __, __, 752 S.E.2d 634, 645 (2013).

In the present case, plaintiff named "Duke University Health Systems" as a defendant in the caption of both complaints. Plaintiff then identified "Duke University Health Systems, Inc." in the body of both complaints. The trial court held that "Duke University Health Systems" was not an existing entity and that "Duke University Health System, Inc." was the entity that supervised plaintiff's healthcare. The trial court concluded that plaintiff's naming of Duke University Health Systems instead of Duke University Health System, Inc. in both her first and second complaints was a misnomer and granted plaintiff's motion to amend the second complaint and summons to name Duke University Health System, Inc. in place of Duke University Health Systems. Plaintiff does not challenge the aforementioned conclusions.

Instead, plaintiff challenges the following findings of fact:

> 4. The First Lawsuit named as defendants Duke University, Duke University Health Systems, Jane Doe, RN, and Hardee Klitzman, RN.
>
> . . . .
>
> 6. On December 12, 2011, through counsel, all named Defendants answered the First Complaint. The Answer set forth that Plaintiff's healthcare that is the subject of the action was provided by Duke University Health System, Inc. Plaintiff did not name Duke University Health System, Inc. as a Defendant in the First Lawsuit, or attempt to amend to add Duke University Health System, Inc. to that Lawsuit.
>
> . . . .

> 15. The Second Complaint does not name Duke University Health System, Inc. or Ms. Emory as Defendants.

Plaintiff also challenges the following conclusion of law:

> 3. Neither the First Complaint nor the Second Complaint names Duke University Health System Inc. as a defendant.

After thorough review, we hold that findings of fact numbers 4, 6, and 15 are supported by competent evidence in the record. The caption of the first complaint named Duke University, Duke University Health Systems, Jane Doe, RN, and Hardee Klitzman, R.N. as defendants. In its 14 December 2011 "Answer and Defenses," defendants stated that plaintiff's healthcare that is the subject of the action was provided by Duke University Health System, Inc. In addition, the record indicates that plaintiff did not name Duke University Health System, Inc. as a defendant in either complaint and that plaintiff did not attempt to amend the first complaint in order to add Duke University Health System, Inc. as a defendant. Based on the foregoing findings of fact, the trial court did not err by concluding that plaintiff failed to name Duke University Health System, Inc. as a defendant.

C. Interest on Costs

[3] In her last argument, plaintiff contends that the trial court erred by awarding interest on costs incurred by defendants in the first action. We agree.

In the 24 June 2014 order, the trial court ordered the following:

> 6. The Motion by all Defendants to tax to Plaintiff the costs arising from 11 CVS 5194 [(the first complaint)] allowed by N.C. Gen. Stat. § 7A-305 and Rule 41(d) is GRANTED. Defendants shall have and recover the amount of $1,388.80 from Plaintiff Brandie Fintchre plus interest at the maximum legal rate after entry of this Order. This Order shall be entered as a Judgment against Plaintiff Brandie Fintchre in the records of the Durham County Clerk of Court in the amount of $1,388.80.

N.C. Gen. Stat. § 1A-1, Rule 41(d) (2014) provides that:

> A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same

> claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

"[I]t is the general rule that interest on costs properly assessed may not be allowed without statutory authority." *Charlotte v. McNeely*, 281 N.C. 684, 696, 190 S.E.2d 179, 188 (1972) (citation omitted). Because N.C. Gen. Stat. § 1A-1, Rule 41(d) does not allow the trial court to award interest on costs assessed, we reverse and remand the portion of the 24 June 2014 order awarding "interest at the maximum legal rate" pursuant to Rule 41(d).

III. Conclusion

We affirm the 24 June 2014 order of the trial court, denying plaintiff's motion to amend the second complaint in order that it comply with Rule 9(j), and entering findings of fact numbers 4, 6, 15, and conclusion of law number 3. We reverse and remand the portion of the order awarding interests on costs pursuant to Rule 41(d).

Affirmed in part; Reversed and remanded in part.

Judge STEELMAN concurs.

Judge STEPHENS concurs by a separate written opinion.

STEPHENS, Judge, concurring.

I agree with the holding of the majority opinion that the mandatory language of Rule 9(j) requires the result we reach here. However, I write separately to distinguish the reasoning underlying that result from the circumstances presented in the cases cited in the majority opinion and also to draw our General Assembly's attention to the possibly unforeseen and certainly harsh consequence of the result this language in Rule 9(j) requires us to reach.

Rule 9(j) provides, *inter alia:*

> Any complaint alleging medical malpractice by a health care provider . . . shall be dismissed unless . . . [t]he

> pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2013). The intent of Rule 9(j) is to prevent the filing of entirely frivolous medical malpractice claims. *See* 1995 N.C. Sess. Laws ch. 309 ("Act To Prevent Frivolous Medical Malpractice Actions By . . . Requiring Expert Witness Review As A Condition Of Filing A Medical Malpractice Action"). This intent is plainly accomplished by the *act* of having a would-be plaintiff's relevant medical care and records *reviewed* by a medical expert prior to the filing of a medical malpractice action. The rule's further requirement that the complaint must specifically assert that this act has occurred serves to put a defendant on notice of the plaintiff's compliance therewith.

Nothing in the records on appeal in *Bass* and *McKoy* suggests that those plaintiffs actually had their medical care and records reviewed by a medical expert before they filed their medical malpractice complaints. In addition, those plaintiffs' initial complaints lacked any assertion that would have given the defendants any notice of the plaintiffs' compliance with the review required under Rule 9(j). Here, in contrast, it is undisputed that plaintiff complied with the requirement that her medical care and records be reviewed by a medical expert before her first complaint was filed and that defendants had notice of that fact. Thus, the *intent* of Rule 9(j), to wit, requiring expert review of medical malpractice claims to prevent frivolous lawsuits, was plainly met before plaintiff filed her first complaint. The obvious failure of plaintiff's trial counsel to word the Rule 9(j) certification of compliance as specified in the statute is a highly technical failure which here results in the dismissal of a medical malpractice case which is *not* frivolous for the reasons Rule 9(j) is designed to prevent. I am thus sympathetic with the position of plaintiff, who is thereby denied any opportunity to prove her claims before a finder of fact. I question whether such a harsh and pointless outcome was intended by our General Assembly in enacting Rule 9(j).

On the other hand, it is also undisputed that plaintiff's trial attorneys were alerted to the flawed wording of the purported Rule 9(j) certification in the first complaint and yet, following the voluntary dismissal without prejudice of the first complaint, *included the identical flawed language in the second complaint*. As noted *supra*, plaintiff's trial

counsel took the time and effort to have a medical expert review plaintiff's medical care *and medical records* before filing a medical malpractice action, and alleged that plaintiff's medical care had been reviewed by a medical expert, yet, inexplicably, failed to allege that "all medical records pertaining to the alleged negligence" had also been reviewed by the expert so as to make a proper Rule 9(j) certification. In light of plaintiff's trial attorneys' failure to comply with the statutory mandate for properly pleading a medical malpractice action, especially after being informed of the deficiency in the first Rule 9(j) certification, I certainly can find no abuse of discretion in the trial court's denial of plaintiff's motion to amend her second complaint.

In sum, despite the thoughtful distinctions between the facts of this case and the facts of *Bass* and *McKoy* drawn by plaintiff's appellate counsel, I am compelled to concur in the majority's affirmance of the 24 June 2014 order.

IN THE MATTER OF THE FORECLOSURE BY ROGERS TOWNSEND & THOMAS, PC, SUBSTITUTE TRUSTEE, OF A DEED OF TRUST EXECUTED BY JULIA WESKETT BEASLEY, DATED FEBRUARY 12, 2007 AND RECORDED ON FEBRUARY 16, 2007 IN BOOK NO. 1211 AT PAGE 169 OF THE CARTERET COUNTY REGISTRY, NORTH CAROLINA

SUBSTITUTE TRUSTEES:
ROGERS TOWNSEND & THOMAS, PC

No. COA14-387

Filed 2 June 2015

1. Mortgages and Deeds of Trust—foreclosure—power of sale—special proceeding

Rule 41 of the North Carolina Rules of Civil Procedure applied to non-judicial foreclosures. A foreclosure under power of sale is a type of special proceeding to which the Rules of Civil Procedure apply.

2. Civil Procedure—Rule 41 dismissal—statute of limitations

Orders to dismiss entered after a second voluntary dismissal in a foreclosure action were void. Rule 41 of the North Carolina Rules of Civil Procedure permits an additional year to refile until the expiration of the ten-year statute of limitations for a foreclosure action. Petitioners' actions were timely filed and the effect of the second voluntary dismissal was such that any subsequent orders were without legal effect.

3. Civil Procedure—Rule 41—statute of limitations

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) provides that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim. This provision is commonly referred to as the "two dismissal" rule, but Rule 41 itself does not bar a subsequent action. It is the doctrine of res judicata that bars subsequent actions based on the same claim or claims.

4. Mortgages and Deeds of Trust—foreclosure—two voluntary dismissals—res judicata—equity

In a foreclosure where petitioners had twice taken voluntary dismissals, and the issue arose as to whether the Superior Court had jurisdiction to dismiss the action, the dispositive issue was whether each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constituted a separate default, or period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involved claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule in Rule 41(a). While the issue had not been addressed in N.C., there was persuasive reasoning from Florida. The two dismissal rule is based on res judicata, but the unique nature of the mortgage obligations and the continuing relationship of the parties as well as equity required that res judicata not be applied so strictly as to prevent lenders from being able to challenge multiple defaults.

5. Mortgages and Deeds of Trust—foreclosure—two voluntary dismissals—res judicata not a bar—different acts of default

In a foreclosure action with two voluntary dismissals, the two dismissal rule of Rule 41(a) did not apply and res judicata did not bar a third power of sale foreclosure action. The claims of default and the particular facts at issue in each action differed, and, as a result of the voluntary dismissals, the claims of acceleration and the alleged acts of default were never adjudicated on their merits. Furthermore, the lender had not lost its right to enforce the note and deed of trust merely because its previous two foreclosure actions were dismissed without prejudice.

Appeal by petitioners from order entered 25 September 2013 by Judge Phyllis M. Gorham in Carteret County Superior Court. Heard in the Court of Appeals 24 September 2014.

Nelson Mullins Riley & Scarborough, LLP, by Joseph S. Dowdy, Donald R. Pocock, and D. Martin Warf; and Rogers Townsend & Thomas, PC, by Renner Jo St. John, for petitioner-appellants.

Shipman & Wright, LLP, by Gregory M. Katzman, for respondent-appellee.

CALABRIA, Judge.

FV-I, Inc. ("FV-I"), in trust for Morgan Stanley Mortgage Capital Holdings, LLC ("Morgan Stanley"), and substitute trustee Rogers Townsend & Thomas, PC ("RTT") (collectively with Morgan Stanley and FV-I, "petitioners"), appeal from an order granting Julia Weskett Beasley's ("Mrs. Beasley") motion to dismiss, with prejudice, FV-I's foreclosure proceeding against her. We reverse.

On 12 February 2007, Mrs. Beasley executed a promissory note ("the note") in favor of Equity Services, Inc. in the original principal amount of one million dollars ($1,000,000). The purpose of the note was to finance the purchase of 109 Knollwood Drive located in the Pine Knoll Shores subdivision of Atlantic Beach, North Carolina ("the property"). The note was secured by a Deed of Trust recorded on 16 February 2007 in Book 1211 at Page 169 in the Carteret County Public Registry ("the deed of trust").

On 15 June 2011, Philip A. Glass ("Mr. Glass"), acting as substitute trustee for FV-I, the holder of the note, filed a Notice of Foreclosure Hearing ("first notice") alleging that Mrs. Beasley had defaulted for failing to make timely payments on the note. According to the first notice, FV-I intended to accelerate payment of the entire amount due on the note and deed of trust; however, Mrs. Beasley could cure the default and prevent the foreclosure by paying the past due indebtedness plus attorneys' fees and actual costs incurred if FV-I agreed to let her do so. On 17 January 2012, Mr. Glass filed a notice of voluntary dismissal in the foreclosure proceedings.

On 4 April 2013, RTT, a new substitute trustee, filed a second Notice of Foreclosure Hearing ("second notice") alleging that Mrs. Beasley was still in default on the note and stating that FV-I had accelerated the maturity of the debt. The second notice also stated Mrs. Beasley could cure her default and reinstate the loan obligation if the deed of trust provided her such a right. Mrs. Beasley's total debt of $1,208,025.18 included the amount of principal and interest $1,151,427.01 plus the amount of other

fees, expenses, or disbursements. On 26 April 2013, Mrs. Beasley filed a motion to dismiss, alleging, *inter alia*, that RTT failed to refile the action within one year in accordance with Rule 41(a) of the North Carolina Rules of Civil Procedure ("Rule 41").

On 10 July 2013, the day before the scheduled foreclosure hearing, RTT filed a second voluntary dismissal without prejudice. On 11 July 2013, the matter was heard before the Carteret County Clerk of Court ("the Clerk of Court"). The Clerk of Court subsequently entered a 16 July 2013 order which found, *inter alia*, that the second voluntary dismissal operated as an adjudication on the merits of the case pursuant to Rule 41(a). As a result, the Clerk granted Mrs. Beasley's motion to dismiss with prejudice.

Petitioners appealed to Superior Court. After conducting a hearing *de novo*, the Superior Court found that, because the new foreclosure by power of sale action was filed more than one year after the first voluntary dismissal, Rule 41(a) barred the claim. The Superior Court also concluded that the second voluntary dismissal operated as an adjudication on the merits pursuant to Rule 41(a). The court then struck the notice of voluntary dismissal and granted Mrs. Beasley's motion to dismiss the action with prejudice. Petitioners appeal.

On appeal, petitioners argue (1) that the Superior Court erred because it lacked jurisdiction to dismiss the matter, and (2) that the Superior Court's order was erroneous to the extent that it precluded further appropriate foreclosure proceedings.

[1] As an initial matter, we address petitioners' contention that nonjudicial foreclosures are not subject to Rule 41. This Court has previously held that "[a] foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply." *Lifestore Bank v. Mingo Tribal Pres. Trust*, ___ N.C. App. ___, ___, 763 S.E.2d 6, 9 (2014), *disc. review denied*, No. 406P14, 2015 WL 1809347 (N.C. Apr. 9, 2015). Therefore, Rule 41 applies in the instant case.

[2] Petitioners next argue that the Superior Court erred because it lacked jurisdiction and misapplied the law. Specifically, petitioners contend that because they filed a notice of dismissal on 10 July 2013, both the Clerk of Court and the Superior Court lacked jurisdiction to grant Mrs. Beasley's motion to dismiss. Petitioners also argue that even if the Superior Court had jurisdiction to enter the dismissal order, the court's conclusion that petitioners' second voluntary dismissal operated as an adjudication on the merits was erroneous to the extent that it prevents them from bringing a third foreclosure action. We agree.

Our standard of review regarding whether the Superior Court had subject matter jurisdiction to decide the matter is *de novo*. *In re Foreclosure of Young*, ___ N.C. App. ___, ___, 744 S.E.2d 476, 479 (2013).

In this instance, a proper examination of both Rule 41(a) and the relevant Statute of Limitations is necessary to determine whether petitioners were required to file their second foreclosure by power of sale action within one year after dismissing the first action.

Rule 41(a) "permits a plaintiff to dismiss, without prejudice, any claim without an order of the court by filing a notice of dismissal at any time before resting his case, and to file a new action based upon the same claim within one year after the dismissal." *Richardson v. McCracken Enters.*, 126 N.C. App. 506, 508, 485 S.E.2d 844, 845 (1997). With respect to Rule 41(a), the additional year to refile is often known as the "savings provision." The extra time granted

> is an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. In other words, a party *always* has the time limit prescribed by the general statute of limitation and in *addition thereto* they get the one year provided in Rule 41(a)(1). But Rule 41(a)(1) shall not be used to limit the time to one year if the general statute of limitation has not expired.

Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 356, 198 S.E.2d 741, 743 (1973) (emphasis added). Accordingly, petitioners could refile their action at any time until the expiration of the applicable statute of limitations. N.C. Gen. Stat. § 1–47 (2013) sets a ten-year statute of limitations during which time a foreclosure action may be commenced. Since the note and deed of trust at issue came into existence in 2007, petitioners' actions were timely filed, and the effect of the second voluntary dismissal was such that any subsequent orders entered by the Clerk or by the Superior Court were without legal effect. *See Carter v. Clowers*, 102 N.C. App. 247, 252, 401 S.E.2d 662, 664 (1991) ("After the dismissal, there is no longer a pending action, and therefore no further proceedings are proper.") (citations omitted); *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970) ("When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, [i].e., as if it had never happened.") (citations omitted).

[3] Even though the orders entered after petitioners' second voluntary dismissal were void, we still must determine the effect of that dismissal. Rule 41(a) provides that "a notice of dismissal operates as an

adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). This provision is commonly referred to as the "two dismissal" rule[1]. According to Rule 41(a)'s two dismissal rule, "a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action . . . operate[s] as an adjudication on the merits and bar[s] a third action based upon the same set of facts." *Richardson*, 126 N.C. App. at 509, 485 S.E.2d at 846. In order to determine whether a second action was based upon the same transaction or occurrence as a first action, we examine whether the claims in both actions were "based upon the same core of operative facts" and whether "all of the claims could have been asserted in the same cause of action." *Id.* at 509, 485 S.E.2d at 846–47.

[4] Here, petitioners twice voluntarily dismissed foreclosure by power of sale actions against Mrs. Beasley and they filed both notices of dismissal prior to resting their case. In addition, FV-I sought to accelerate Mrs. Beasley's debt in both actions. Therefore, we must decide whether FV-I's decision to accelerate the debt placed the entire balance of the note at issue and eliminated any factual distinctions between the two actions. If it did, the second action was based upon the same transaction or occurrence as the first one, and Rule 41 as well as the principles of res judicata will bar petitioners from bringing a third foreclosure by power of sale action on the same note. The dispositive issue, as we see it, is whether or not each failure to make a payment by a borrower under the terms of a promissory note and deed of trust constitutes a separate default, or separate period of default, such that any successive acceleration and foreclosure actions on the same note and deed of trust involve claims based upon different transactions or occurrences, thus exempting them from the two dismissal rule contained in Rule 41(a). Neither this Court nor our Supreme Court have addressed this precise issue, but relevant case law exists to resolve it in this case.

Recently, in *Lifestore Bank*, this Court considered the application of Rule 41(a)'s two dismissal rule in the context of foreclosure actions. There, after the borrowers defaulted on two promissory notes, the lender filed two actions for foreclosure by power of sale. *Lifestore Bank*, ___ N.C. App. at ___, 763 S.E.2d at 8. In each action, the lender twice entered voluntary dismissals. *Id.* However, the lender filed a third

1. In construing Rule 41(a), we note that when the two dismissal rule applies and the dismissal of a second action operates as an adjudication on the merits, it is the doctrine of res judicata that bars subsequent actions based on the same claim or claims. Thus, Rule 41 itself does not bar a subsequent action.

action seeking money judgments on both notes and judicial foreclosure on both of deeds of trust that secured them. *Id.* On appeal, the pertinent issue was whether Rule 41 barred the lender's claims for money judgments and judicial foreclosure. *Id.* at ___, 763 S.E.2d at 9. This Court held that, because an action for foreclosure by power of sale is a special proceeding, limited in jurisdiction and scope, the lender's money judgment and judicial foreclosure claims—though based upon the same core of operative facts—could not have been brought in the previously dismissed actions and, thus, were not barred by Rule 41(a)'s two dismissal rule. *Id.* at ___, 763 S.E.2d at 11–13. In reaching its conclusion, the *Lifestore Bank* Court anticipated that Rule 41(a) would have barred any subsequent action by the lender for foreclosure by power of sale:

> [The lender] pursued two foreclosures by power of sale under N.C.G.S. § 45–21.16(a). . . . [The lender] subsequently took voluntary dismissals of each foreclosure by power of sale action. As such, the "two dismissal rule" of Rule 41 applies here for, by taking two sets of voluntary dismissals as to its claims for foreclosure by power of sale, the second set of voluntary dismissals is an adjudication on the merits which bars [the lender] from undertaking a third foreclosure by power of sale action pursuant to N.C.G.S. § 45–21.16(a).
>
> However, in the instant matter [the lender] has now filed a complaint seeking, in addition to money judgments, judicial foreclosure against [the borrowers].

Id. at ___, 763 S.E.2d at 12.

While the Court did not squarely address the issue presented in this case, the language quoted above suggests that successive foreclosure by power of sale actions on the same notes generally involve the same facts and, thus, constitute the same claims for purposes of the two dismissal rule analysis. Nevertheless, we find that *Lifestore Bank* is easily distinguished from the instant case. Indeed, the *Lifestore Bank* Court did not reveal the alleged dates or periods of default relevant to the lenders' foreclosure by sale actions, and there was no mention that the debts were accelerated. Nor did the Court address the question whether each failure to make a payment by a borrower under the terms of a note secured by a deed of trust constitutes a separate default. As noted above, there are no North Carolina appellate decisions that have directly answered this question, but the Supreme Court of Florida has, and we find that Court's reasoning persuasive.

In *Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1005 (Fla. 2004), the lender filed a foreclosure action alleging default based on the borrower's failure to make payments due from September 1999 through February 2000, which was dismissed with prejudice. The lender then filed a subsequent foreclosure action alleging default of mortgage payments from April 2000, onward. *Id.* at 1005. Both foreclosure actions sought to accelerate the entire indebtedness against the borrowers. *Id.*, n.1. The trial court rejected the borrower's argument that the prior dismissal barred relief in the second action and granted summary judgment in favor of the lender. *Id.* at 1005. On appeal, Florida's Fourth District Court of Appeals agreed and held that "[e]ven though an earlier foreclosure action filed by [the lender] was dismissed with prejudice, the application of res judicata does not bar this lawsuit. . . . The second action involved a new and different breach." *Singleton v. Greymar Assocs.*, 840 So.2d 356, 356 (Fla. Dist. Ct. App. 2003). Florida's Supreme Court granted the lender's petition for review, *Singleton*, 882 So.2d at 1006, as the holding conflicted with the decision of Florida's Second Circuit Court of Appeals in *Stadler v. Cherry Hill Developers, Inc.*, 150 So.2d 468 (Fla. Dist. Ct. App. 1963) (holding that res judicata barred a second foreclosure action that was identical to the first action other than the period of defaults alleged were different—the acceleration of payments in the first action put the entire balance of the loan at issue at that time and, thus, the second action was identical to the first).

Florida's Supreme Court rejected *Stadler*'s "stricter and more technical view of mortgage acceleration elections" and agreed with the Fourth District Court "that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata." *Singleton*, 882 So.2d at 1006. In reaching this conclusion, the *Singleton* Court reasoned as follows:

> While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue. . . . For example, a [borrower] may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the [lender] had waived reliance on the defaults. In those instances, the [borrower] and [lender] are simply placed back in the same contractual relationship with the same continuing

> obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the [borrower] ignores her obligations on the mortgage and a valid default can be proven.
>
> This seeming variance from the traditional law of res judicata rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. . . .
>
> We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent [lenders] from being able to challenge multiple defaults on a mortgage. . . .
>
> We conclude that the doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the [lender] sought to accelerate payments on the note in the first suit.

Id. at 1007-08 (emphasis added). In the Court's view, "the subsequent and separate alleged default created a new and independent right in the [lender] to accelerate payment on the note in a subsequent foreclosure action." *Id.* at 1008.

We recognize that this view of foreclosure actions involving acceleration on a note is not universal. *See U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St. 3d 399, 405, 899 N.E.2d 987, 992 (2008) (holding that each missed payment under a promissory note and mortgage did not give rise to a new claim because "[o]nce [the borrower] defaulted and [the lender] invoked the acceleration clause of the note, the . . . obligations to pay each installment merged into one obligation to pay the entire balance on the note"). Even so, *Singleton*'s pronouncement that an "acceleration and foreclosure [action] predicated upon subsequent and different defaults present[s] a separate and distinct" claim expresses the better reasoned view. 882 So. 2d at 1007. As the *Singleton* Court stated,

> [i]f res judicata prevented a [lender] from acting on a subsequent default even after an earlier claimed default could not be established, the [borrower] would have no incentive to make future timely payments on the note.

> The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the [lender] was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

Id. at 1007–08. Other state and federal courts have recognized these concerns and reached similar conclusions after examining *Singleton*. *See*, *e.g.*, *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006) ("res judicata does not bar successive foreclosure claims. . . . Here, the subsequent and separate alleged defaults under the note created a new and independent right in the [lender] to accelerate payment on the note in a subsequent foreclosure action."); *Fairbank's Capital Corp. v. Milligan*, 234 F. App'x 21, 24 (3d Cir. 2007) ("stipulated dismissal with prejudice . . . cannot bar a subsequent mortgage foreclosure action based on defaults occurring after dismissal of the first action. . . . If we were to so hold, it would encourage a delinquent [borrower] to come to a settlement with a [lender] on a default in order to later insulate the [borrower] from the consequences of a subsequent default. This is plainly nonsensical."). Moreover, several of this Court's decisions support the proposition that we adopt in this case: that a lender's election to accelerate payment on a note and foreclose on a deed of trust does not necessarily place future payments at issue such that the lender is barred from filing subsequent foreclosure actions based upon subsequent defaults, or periods of default, on the same note.

"Where payments arising from [an installment] contract are at issue, this Court has [acknowledged] that more than one claim may arise from a single contract and that a dismissal with prejudice of a suit based on a default with respect to some payments does not bar future claims with respect to subsequent payments." *Centura Bank v. Winters*, 159 N.C. App. 456, 459, 583 S.E.2d 723, 725 (2003) (citing *Shaw v. Lanotte, Inc.*, 92 N.C. App. 198, 202, 373 S.E.2d 882, 884–85 (1988)).

In *Shaw*, this Court held that res judicata was not applicable where the first action—which was dismissed with prejudice—sought to determine the issue of default on three particular payments under an asset purchase agreement and the second action was for the total amount due. 92 N.C. App. at 202–03, 373 S.E.2d at 884–85. Significantly, the *Shaw* Court reached this conclusion even though the lender sought to accelerate the entire debt in the first action. *Id.* at 199, 373 S.E.2d at 883. In addressing the lender's attempt at acceleration, the Court noted that

the issue in the first action "was whether [the borrower] was in default for three particular installment payments." *Id.* at 202, 373 S.E.2d at 884. Thus, because "the issue involved in the prior action was not whether [the borrower] had defaulted on the entire amount due under the agreement but whether he had defaulted on three particular payments, acceleration of the entire debt was never an issue in the first [action]. *Id.* at 202, 373 S.E.2d at 884–85. In other words, the order of dismissal with prejudice in the first action served to adjudicate, in favor of the borrower, the merits of the lender's claim and to determine that there was neither a default nor an effective acceleration of the debt.

[5] In the instant case, FV-I filed voluntary dismissals in two foreclosure by power of sale actions and, as a result, its claims of acceleration and Mrs. Beasley's alleged acts of default have never been adjudicated on their merits. Nonetheless, as with the first action in *Shaw*, the acceleration issue in this case has yet to materialize. This is especially true here given that "a foreclosure by power of sale is a type of special proceeding . . . in which the clerk of court determines whether a foreclosure pursuant to a power of sale [and, by extension, an acceleration of the debt,] should be granted[.]" *Lifestore Bank*, ___ N.C App. at ___, 763 S.E.2d at 10. Further, under the "new and independent right" reasoning in *Singleton*, FV-I has not lost its right to enforce the note and deed of trust merely because its previous two foreclosure actions, in which acceleration was invoked, were dismissed without prejudice.

In *Winters*, after citing *Shaw*, this Court held that Rule 41(a)'s two dismissal rule did not bar an automobile lessor from bringing a third action against a lessor for the balance due on a lease, even where the two previous suits also sought to collect the entire balance due on the lease at the time the complaints were filed. 159 N.C. App. at 459–60, 583 S.E.2d at 725. The *Winters* Court explained its conclusion as follows:

> Each lawsuit in the present case was based on a default with respect to a separate set of payments. Plaintiff's first civil action alleged defendants were in default for approximately four rental payments totaling $3,714.51. The complaint sought judgment in the amount of $13,572.00. Plaintiff then voluntarily dismissed the complaint after defendants agreed to cure the default by paying plaintiff $3,050.00 towards the arrearage. . . . Subsequently, defendants defaulted again on the lease after which plaintiff filed a second action that sought a judgment in the amount of $35,513.49. Although plaintiff's prior lawsuits arose from

> breaches of the same lease agreement, both suits were based on separate defaults. Thus, the prior suits involved claims which were based upon different transactions.

Id.

Similarly here, each foreclosure action was based on different periods of missed payments constituting separate defaults. In both the first and second actions, FV-I sought foreclosure by power of sale and acceleration of the balance due on the note secured by the deed of trust. While neither the first nor the second notice alleged a particular date of default, the record indicates that the due date of the last scheduled payment made by Mrs. Beasley was 1 July 2009, and there is no evidence that she made any payments after that date. An issue pertinent to both actions, therefore, was whether Mrs. Beasley defaulted on 1 July 2009 or any time thereafter. Because the facts at issue in each foreclosure action differed, the possible dates of default also differed.

The first foreclosure action was voluntarily dismissed on 17 January 2012, and the issue in that action was whether Mrs. Beasley defaulted between 1 July 2009 and January of 2012. By contrast, the second foreclosure action was voluntarily dismissed on 10 July 2013. Consequently, the issue in that action was whether Mrs. Beasley defaulted between July of 2009 and July of 2013. When compared side by side, the facts necessary to establish a default in the first foreclosure action differ from those necessary to establish a default in the second foreclosure action, i.e., these facts present separate and subsequent periods of alleged default.

In construing Rule 41(a)'s two dismissal rule, "[o]ur courts have required the strictest factual identity between the original claim, and the new action, which must be based upon the same claim . . . as the original action." *Brannock v. Brannock*, 135 N.C. App. 635, 639–40, 523 S.E.2d 110, 113 (1999) (citations omitted) (internal quotation marks omitted). Therefore, Rule 41(a) applies when there is an identity of claims, the determination of which depends upon a comparison of the operative facts constituting the underlying transaction or occurrence. If the same operative facts serve as the basis for maintaining the same defaults in two successive foreclosure actions, and the relief sought in each is based on the same evidence, the voluntary dismissal of those actions under Rule 41(a) bars the filing of a third such action.

We find no strict factual identity between the two foreclosure by sale actions filed in this case. FV-I's second action was not simply a continuation of its original action and it was not an attempt to relitigate the same alleged default. Certainly, in both foreclosure actions, the Clerk

of Court would have to determine whether FV-I could establish that a default occurred between July 2009 and January 2012. But in the second foreclosure action, the Clerk would also have had to determine whether Mrs. Beasley defaulted between January 2012 and July 2013—this is a claim that FV-I could not have brought in the first foreclosure action. Consequently, the operative facts and transactions necessary to the disposition of both actions gave rise to separate and distinct claims of default, and some of the particular default claims relevant to the second action could not have been brought in the first one. As the claims of default and particular facts at issue in each action differed, Rule 41(a)'s two dismissal rule does not apply. Accordingly, petitioners' second voluntary dismissal did not operate as an adjudication on the merits and the principles of res judicata do not bar a third power of sale foreclosure action.

In conclusion, petitioners filed a voluntary dismissal prior to the hearing on FV-I's second foreclosure action; thus, both the Clerk of Court and the Superior Court lacked jurisdiction to enter orders in the matter. Furthermore, since petitioners filed successive foreclosure by power of sale actions based upon different claims of default, Rule 41(a) does not bar them from filing a third such action. The trial court's order granting Mrs. Beasley's motion to dismiss is therefore reversed. Because we reverse the trial court's order on the bases of lack of jurisdiction and its misapplication of Rule 41(a)'s two dismissal rule, we need not address petitioners' remaining arguments.

Reversed.

Judges STEELMAN and McCULLOUGH concur.

IN RE FORECLOSURE OF GARVEY

[241 N.C. App. 260 (2015)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY MICHAEL JAMES GARVEY AND JANE HOLZER GODBREY A/K/A EMILY J. HOLZER A/K/A JANE HOLZER AND JACQUELINE HOLZER DATED MARCH 9, 2004, AND RECORDED ON APRIL 14, 2004, IN BOOK 311 AT PAGE 347, ASHE COUNTY REGISTRY; SUBSTITUTE TRUSTEE SERVICES, INC., SUBSTITUTE TRUSTEE

No. COA14-570

Filed 2 June 2015

Mortgages and Deeds of Trust—foreclosure—N.C.G.S. § 45-21.16(d) criteria—insufficient findings of fact

In its order allowing petitioner's foreclosure on certain real property to proceed, the superior court failed to make sufficient findings of fact pursuant to Rule of Civil Procedure 52(a)(1) regarding whether the six criteria of N.C.G.S. § 45-21.16(d) had been satisfied. The case was reversed and remanded with instructions to conduct a de novo hearing followed by entry of an order setting out specific findings of fact on the N.C.G.S. § 45-21.16(d) criteria.

Appeal by respondent from order entered 12 August 2013 by Judge Richard L. Doughton in Ashe County Superior Court. Heard in the Court of Appeals 6 November 2014.

Hutchens, Senter, Kellam & Pettit, P.A., by Lacey M. Moore, for petitioner- appellee.

Katherine S. Parker-Lowe for respondent-appellant.

GEER, Judge.

Respondent Michael J. Garvey appeals from an order allowing petitioner, Substitute Trustee Services, Inc., to proceed with foreclosure on certain real property that Mr. Garvey owned. On appeal, Mr. Garvey primarily argues that the superior court failed to conduct a de novo hearing as required by N.C. Gen. Stat. § 45-21.16(d1) (2013) and failed to make specific findings of ultimate fact and conclusions of law as required by Rule 52(a)(1) of the Rules of Civil Procedure. We agree that the superior court's order lacked sufficient findings of fact to comply with Rule 52(a)(1). Moreover, we cannot determine from the order or the transcript whether the superior court conducted a de novo hearing as required by statute, as opposed to essentially engaging in an appellate review of the order of the clerk of superior court. We, therefore, reverse and remand for a de novo hearing and entry of an order compliant with Rule 52(a)(1).

Facts

On 9 March 2004, Mr. Garvey executed a mortgage with Quicken Loans Inc. in the amount of $80,700.00. The mortgage included an Adjustable Rate Note ("ARN"), a Second Home Rider, and an Adjustable Rate Rider. The mortgage was secured with property in West Jefferson, North Carolina by a deed of trust executed by Mr. Garvey, Jane Holzer Godbrey, and Jaqueline Holzer.

The ARN was endorsed by Quicken Loans to Countrywide Document Custody Services, then by Countrywide Document Custody Services to Countrywide Home Loans Inc., and then by Countrywide Home Loans in blank. At some point, Countrywide Home Loans changed its name to BAC Home Loans Servicing LP, which subsequently merged with Bank of America, N.A.

Mr. Garvey defaulted on the mortgage, and on 27 August 2012, Substitute Trustee Services filed "AMENDED NOTICE OF HEARING PRIOR TO FORECLOSURE OF DEED OF TRUST." This notice explained that petitioners intended to foreclose on the West Jefferson real property by power of sale. It further explained that petitioners

> have the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d). To authorize the foreclosure the clerk must find the existence of (i) a valid debt of which the party seeking to foreclose is the holder, (ii) a default, (iii) a right to foreclose under the instrument, (iv) notice to those entitled to notice, and (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A.

Mr. Garvey served petitioner Bank of America with a request for admissions on 17 September 2012 and with a request for production of documents on 25 September 2012. On 15 November 2012, Mr. Garvey filed a motion to compel and motion for sanctions on the grounds that petitioners had not responded to his discovery requests. Bank of America responded by filing, on 12 December 2012, a motion for a protective order, contending that Mr. Garvey's discovery requests were not relevant to the subject matter of the power of sale foreclosure action

and that respondents were required to file a separate civil action in superior court if they wished to conduct discovery.

On 8 January 2013, Pam W. Barlow, Clerk of Superior Court for Ashe County, held a hearing on whether the substitute trustee was entitled to foreclose by power of sale. That same day, Ms. Barlow entered an order denying Mr. Garvey's motion to compel and motion for sanctions and granting Bank of America's motion for protective order. She also entered an order that day "find[ing] that the Substitute Trustee can proceed to foreclose under the terms of the . . . Deed of Trust and give notice of and conduct a foreclosure sale as by statute provided." On 15 January 2013, Mr. Garvey and Ms. Holzer filed a notice of appeal from the clerk's order authorizing the foreclosure. In addition, on 2 August 2013, respondents filed a second request for admissions and a second request for production of documents.

On 12 August 2013, a hearing was held as a result of respondents' notice of appeal in Ashe County Superior Court. At that hearing, Mr. Garvey appeared pro se. Petitioners submitted to the court a copy of the mortgage and what was represented to be the original ARN, as well as a "MILITARY AFFIDAVIT," an "AFFIDAVIT OF DEFAULT," and an "AFFIDAVIT OF PAYMENT HISTORY." Although Mr. Garvey appears to have prepared evidence to introduce to the superior court, he ultimately introduced no evidence other than his own statement that Ms. Holzer did not receive written notice of the hearing.[1]

On 12 August 2013, the superior court entered a written order providing in pertinent part:

> It appear[s] to the Court that the Appeal is properly before this Court, that all parties have been given adequate and timely notice of the hearing on this matter, that Andrew Cogbill appeared and represented Bank of America, N.A. and Substitute Trustee Services, Inc., and that Michael J. Garvey appeared *pro se*.
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:
>
> 1. That Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and

1. Apparently Jane Holzer Godbrey had passed away prior to this hearing. A guardian ad litem appeared at the hearing on behalf of any unknown heirs.

> the Substitute Trustee is entitled to proceed with the foreclosure sale; and
>
> 2. That the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed.

On 21 August 2013, Mr. Garvey filed a pro se notice of appeal. Subsequently, Katherine S. Parker-Lowe gave notice of appearance on behalf of Mr. Garvey and filed an amended notice of appeal to reflect her representation.

Discussion

Upon the filing and service of a notice of hearing on a mortgagee's or trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court in the county where the land or any portion of it is situated shall conduct a hearing at which "the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents." The statute further provides:

> If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

Id.

The order of the clerk following the hearing set out in N.C. Gen. Stat. § 45-21.16(d) "may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. *Appeals from said act of the clerk shall be heard de novo.*" N.C. Gen. Stat. § 45-21.16(d1) (emphasis added). In reviewing the superior court's order under § 45-21.16(d1), this Court first determines whether the superior court applied the proper scope of review. *In re Watts*, 38 N.C. App. 90, 94-95, 247 S.E.2d 427, 430 (1978). If so, then this Court decides only

" 'whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011) (quoting *In re Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010)).

Mr. Garvey first argues on appeal that the superior court, in its order, failed to make adequate findings of fact and conclusions of law in violation of Rule 52(a)(1). The parties in this appeal all assume that Rule 52(a)(1) applies to proceedings under N.C. Gen. Stat. § 45-21.16(d1), and this Court has previously held that "[a] foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply." *Lifestore Bank v. Mingo Tribal Pres. Trust*, ___ N.C. App. ___, ___, 763 S.E.2d 6, 9 (2014), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___, 2015 WL 1809347, 2015 N.C. Lexis 297 (Apr. 9, 2015). *See also* N.C. Gen. Stat. § 1-393 (2013) ("The Rules of Civil Procedure . . . are applicable to special proceedings, except as otherwise provided.").

Nonetheless, a recent unpublished opinion cited *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E.2d 641 (1976), as establishing that "our Rules of Civil Procedure generally do not apply in the context of a foreclosure proceeding brought under N.C. Gen. Stat. § 45-21.16 . . . ." *In re Foreclosure by Cornish*, ___ N.C. App. ___, 753 S.E.2d 743, 2013 N.C. App. LEXIS 1327, at *7, 2013 WL 6669278, at *3 (2013) (unpublished). *Furst* did in fact "reject plaintiffs' contention and the trial court's conclusion that the foreclosure of the deed of trust under the power of sale contained therein [was] an action or proceeding subject to the Rules of Civil Procedure." 29 N.C. App. at 255, 224 S.E.2d at 645. However, *Furst* did not address whether the action before it -- an "action to have defendants restrained and enjoined" from foreclosing by power of sale, *id.* at 250, 224 S.E.2d at 642 -- was a "special proceeding" to which the Rules of Civil Procedure would have applied under N.C. Gen. Stat. § 1-393. Significantly, after holding that the action before it was not subject to the Rules of Civil Procedure, the Court specifically "noted that the foreclosure in this case antedated the 1975 amendments to Article 2A of G.S. Chapter 45[,]" which enacted N.C. Gen. Stat. § 45-21.16(d).[2] *Furst*, 29 N.C. App. at 255, 224 S.E.2d at 645. Moreover, N.C. Gen. Stat. § 45-21.16(d1), governing the hearing before the superior court, was not enacted until 1993, 17 years after *Furst*. See 1993 N.C. Sess. Laws ch. 305, § 8. Thus, *Furst* did not hold that the Rules of Civil Procedure are inapplicable to foreclosures by power of sale initiated under N.C. Gen. Stat. § 45-21.16(d) and (d1).

2. *See* 1975 N.C. Sess. Laws ch. 492, § 2 (enacting N.C. Gen. Stat. § 45-21.16(d)).

Lifestore Bank, therefore, controls, and the proceeding below was a special proceeding to which Rule 52(a)(1) applied. *See also In re Cooke*, 37 N.C. App. 575, 576, 246 S.E.2d 801, 803 (1978) ("[Petitioner] commenced this special proceeding . . . before the Clerk . . . seeking an order, *pursuant to G.S. 45-21.16*, allowing him to proceed to sell the property under the power of sale contained in the deed of trust." (emphasis added)). *Cf. In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 400, 722 S.E.2d 459, 467 (2012) ("Indisputably, a foreclosure by power of sale is a special proceeding." (Newby, J., dissenting)).

Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment." It is well established that "the purpose for requiring findings of fact and conclusions of law under Rule 52 [is] to allow meaningful appellate review[.]" *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 370-71, 649 S.E.2d 14, 24 (2007). According to our Supreme Court, Rule 52(a) "require[s] the trial judge to do the following three things *in writing*: '(1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.' " *Hinson v. Jefferson*, 287 N.C. 422, 428, 215 S.E.2d 102, 106 (1975) (emphasis added) (quoting *Coggins v. City of Asheville*, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971)). Further, this Court has explained that Rule 52(a) requires the findings to be " '*specific findings* of the ultimate facts established by the evidence, admissions and stipulations . . . .' " *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 708, 635 S.E.2d 442, 449 (2006) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982)).

Under N.C. Gen. Stat. § 45-21.16(d1), the superior court is required to make findings regarding whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied. *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). In other words, the superior court must make specific findings of fact relating to (1) the existence of a valid debt of which the party seeking to foreclose is the holder, (2) the occurrence of a default, (3) the existence of a right to foreclose under the instrument at issue, (4) the giving of notice to those entitled to receive notice, (5) whether the mortgage debt is a home loan under N.C. Gen. Stat. § 45-101(1b) (2013), and (6) whether the sale is barred by N.C. Gen. Stat. § 45-21.12A (2013). 219 N.C. App. at 372, 725 S.E.2d at 24.

Here, the only specific findings in the superior court's order were that "the Appeal is properly before this Court, [and] that all parties have

been given adequate and timely notice of the hearing on this matter . . . ." After that single recitation of fact -- which was not even labeled as a finding of fact -- the superior court made no express conclusions of law, but rather moved directly to the decretal portion of the order. As part of the decree, the superior court concluded that "Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and the Substitute Trustee is entitled to proceed with the foreclosure sale[.]" The superior court then ordered that "the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed." In sum, the superior court only found one of the six criteria: that proper notice was given.

Bank of America, however, argues that Rule 52(a) was satisfied because the superior court's written order summarily concluded that petitioners "ha[d] satisfied the requirements" of the statute. According to Bank of America, this statement satisfies Rule 52(a) because it indicates that the superior court necessarily found the existence of all required facts and conclusions of law under N.C. Gen. Stat. § 45-21.16(d). Bank of America's position, if adopted, would eviscerate Rule 52(a)'s requirement of findings of fact since it effectively requires us to infer from a conclusion of law that the superior court made all the pertinent findings of fact.

The sole case relied upon by Bank of America -- *In re Gilmore*, 206 N.C. App. 596, 698 S.E.2d 768, 2010 N.C. App. LEXIS 1582, 2010 WL 3220675 (2010) (unpublished) -- does not support its position.[3] In *Gilmore*, this Court reversed an order allowing foreclosure, noting that "the superior court's order lacks the requisite fifth finding required by revised N.C.G.S. § 45-21.16(d)." *Id.*, 2010 N.C. App. LEXIS 1582, at *8, 2010 WL 3220675, at *3. This Court pointed out that although the clerk's order contained a finding on that issue, "[i]n an appeal of a foreclosure order, a *de novo* hearing occurs, not just a *de novo* review of the Clerk's order. Therefore, the superior court's order does not merely 'affirm' the clerk's order, but replaces it as the order of foreclosure. As such, it must contain all the statutorily required findings, and the fifth finding is absent from the superior court's order." *Id.* (internal citation omitted).

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3. We note that Bank of America contends that because the panel in *Gilmore* was presented with "a similar situation" as the one here, *Gilmore* "has precedential value to the material issue before this Court." To the contrary, while an unpublished opinion from a prior panel of this Court with substantially similar facts may be persuasive to the case on appeal, it nonetheless carries no binding precedential weight. *See Espinosa v. Tradesource, Inc.*, ___ N.C. App. ___, ___ n.9, 752 S.E.2d 153, 165 n.9 (2013) ("Unpublished opinions lack any precedential value and are not controlling on subsequent panels of this Court. N.C.R. App. P. 30(e)."), *disc. review denied*, ___ N.C. ___, 763 S.E.2d 391 (2014).

In short, under N.C. Gen. Stat. § 45-21.16(d1), because the superior court was required to conduct a de novo hearing and not just a de novo review, the superior court, in this case, was required -- like the superior court in *Gilmore* -- to make its own findings of fact as to each of the statutorily-required factors set forth in N.C. Gen. Stat. § 45-21.16(d). Because the superior court did not do so, we must reverse and remand.

Further, Mr. Garvey also argues that the superior court erred in failing to conduct a de novo hearing. The lack of findings of fact hinders our ability to review this issue. We cannot determine from the order whether the superior court in fact did conduct the de novo hearing mandated by statute as opposed to conducting an appellate review of the clerk's order. Although Bank of America points to the transcript as suggesting that the superior court conducted a de novo hearing, the transcript is ambiguous -- it is not obvious that the superior court understood its role.

The superior court stated that Mr. Garvey was "entitled to a de novo *review* of the clerk's order," identified the proceeding as an "appeal," and explained that the court's "review is to review [the clerk's] findings and to determine whether or not there is sufficient evidence of each and every one of those." (Emphasis added.) These quotes suggest that the superior court was reviewing the clerk's order to determine whether it was supported by the evidence. Bank of America, however, points to the superior court's statement that its duty was "to review those findings [made by the clerk] in this proceeding, de novo. And if I find that all those things exist, then I'm *required to uphold her findings.*" (Emphasis added.) Far from clarifying how the superior court viewed its role, the quote relied upon by Bank of America is itself unclear -- it contains indications both that the superior court understood that it was to make its own findings of fact and that the superior court believed it was reviewing the clerk's findings of fact.

Consequently, on remand, the superior court must apply the correct standard. It must conduct a de novo hearing followed by entry of an order setting out the superior court's own findings of fact regarding the criteria set forth in N.C. Gen. Stat. § 45-21.16(d). Based on those findings of fact, the superior court must then make its own conclusions of law deciding whether to authorize the Substitute Trustee to proceed to foreclose on the property at issue.

Because of our disposition of this appeal, remanding for a de novo hearing before the superior court, we need not address Mr. Garvey's remaining arguments. Those arguments either address the hearing before the clerk, involve issues that should be addressed in the first

instance by the superior court, or argue alleged errors that may not recur on remand.

REVERSED AND REMANDED.

Judges STEELMAN and STEPHENS concur.

IN THE MATTER OF VIENNA BAPTIST CHURCH FROM THE DECISION OF THE FORSYTH COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE TAXATION OF CERTAIN REAL PROPERTY FOR TAX YEAR 2012

No. COA14-1267

Filed 2 June 2015

1. Taxes—religious exemption—new church building

A church was properly denied a tax exemption for the year in which a building was constructed where the building was not certified for occupancy until 16 March of that year. Even though the building was roofed and had an outside wall by 1 January, the determination of the tax exemption is based on whether the building is wholly and exclusively used for religious purposes, not on the existence of a building.

2. Taxes—religious exemption—unfinished building—used for retreats

The use of a partially completed building for spiritual retreats such as campouts was not sufficient to qualify the building for a tax exemption where the certificate of occupancy was not issued until 16 March of that year.

Appeal by appellant from order entered 23 June 2014 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 7 April 2015.

B. Gordon Watkins, III, for Forsyth County.

SMITH LAW GROUP, PLLC, by Matthew L. Spencer and Steven D. Smith, for appellant.

ELMORE, Judge.

Vienna Baptist Church ("Appellant") appeals from the 23 June 2014 decision of the North Carolina Property Tax Commission denying Appellant's request for a tax exemption for 2012 pursuant to N.C. Gen. Stat. § 105.287.3. After careful consideration, we affirm.

I. Background

Appellant is a religious organization located in Forsyth County. In 2002, Appellant purchased a 28.85 acre tract of land located at 1831 Chickasha Drive ("the property"), and has paid property taxes thereon ever since. There was no building on the property when Appellant purchased it. Appellant held its services at a nearby church located on Yadkinville Road. In 2011, Appellant began construction of a church building on the property. As of 1 January 2012, the building was one-half completed, and a certificate of occupancy had not yet been issued.

Despite the fact that construction of the church building was not complete, Appellant applied for an exemption from property taxes for the property for the tax year 2012. The Forsyth County Tax Administrator denied the exemption application. Appellant challenged the Tax Administrator's denial by filing an appeal with the Forsyth County Board of Equalization and Review. After conducting a hearing, the County Board issued a decision affirming the Tax Administrator's denial of Appellant's application for tax exemption.

Appellant then challenged the County Board's decision by filing a Notice of Appeal and Application for Hearing before the North Carolina Property Tax Commission ("the Commission"). On appeal to the Commission, Appellant contended that the property should be eligible for a tax exemption pursuant to N.C. Gen. Stat. § 105-278.3. The County disputed Appellant's argument, contending that the property did not qualify for the tax exemption because it was not being used for religious purposes as of 1 January 2012.

In its final decision, the Commission made the following findings: During the time of construction, Appellant held religious services at a church located on Yadkinville Road, approximately one-half mile away from the property. "Prior to January 1, 2012, Appellant met at [the property] for three occasions only for campouts, prayer ceremonies, and a beam signing ceremony on September 21, 2011." "The prayer ceremonies were not for the congregation or the public; rather the minister met with the general contractor's workers at the construction site." "At no time prior to 2012 was Appellant authorized to occupy or use the construction site as a church." A Certificate of Compliance and Occupancy was issued for the property on 16 March 2012. After receiving the Certificate

of Occupancy, Appellant moved its church activities to the property from the Yadkinville Road location. Appellant was granted tax exemption for the tax year 2013.

The Commission held that the property was not entitled to tax exemption for the tax year 2012: "Appellant did not use [the property] wholly and exclusively for religious purposes, because it was forbidden to do so by law. As of January 1, 2012, the property was only a construction site with no finished building. As a result, the intermittent use of the property was not sufficient to constitute wholly and exclusive use for religious purposes as provided by N.C.G.S. § 105-278.3(a)."

Appellant appealed the Commission's decision to this Court, arguing that the Commission erred by failing to find and conclude that Appellant wholly and exclusively used the subject property for religious purposes as of 1 January 2012. For the reasons outlined below, we affirm the decision of the North Carolina Property Tax Commission.

II. Analysis

a.) Standard of Review

This Court reviews decisions of the North Carolina Property Tax Commission pursuant to N.C. Gen. Stat. § 105-345.2(b) (2013):

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
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> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

In re Appeal of Westmoreland-LG&E Partners, 174 N.C. App. 692, 696, 622 S.E.2d 124, 128 (2005). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of the Church of Yahshua the Christ at Wilmington*, 160 N.C. App. 236, 238, 584 S.E.2d 827, 829 (2003) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Under a *de novo* review, the Court "considers the matter anew and freely substitutes its own judgment for that of the Commission." *Yahshua*, 160 N.C. App. at 238, 584 S.E.2d at 829.

b.) Whole and Exclusive Use of Property for Religious Purposes

[1] On appeal, Appellant argues that the Commission erred in determining that there was no building on the property that was being wholly and exclusively used for religious purposes. We disagree.

All real property located in North Carolina is subject to property taxation, unless it is exempted by a statutory or constitutional provision. N.C. Gen. Stat. § 105-274 (2013). Requests for exemption are based upon the use of the property as of January 1 of the tax year at issue. *See, e.g.*, *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. 85, 86, 582 S.E.2d 645, 646–47 (2003). Each property owner applying for an exemption has the burden of proving that it is entitled to such exemption. *Id.*; N.C. Gen. Stat. § 105-282.1(a) (2013). "Buildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient use of such building shall be exempted from taxation if . . . [w]holly and exclusively used by its owner for religious purposes[.]" N.C. Gen. Stat. § 105-278.3. (2013). Therefore, in order to qualify for the religious property tax exemption, Appellant has the burden of proving that it was using a building on the property wholly and exclusively used for religious purposes as of 1 January 2012.

Appellant specifically contends that a building existed on the property as early as the beam signing in September 2011. Further, before 1 January 2012, Appellant argues that the property was wholly and exclusively to promote its spiritual and religious purposes. As such, Appellant contends that they are entitled to a tax exemption pursuant to N.C. Gen. Stat. § 105-278.3. We are not persuaded.

This Court's ruling in *Yahshua*, 160 N.C. App. at 239, 584 S.E.2d at 829, is instructive on the issue presented here. In *Yahshua*, the appellant, a religious organization, challenged a decision of the North Carolina

Property Tax Commission that denied its application for a religious purposes tax exemption. *Id.* at 237, 584 S.E.2d at 828. While there were no formal buildings on the property, the appellant used the land for camping and recreational outings, and had plans to construct buildings in the future. *Id.* On appeal, the appellant argued that the property at issue should be exempted from taxation, even though the land did not have a building on it. *Id.* This Court held that "the tax exemption set out in § 105-278.3 applies only to buildings and the land necessary for their convenient use." *Id.* "The statute is unambiguous. The focus of the exemption is on 'buildings.' Land is exempted only to the extent necessary for convenient use of the building." *Id.* at 239, 584 S.E.2d at 829.

Here, Appellant attempts to distinguish *Yahshua* from the case at bar by explaining that, although there were no buildings on the land in *Yahshua*, a "building," as defined by the Forsyth County Unified Development Ordinance ("UDO"), existed on the property in question as early as the September 2011 beam signing. Under the Forsyth County UDO, a building is "any structure having a roof supported by columns or walls and intended for shelter, housing or enclosure of any person, process, equipment, or good." Winston-Salem/Forsyth County UDO § A.II. According to Appellant's testimony, at the September 2011 hearing, the "superstructure" was up, roofed and had an outside wall—therefore satisfying the definition of "building" as of 1 January 2012. Thus, Appellant claims that the existence of such a building distinguishes this case from *Yahshua*, and qualifies the property for tax exempt status.

Appellant is misguided. It has been settled that the determination of tax exemption is not based on the existence of a building, but rather on whether the building is "wholly and exclusively used by its owner for religious purposes." *See* N.C. Gen. Stat. § 105-278.3. A building cannot be used or occupied "until the inspection department has issued a certificate of compliance." N.C. Gen. Stat. § 153A-363. Violation of this pronouncement constitutes a Class 1 misdemeanor. *Id.* Therefore, the property could not be used wholly and exclusively for religious purposes until the building was certified for occupancy, which was not until 16 March 2012. Thus, we cannot conclude that the property was used wholly and exclusively for religious purposes as of 1 January 2012.

[2] Appellant also contends that its use of the property for spiritual retreats such as campouts is sufficient to qualify it for a tax exemption, despite the fact that arguably no building had been erected on the property. In support of this argument, Appellant cites *In re Worley*, 93 N.C. App. 191, 377 S.E.2d 270 (1989). In *Worley*, the appellant (a religious organization) had recently expanded the land surrounding its church

complex. *Id.* at 193, 377 S.E.2d at 271. The church complex included a sanctuary building on one lot, and an adjacent lot (Lot 37) consisting of a largely wooded area which did not contain any buildings. *Id.* Lot 37 was purchased to serve as a "buffer zone" between the church grounds and the surrounding industrial area. *Id.* at 193, 377 S.E.2d at 271–72. Although there were no buildings on it, Lot 37 was regularly used as a spiritual retreat and for recreational activities. *Id.* at 193–94, 377 S.E.2d at 271–72. This Court held that Lot 37 qualified for tax exemption because the use of the land was "reasonably necessary for the convenient use of [church] buildings." *Id.* at 187, 377 S.E.2d at 274 (alteration in original) (citing N.C. Gen. Stat. § 105-278.3(a)).

Thus, although the specific lot in *Worley* did not have a building on it, this Court determined that the use of the lot was wholly and exclusively for religious purposes because it was reasonably necessary for the convenient use of the existing religious building. *See id.*

Here, unlike *Worley*, there was no functional building being used by Appellant for religious purposes located on or adjacent to the property as of 1 January 2012. Rather, the purported building was under construction, and it could not legally be used or occupied. Without the existence of a building on adjacent property owned by Appellant that was also being used wholly and exclusively for religious purposes, the property in question does not qualify for tax exemption under *Worley*.

III. Conclusion

The property at issue here does not qualify for tax exemption for the tax year 2012 under N.C. Gen. Stat. § 105-278.3. In order for property to qualify for the religious purposes tax exemption, there must have been a building on the property that was actually being used for religious purposes as of January 1 of the tax year in question. "Land is exempted only to the extent necessary for convenient use of the building." *Yahshua*, 160 N.C. App. at 239, 584 S.W.2d at 829. A building that is not certified for occupancy cannot be used for religious purposes. Therefore, the property does not qualify for the religious purposes tax exemption.

Affirmed.

Judges GEER and DILLON concur.

PATRICIA MITCHELL MALONE, PLAINTIFF
v.
CALVIN EUGENE BARNETTE, PARKER TRUCKING SERVICES, INC., ADVANTAGE TRUCK LEASING, LLC, YOUNG'S TRUCK CENTER, INC, VOLVO/GMC TRUCK CENTER OF THE CAROLINAS, AND PAXTON VAN LINES OF NORTH CAROLINA, INC., DEFENDANTS

YOUNG'S TRUCK CENTER, INC., CROSS-CLAIMANT
v.
PAXTON VAN LINES OF NORTH CAROLINA, INC., CROSS-DEFENDANT

CALVIN EUGENE BARNETTE, CROSS-CLAIMANT
v.
ADVANTAGE TRUCK LEASING, LLC AND YOUNG'S TRUCK CENTER, INC., CROSS-DEFENDANTS
v.
PAXTON VAN LINES OF NORTH CAROLINA, INC., CROSS-DEFENDANT

No. COA14-822

Filed 2 June 2015

1. Appeal and Error—interlocutory orders and appeals—remaining claims—certification under Rule 54(b)

Although the trial court's order granting partial summary judgment in favor of Young's Truck Center, Inc. was interlocutory since it did not dispose of all the claims asserted by the parties, the trial court certified the order for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b).

2. Indemnification—contractual indemnification—no per se prohibition—past negligence conduct

The trial court did not err by entering partial summary judgment in favor of Young's Truck Center, Inc. as to its cross-claims for contractual indemnification. There are no North Carolina cases expressly articulating a *per se* prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct. Further, the indemnity provision between reflected an arms-length bargained-for contractual agreement between two commercial entities which prevented public confusion about who was financially responsible if accidents occurred by specifically identifying the party bearing financial responsibility for claims arising out

of injuries occurring during the lease term that resulted from the maintenance or operation of the truck.

Appeal by cross-defendant Paxton Van Lines of North Carolina, Inc. from order entered 28 March 2014 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 January 2015.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for cross-claimant-appellee Young's Truck Center, Inc.

Teague Campbell Dennis & Gorham, L.L.P., by Leslie P. Lasher, for cross-defendant-appellant Paxton Van Lines of North Carolina, Inc.

DAVIS, Judge.

Paxton Van Lines of North Carolina, Inc. ("Paxton") appeals from the trial court's order granting partial summary judgment in favor of Young's Truck Center d/b/a Advantage Truck Leasing, LLC ("Young's") on Young's cross-claims against Paxton for contractual indemnification. On appeal, Paxton contends that the entry of partial summary judgment in favor of Young's was improper because the claims for which Young's seeks indemnification are not covered by the indemnity provision contained in the rental agreement between them. After careful review, we affirm the trial court's order.

Factual Background

On 1 August 2013, Patricia Mitchell Malone ("Malone") filed a complaint in New Hanover County Superior Court against Calvin Eugene Barnette ("Barnette"), Parker Trucking Services, Inc., Young's, Volvo/GMC Truck Center of the Carolinas, and Paxton (collectively "Defendants"). The complaint alleged that on 1 August 2010, Malone was driving east on Holly Tree Road in Wilmington, North Carolina when a 2004 GMC truck ("the Truck") driven by Barnette, an employee of Paxton, struck her vehicle at the intersection of Holly Tree Road and South College Road. In her complaint, Plaintiff further asserted that the Truck had been leased from Young's by Paxton pursuant to a rental agreement ("the Rental Agreement") executed 29 July 2010 and that Defendants had been negligent in failing to inspect and maintain the braking system on the Truck, leading to Barnette's collision with Malone's vehicle and her resulting injuries.

On 21 October 2013, Barnette filed a cross-claim against Young's alleging that it had "breached its general and statutory duty of care by leasing a truck with defective brakes to Paxton . . . which [Young's] knew or should have known would cause injury to persons either driving the truck or traveling on roadways." Barnette's cross-claim alleged that Young's negligence proximately caused the physical injuries he suffered in the collision and sought compensatory and punitive damages. Barnette filed an amended cross-claim against Young's on 10 January 2014, which eliminated his prior allegations of gross negligence and his request for punitive damages.

In response to both Malone's and Barnette's negligence claims, Young's filed cross-claims against Paxton on 1 October 2013 and 15 January 2014, respectively. In these cross-claims, Young's alleged that pursuant to the Rental Agreement, Paxton was contractually required to indemnify Young's for any monetary damages that Young's may be obligated to pay as a result of a settlement or judgment relating to the 1 August 2010 accident as well as for any attorneys' fees and costs Young's incurs in defending such claims.

Young's filed a motion for partial summary judgment as to its cross-claims for contractual indemnification on 16 January 2014. The motion came on for hearing on 17 February 2014 before the Honorable Phyllis M. Gorham, and on 28 March 2014, Judge Gorham entered an order granting partial summary judgment in Young's favor, stating in pertinent part as follows:

> After reviewing the pleadings and other documents of record, and after hearing arguments of counsel, the Court finds that there are no genuine issues of material fact and Defendant Young's . . . is entitled to judgment in its favor as a matter of law. After reviewing the pleadings of record, and after hearing arguments of counsel, the court further finds that Paxton is not entitled to judgment on the pleadings as to [Young's].
>
> IT IS THEREFORE, ordered that Young's . . . MOTION FOR PARTIAL SUMMARY JUDGMENT is GRANTED and Young's . . . is entitled to contractual indemnification for monetary damages payable as a result of settlement or judgment against Young's . . . and for defense costs and attorney fees incurred by Young's . . . as a result of or in defense of the actions asserted by Patricia Mitchell

> Malone, Calvin Eugene Barnett [sic] and/or any other party in this matter.

Paxton filed a notice of appeal to this Court.[1]

Analysis

I. Appellate Jurisdiction

[1] We first note that the trial court's order granting partial summary judgment in favor of Young's is interlocutory as it does not dispose of all the claims asserted by the parties. *See Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) ("An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." (citation and quotation marks omitted)). Generally, interlocutory orders are not immediately appealable. *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). However, when the trial court's order constitutes a final determination as to some, but not all, of the claims asserted and the trial court certifies the order for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, an immediate appeal will lie. *Id.* at 734, 460 S.E.2d at 334.

Here, in its 28 March 2014 order, the trial court noted that its order constituted a final judgment as to Young's cross-claims for indemnification and certified the order for immediate appeal pursuant to Rule 54(b). Therefore, we possess jurisdiction over Paxton's appeal. *See Feltman v. City of Wilson*, ___ N.C. App. ___, ___, 767 S.E.2d 615, 619 (2014) (explaining that appellate jurisdiction existed where trial court resolved two of four claims asserted by plaintiff and certified case pursuant to Rule 54(b)).

II. Entitlement of Young's to Contractual Indemnity

[2] On appeal, 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). The entry of summary judgment is proper "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

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1. Prior to oral argument, the parties filed a "Notice Regarding Partial Settlement," informing the Court that a confidential settlement had been reached relating to Barnette's cross-claims. However, the parties advised the Court that the settlement did not resolve the parties' dispute as to the issues raised in this appeal. Therefore, we proceed to consider the merits of the appeal.

and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact. *See Premier, Inc. v. Peterson*, ___ N.C. App. ___, ___, 755 S.E.2d 56, 59 (2014) ("In a contract dispute between two parties, the trial court may interpret a plain and unambiguous contract as a matter of law if there are no genuine issues of material fact."); *Metcalf v. Black Dog Realty, LLC*, 200 N.C App. 619, 633, 684 S.E.2d 709, 719 (2009) ("[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which is appropriate for summary judgment is presented to the court.").

Paxton and Young's entered into the Rental Agreement on 29 July 2010, and it took effect as of that date. The Truck is the only vehicle covered in the agreement. In this appeal, the parties disagree as to whether the indemnification provision contained within the Rental Agreement should be construed as obligating Paxton, the lessee of the Truck, to indemnify Young's, the lessor, in connection with the personal injury claims brought against Young's stemming from the 1 August 2010 accident. The indemnification provision states as follows:

> 10. [Paxton] agrees to release, indemnify and hold [Young's] harmless from and against any and all claims, demands, suits, causes of action or judgments for death or injury to persons or loss or damage to property arising out of or caused by the ownership, maintenance, leasing, repair, possession, use or operation of any Vehicle covered by this Agreement, including, but not limited to the following:
>
> (a) Any claims or causes of action arising from requirements of Insurance and which [Young's] would not otherwise, pursuant to the terms hereof, be required to pay.
>
> (b) Any and all losses, damages, costs and expenses incurred because of injury or damage sustained by any occupant of said Vehicle, including without limitation [Paxton], [Paxton's] employees, agents or representatives and loss or damage to cargo or property owned by or in the possession of [Paxton], [Paxton's] employees, agents or representatives or occupants.

(c) All loss, damage, cost and expense resulting from [Paxton's] violation of any term of this agreement or breach of [Paxton's] warranties as expressed herein.

(d) The value of all tires, tools and accessories damaged, lost or stolen from the Vehicle.

(e) All cost of retaking the Vehicle, including but not restricted to attorney's fees and court costs.

(f) Any fines or penalties including forfeiture or seizure resulting from the use of the Vehicle.

(g) All claims for damages which [Paxton] or any other party may sustain as a result of any actions taken by [Young's] under paragraphs 13 and 14 hereof.

(h) All costs of defense and expenses of every kind, including attorneys' fees incurred in connection with any suits or claims covered under this Paragraph 10.

Paxton essentially makes three arguments on appeal. First, Paxton argues that, as a general proposition, North Carolina law does not permit the contractual indemnification of a party for its own prior negligent acts. Second, it contends that the language contained in the indemnification provision here should not be construed as indemnifying Young's for its own past acts of negligence. Third, Paxton asserts that Young's interpretation of the indemnification provision is inconsistent with the Federal Motor Carrier Safety Act. We address each of these arguments in turn.

A. Limits on Indemnity Provisions under North Carolina Law

Our Supreme Court has previously recognized the right of a party to contractually provide for indemnification against its own negligence. *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). In so doing, the Court emphasized the fundamental principle of freedom of contract that exists in North Carolina. *See id.* (explaining that "[f]reedom of contract is a fundamental basic right" in upholding indemnity agreement providing that defendant-company would be indemnified against liability for its own negligence). This Court has expressly held that North Carolina public policy is not violated by an indemnity contract that provides for the indemnification of a party against the consequences of its own negligent conduct, particularly when the agreement is made "at arms length and without the exercise

of superior bargaining power."[2] *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 267, 258 S.E.2d 842, 846 (1979). We further noted that the enforcement of such provisions "would have no greater tendency to promote carelessness on the part of the indemnitee than would enforcement against the insurer of a policy of liability insurance" and recognized that "the occasion for the indemnitee seeking indemnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it." *Id.* at 266-68, 258 S.E.2d at 846 (citation and brackets omitted).

Paxton attempts to distinguish the present case from our previous decisions enforcing indemnification contracts that hold a party harmless against the consequences of its own negligence by emphasizing that here Young's alleged negligent acts occurred *prior* to the parties' execution of the Rental Agreement (and the indemnity provision included therein). However, neither Paxton's brief nor our own research reveal any North Carolina case expressly articulating a *per se* prohibition against indemnity contracts that hold an indemnitee harmless from its past negligent conduct. Indeed, to the contrary, in discussing the nature of a contract for indemnity, our Supreme Court has stated the following: "In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which *he has incurred or is about to incur* to a third party . . . ." *New Amsterdam Cas. Co. v. Waller*, 233 N.C. 536, 537, 64 S.E.2d 826, 827 (1951) (emphasis added). Accordingly, we reject Paxton's argument on this issue.

B. Applicability of Indemnity Provision in Rental Agreement to Prior Negligent Acts by Young's

Paxton's next argument is that the parties did not intend for the indemnity provision to cover the prior negligent acts of Young's. When interpreting an indemnification clause within a contract, a court's primary objective "is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply." *Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citation and quotation marks omitted). An indemnification provision "will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms nor of such character that it can reasonably

2. Because Young's and Paxton were similarly situated commercial entities, this case does not require us to address the extent to which public policy concerns may be triggered by the existence of unequal bargaining power between the contracting parties.

be inferred that they were intended to be within the contract." *Dixie Container Corp. of N.C. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (citation and quotation marks omitted).

Paxton contends that the indemnity Young's seeks in this action was neither contemplated nor intended by the parties because "the indemnification provision on its face applies only prospectively to the operation and maintenance of the [T]ruck which occurred on or after 29 July 2010," the date of the Rental Agreement. Specifically, Paxton asserts, it is not required to provide indemnification for the claims asserted against Young's by Malone and Barnette — which allege that Young's "failed to properly inspect, maintain and repair the brakes on the [T]ruck prior to leasing the [T]ruck to Paxton" — because these alleged negligent acts occurred before the Rental Agreement was executed. We disagree.

The indemnification provision is devoid of any language suggesting that the parties intended for Young's to be indemnified only as to liability or claims arising from *future* acts of negligence. Instead, the indemnification provision broadly requires Paxton to "release, indemnify and hold [Young's] harmless from and against *any and all* claims, demands, suits, causes of action or judgments for . . . injury to persons . . . arising out of or caused by the ownership, maintenance, leasing, repair, possession, use or operation of any Vehicle covered by this Agreement . . . ." without containing the restriction advanced by Paxton in this appeal. (Emphasis added.) *See Cooper*, 43 N.C. App. at 267, 258 S.E.2d at 846 (explaining that language used by parties in indemnification agreement did not lend itself to narrow construction advanced by indemnitor where parties had agreed that indemnitee would be held harmless from any claims "[a]rising from the use of, transportation of, or in any way connected with the said equipment or any part thereof, from whatsoever cause arising").

While the negligent acts attributed to Young's are alleged to have occurred prior to the execution of the Rental Agreement, the claims for which Young's seeks indemnity are nevertheless covered under the indemnification provision as they are predicated on injuries that occurred on 1 August 2010 (the date of the subject motor vehicle accident and the resulting injuries to Malone and Barnette), which was during the term in which the Rental Agreement was in effect. *See Blue Ridge Sportcycle Co. v. Schroader*, 60 N.C. App. 578, 581, 299 S.E.2d 303, 305 (1983) (explaining that "[i]njury, or damage, is an essential element of the tort [of negligence]" and that where there is no injury, there is no actionable negligence). Thus, because the Truck was a "Vehicle covered by this Agreement" on the date of the accident, the claims asserted against Young's fall squarely within the scope of the indemnification provision,

and as such, Paxton is obligated to hold Young's harmless from such claims based on the plain language of the indemnification provision.

Moreover, were we to adopt Paxton's narrow interpretation of the indemnity provision, the language therein providing for indemnification for claims arising out of the *maintenance* of the Truck would be rendered essentially meaningless. As Young's notes in its brief, the federal regulations governing the leasing of trucks, tractors, and trailers between motor carriers required Paxton to "have exclusive possession, control, and use of the [Truck] for the duration of the lease." 49 C.F.R. 376.12 (c) (1) (2012). Thus, it is unlikely that Young's would have had the ability to perform *any* maintenance on the Truck while the Rental Agreement was in effect as the Truck would have been in Paxton's exclusive possession and control during that time period.

Basic rules of construction applicable to contracts preclude an interpretation rendering such language in the parties' agreement purposeless. *See Cooper*, 43 N.C. App. at 267, 258 S.E.2d at 846 (declining to construe indemnification clause in manner that "render[ed] it largely purposeless"); *see also S. Seeding Serv., Inc. v. W.C. English, Inc.*, 217 N.C. App. 300, 305, 719 S.E.2d 211, 215 (2011) (noting that "[t]his Court has long acknowledged that an interpretation which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous" (citation omitted)). Accordingly, we do not accept Paxton's contention that it only contracted to indemnify Young's from claims arising out of the negligent maintenance of the Truck occurring during the lease period.

C. Federal Motor Carrier Safety Act

Paxton's final argument is that construing the indemnity provision so as to allow Young's to be indemnified for its own prior acts of negligence would be inconsistent with the requirements of the Federal Motor Carrier Safety Act ("the Act"). Once again, we reject Paxton's argument.

The Act was enacted by Congress to "ensure that interstate motor carriers would be fully responsible for the maintenance and operation of the leased equipment . . . , thereby protecting the public from accidents, preventing public confusion about who was financially responsible if accidents occurred, and providing financially responsible defendants." *Tamez v. Sw. Motor Transport, Inc.*, 155 S.W.3d 564, 572 (Tex. App. 2004). Paxton contends that requiring it to indemnify Young's for negligence that occurred prior to the execution of the Rental Agreement would be contrary to the Act because the Act only requires the lessees of trucks and other leased equipment to "assume complete responsibility

for the operation of the equipment *for the duration of the lease*." 49 C.F.R. 376.12 (c)(1) (emphasis added).

In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 46 L.Ed.2d 169 (1975), the United States Supreme Court addressed the issue of whether the enforcement of indemnification provisions between motor carriers conflicted with the provisions of the Act and the regulations promulgated thereunder regarding operational control and responsibility over leased vehicles.[3] The Supreme Court held that the existence of an indemnification provision between motor carriers is not in itself contrary to the Act's provisions because it "affect[s] only the relationship between the lessee and the lessor" and does not affect the basic responsibilities of the parties to the public and the public's safety. *Id.* at 39, 46 L.Ed.2d at 178. The Court further ruled that the indemnification provision at issue in that case — providing that the lessor would be responsible for and bear the costs of its own negligence while the leased tractor-trailer was in the lessee's control — did not contravene the purpose of the Act because placing ultimate financial responsibility on one party "is not in conflict with the safety concerns of the [Interstate Commerce] Commission or with the regulations it has promulgated." *Id.* at 40-41, 46 L.Ed.2d at 178-79 (noting that applicable regulations "neither sanction nor forbid" indemnification between lessors and lessees and that such provisions do not "offend the regulations so long as the lessee does not absolve itself from the duties to the public and to shippers imposed upon it by the Commission's regulations").

We believe the same is true of the indemnification provision at issue here. Enforcement of the indemnity provision in the present case does not leave victims of the alleged negligent acts of Young's without financial recourse. Instead, it merely shifts the financial responsibility for such negligence from one entity to another. As noted above, a primary focus of the Act is to protect the public by ensuring the presence of a responsible party from whom persons harmed in accidents involving motor carriers may seek recovery for their injuries. *See id.* at 37, 46 L.E.2d at 177 (explaining that policy goal of Act, in addition to safety of operation, is to "fix[] financial responsibility for damage and injuries to shippers and members of the public"). That purpose is not undermined by the enforcement of the indemnification provision here.

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3. While the regulations addressed in *Transamerican* have since been amended, the requirements concerning control and responsibility for leased vehicles discussed therein are substantially the same as those contained in the current version of the regulations.

Moreover, it is appropriate to reiterate that the indemnity provision between Young's and Paxton reflects an arms-length, bargained-for contractual agreement between two commercial entities, which "prevent[s] public confusion about who [is] financially responsible if accidents occur[]" by specifically identifying the party bearing financial responsibility for claims arising out of injuries occurring during the lease term that result from the maintenance or operation of the Truck. *Tamez*, 155 S.W.3d at 572. Accordingly, the trial court did not err in entering partial summary judgment in favor of Young's.

Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and TYSON concur.

NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., RICHARD J. NIXON, RHONDA HOLMES, BRIAN LINK, ANNETTE BEATTY, STEPHANIE WALLACE, AND JOHN DEVILLE, PLAINTIFFS

v.

THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA14-998

Filed 2 June 2015

1. Schools and Education—repeal of teacher career status law—vested contractual right—Contract Clause violated

The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and career status of public school teachers (Career Status Law) violated the Contract Clause of the United States Constitution for plaintiff teachers who had already earned career status. The Career Status Law created contractual obligations; the State's actions substantially impaired those contractual obligations; and the impairment was not reasonable and necessary to serve an important public purpose.

2. Schools and Education—repeal of teacher career status law—vested contractual right—Law of the Land Clause violated

The trial court did not err by concluding that the prospective and retroactive repeal of the law governing the employment and

career status of public school teachers (Career Status Law) violated the Law of the Land Clause of the North Carolina Constitution for plaintiff teachers who had already earned career status. The repeal of the Career Status Law abrogated plaintiffs' contracted-for and vested career status protections and constituted an unconstitutional taking of property without just compensation.

3. Schools and Education—repeal of teacher career status law—motion to strike portions of affidavits—any error harmless

In plaintiffs' challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by declining to strike certain portions of plaintiffs' affidavits as not based on the affiants' personal knowledge. Even assuming that the challenged portions should have been excluded, any failure to strike was harmless. The trial court's findings of fact were supported by the forecasted evidence.

4. Schools and Education—repeal of teacher career status law—contract right not yet vested—no standing

In plaintiffs' challenge to the repeal of the law governing the employment and career status of public school teachers, the trial court did not err by denying summary judgment to plaintiff Link based on a lack of standing. As a probationary teacher, Link had not yet acquired a vested contractual right to career status protections.

DILLON, Judge, concurring in part and dissenting in part

Cross-appeals by Plaintiffs and Defendant from orders entered 6 June 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 22 January 2015.

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh, and National Education Association, by Philip A. Hostak, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

STEPHENS, Judge.

Defendant State of North Carolina ("the State") argues that the trial court erred in granting summary judgment in favor of Plaintiffs North Carolina Association of Educators, Inc. ("NCAE"), Nixon, Holmes,

Beatty, Wallace, and deVille based on the court's conclusion that the State's enactment of legislation repealing career status teachers' benefits under section 115C-325 of our General Statutes violated Article I, Section 10 of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. The State also argues that the trial court erred in failing to strike certain portions of the affidavits Plaintiffs submitted in support of their motion for summary judgment. Plaintiffs cross-appeal, arguing that the trial court erred in denying summary judgment to Plaintiff Link based on the court's conclusion that, as a probationary teacher who had not yet earned career status, he lacked standing to challenge the General Assembly's repeal of section 115C-325. After careful consideration, we hold that the trial court did not err and we consequently affirm its orders.

I. Background and Procedural History

A. Legislative Background

In 1971, our General Assembly enacted a statutory scheme ("the Career Status Law") to govern the employment and dismissal of our State's public school teachers. *See* An Act to Establish an Orderly System of Employment and Dismissal of Public School Personnel, 1971 N.C. Sess. Laws ch. 883. For more than four decades following its passage, the Career Status Law, codified in its most recent form at N.C. Gen Stat. § 115C-325 (2012), provided all public school teachers in North Carolina with certain procedural guarantees regarding the terms of their employment and the reasons they could be terminated.

Under the Career Status Law, teachers who were employed by a public school system for fewer than four consecutive years on a full-time basis were deemed to be "probationary" teachers. *Id.* § 115C-325(a)(5). These probationary teachers were employed from year to year pursuant to annual contracts, which school boards could choose to "non-renew" at the end of a school year for any cause the boards deemed sufficient, so long as the non-renewal was not "arbitrary, capricious, discriminatory, or for personal or political reasons." *Id.* § 115C-325(m)(2). After a probationary teacher completed four consecutive years as a full-time teacher, that teacher became eligible for career status, which was granted or denied by a majority vote of the local school board. *Id.* § 115C-325(c)(1). Teachers who achieved career status would "not be subjected to the requirement of annual appointment." *Id.* § 115C-325(d)(1). Instead, career status teachers were employed on the basis of continuing contracts and could only be dismissed, demoted, or relegated

to part-time status for one of fifteen statutorily enumerated reasons, including, *inter alia*, "[i]nadequate performance," "[i]nsubordination," and "[n]eglect of duty." *Id.* § 115C-325(e)(1). Moreover, the Career Status Law further provided that, before a career status teacher could be dismissed, demoted, or relegated to part-time status, the school board was required to provide that teacher with notice, an explanation of the charges, and, if requested, a hearing before the board or an impartial hearing officer. *Id.* § 115C-325(h)(2), (3). In those cases in which a career status teacher chose to have a hearing before a hearing officer, that teacher had the right "to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist or whether the procedures set forth in [the statute] have been followed." *Id.* § 115C-325(j)(3).

On 24 July 2013, our General Assembly repealed the Career Status Law, both prospectively and retroactively, by enacting Sections 9.6 and 9.7 ("the Career Status Repeal") of the Current Operations and Capital Improvements Appropriations Act of 2013, which Governor Pat McCrory subsequently signed into law as S.L. 2013-360. Under the Career Status Repeal, as of 1 August 2013, any teacher who had not achieved career status before the beginning of the 2013-14 school year will never be granted career status, but will instead, with limited exceptions, be employed on the basis of one-year contracts until 2018. *See* 2013 N.C. Sess. Law 360 § 9.6(f). Further, as of 1 July 2018, the Career Status Repeal revokes the career status of all teachers who had previously earned that status pursuant to the Career Status Law. *Id.* § 9.6(i). Instead, all teachers will be employed on one-, two-, or four-year contracts that can be non-renewed at their school board's discretion on any basis that is not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id.* § 9.6(b). Moreover, the Career Status Repeal provides no right to a hearing for former career status teachers; although such teachers will be permitted to request a hearing after receiving notice of non-renewal, local school boards will have unfettered discretion to decide whether or not to hold one. *Id.* Finally, the Career Status Repeal's "25% Provision" mandates that before the beginning of the 2014-15 school year, school districts must select one quarter of their teachers with at least three years of experience and offer them four-year contracts, providing for a $500 raise in each year of the contract, in exchange for their "voluntarily relinquish[ing] career status." *Id.* § 9.6(g), (h).

B. Procedural History

On 17 December 2013, NCAE and six public school teachers filed a complaint in Wake County Superior Court seeking declaratory and injunctive relief based on their allegations that the Career Status Repeal amounts to both a taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution, and an unconstitutional impairment of their contractual rights under Article I, Section 10 of the United States Constitution. The State filed an answer and motion to dismiss pursuant to N.C.R. Civ. P. 12 on 17 January 2014. Plaintiffs then filed a motion for summary judgment pursuant to N.C.R. Civ. P. 56 on 10 March 2014.

In support of their Rule 56 motion for summary judgment, Plaintiffs submitted affidavits from:

- NCAE president Rodney Ellis, whose nonprofit organization's membership includes thousands of public school teachers, administrators, and education support personnel who either had already attained career status or would have been eligible for it in the coming years, and who, Ellis explained, relied on the Career Status Law for "peace of mind because they know that any issues implicating their jobs will be handled fairly and with due process;"
- Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille, each of whom are public school teachers who relied on the statutory promise of career status rights in exchange for meeting the requirements of the Career Status Law in accepting their teaching positions, had already attained career status prior to the Law's repeal, and considered its protections to be a fundamental part of their overall compensation that offsets their relatively low pay and allows them the opportunity to grow and improve by being innovative in the classroom, as well as the ability to advocate for their students by raising concerns about instructional issues to administrators without fear of losing their jobs;
- Plaintiff Link, a public school teacher who had not yet attained career status before the Career Status Repeal but would have been eligible for it by the end of the 2013-14 school year and who relied on the statutorily promised opportunity to earn the protections career status provides when he chose to accept a teaching position here in North Carolina over a job offer in Florida;
- eight public school administrators who explained that career status protections help attract and retain teachers despite the relatively

low salaries established by State salary schedules; that the Career Status Law's four-year probationary period provided more than adequate time for school districts to evaluate teachers and make informed decisions that ensure career status is only granted to teachers who have proven their effectiveness; that the Career Status Law already provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance; and that although, in the vast majority of cases when a school district seeks removal of a career status teacher, the teacher agrees to resign without a hearing, on the few occasions when hearings do occur, the process is not onerous for the district;

- Representative Richard Glazier, who represents North Carolina's 44th district in the State House of Representatives and explained that before the Career Status Repeal was enacted as part of the Appropriations Act, the House had already passed legislation aimed at reforming the Career Status Law in the form of House Bill 719, which would have "added definitions of teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and revocation of career status based on evaluation ratings," by a bipartisan and nearly unanimous vote of 113-to-1; and

- labor economist Jesse Rothstein, who explained that the job security afforded by career status functions as a valuable employment benefit for North Carolina's teachers insofar as it offsets their lower salaries relative to other professions and other teachers in almost every other state in the country, and also serves the State's interest in running an efficient system of public education by helping to recruit and retain experienced and effective teachers who might otherwise leave the profession; by ensuring that non-retention decisions are made in a timely way in order to remove ineffective teachers from the classroom more quickly; and by reducing the need for expensive and disruptive annual retention evaluations for career status teachers, thereby enabling school districts to focus their resources, and teachers to focus their time and energy, on classroom instruction.

In addition, Plaintiffs also submitted resolutions adopted by the Boards of Education of Brunswick, Carteret, Chatham, Cleveland, Craven, Cumberland, Guilford, Haywood, Jackson, Lee, Lenoir, Macon, Onslow, Orange, Person, Robeson, Rockingham, Rowan, Transylvania, Tyrrell, Wake, and Washington Counties calling on our General Assembly to

repeal the Career Status Repeal's 25% Provision because it is too vague to provide any discernible standard for determining who should qualify for the four-year contracts and bonuses and also provides no funding beyond the first year.

In opposition to Plaintiffs' motion for summary judgment, the State submitted affidavits from Terry Stoops, a policy analyst at the John Locke Foundation, and Eric A. Hanushek, a senior fellow at the Hoover Institute. Citing North Carolina students' low scores on standardized tests and arguments by Hanushek and other researchers that raising the quality of the teacher workforce is the key to raising student achievement, Stoops defended the Career Status Repeal because it "will make it easier for public school administrators and school boards to remove ineffective tenured teachers from the classroom" and "will likely produce a much-needed surge in student performance, particularly for public school students in low-income and low-performing schools." For his part, Hanushek described how his research demonstrated that the quality of teachers is the most important factor in maximizing student learning but that teacher quality is difficult to measure and new metrics for best assessing teacher quality are ever-evolving, which means that granting teachers tenure not only makes it more difficult to remove ineffective teachers but also "severely restricts the ability of the schools to use updated teacher performance information in making personnel decisions." Hanushek took issue with aspects of Rothstein's analysis of the Career Status Law's systemic benefits but provided no specific evidence that career status protections adversely impact the quality of education North Carolina's public school children receive.

On 12 May 2014, the trial court held a hearing on Plaintiffs' Rule 56 motion for summary judgment. During that hearing, the State submitted a document entitled "Inadmissible Provisions of Affidavits Submitted in Support of Plaintiffs' Motion for Summary Judgment," which asked the trial court to disregard portions of Plaintiffs' affidavits consisting of hearsay statements, conclusions as to the legal issues in the case, and statements regarding the impact of career status and its repeal on all teachers that the State contended could not have been based on any individual affiant's personal knowledge. In an order entered 6 June 2014, the trial court explained that it had treated the State's request as a motion to strike, which it granted with regard to the portions of Plaintiffs' affidavits that consisted of legal conclusions or inadmissible hearsay, but otherwise denied.

That same day, the trial court entered a separate order granting in part and denying in part Plaintiffs' motion for summary judgment.

In support of its order, the trial court found as an undisputed material fact that

> [Plaintiffs] were statutorily promised career status rights in exchange for meeting the requirements of the Career Status Law. When they made their decisions both to accept teaching positions in North Carolina school districts and to remain in those positions, they reasonably relied on the State's statutory promise that career status protections would be available if they fulfilled those requirements. The protections of the Career Status Law are a valuable part of the overall package of compensation and benefits for [P]laintiffs and other teachers, benefits that they bargained for both in accepting employment as teachers in North Carolina school districts and remaining in those positions. From the perspective of school administrators, career status protections help attract and retain teachers despite the low salaries established by State salary schedules.

After additional findings that the four-year probationary period "ensure[s] that career status is only granted to teachers who have proven their effectiveness" and that the Career Status Law does not impede school administrators' ability to remove career status teachers whose performance is inadequate, the court found as an undisputed material fact that "[t]here is no evidence that the Career Status Law prevents North Carolina school districts from achieving the separation of teachers when they believe dismissal is necessary. School administrators are able to make all necessary personnel changes within the framework of the Career Status Law."

In light of these undisputed material facts, the trial court concluded that the Career Status Repeal violated Article I, Section 10 of the United States Constitution. The trial court based this conclusion on its application of the three-factor test articulated by the United States Supreme Court in *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 52 L. Ed. 2d 92 (1977) to determine whether a state law violates the Contract Clause. As to the first factor, the trial court concluded based on the United States Supreme Court's holding in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 82 L. Ed. 685 (1938), and our Supreme Court's holdings in *Faulkenbury v. Teachers' & State Employees' Retirement Sys. of N.C.*, 345 N.C. 683, 483 S.E.2d 422 (1997), *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), and *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 643 S.E.2d 904 (2007), that "[a]ll teachers who earned career status before the [26 July 2013]

enactment of the Career Status Repeal have contractual rights in that status and to the protections established by the Career Status Law." As to the second factor, the trial court concluded that "[b]y eliminating those protections, the Career Status Repeal substantially impairs the contractual rights of career status teachers." As to the third factor, the trial court concluded that this impairment of contractual rights "was not reasonable and necessary to serve an important public purpose," given that the "Career Status Repeal does not further any public purpose because the undisputed facts demonstrate that, under the Career Status Law, school administrators already have the ability to dismiss career status teachers for inadequate performance whenever necessary." After noting that "eliminating career status hurts North Carolina public schools by making it harder for school districts to attract and retain quality teachers," the trial court also concluded that "[e]ven if there was an actual need for school administrators to have greater latitude to dismiss ineffective career status teachers, that objective could have been accomplished through less drastic means, such as by amending the grounds for dismissing teachers for performance-related reasons."

As a separate and independent ground for concluding that the Career Status Repeal is unconstitutional, the trial court also determined that it violated the Law of the Land Clause found in Article I, Section 19 of North Carolina's Constitution, which "has long been interpreted to incorporate a protection against the taking of property by the State without just compensation." In light of our Supreme Court's holding in *Bailey* that "[c]ontract rights, including those created by statute, constitute property rights that are within the Law of the Land Clause's guarantee against uncompensated takings," the trial court concluded that by eliminating career status teachers' contractual rights, "the Career Status Repeal constitutes a taking of property without compensation that violates the Law of the Land Clause beyond a reasonable doubt."

Consequently, the trial court granted summary judgment to Plaintiffs NCAE, Nixon, Holmes, Beatty, Wallace, and deVille, declared that Sections 9.6 and 9.7 of S.L. 2013-360 "are unconstitutional with regard to teachers who had received career status before [26 July 2013]," and—after concluding those teachers had no other adequate remedy at law and would suffer irreparable harm otherwise—permanently enjoined the State from implementing and enforcing the Career Status Repeal. The trial court also permanently enjoined the State from implementing and enforcing the 25% Provision, which it concluded "violates the constitutional vagueness doctrine because it provides no discernible,

workable standards to guide local school districts in its implementation" and is "inextricably tied" to the Career Status Repeal because it is "predicated on the revocation of career status as of 2018" and thus "cannot be severed from the unconstitutional revocation of career status." However, the trial court denied summary judgment on Plaintiff Link's claims, and therefore granted summary judgment to the State against all claims on behalf of teachers who had not yet earned career status, reasoning that such teachers lacked standing to bring these claims because "[p]robationary teachers who have not yet received career status do not have contractual rights that are protected by the Contract Clause or the Law of the Land Clause."

The State gave written notice of appeal on 3 July 2014, and, on 7 July 2014, Plaintiffs also gave written notice of appeal.

II. The State's Appeal

A. The Career Status Repeal violates the Contract Clause of the United States Constitution

[1] The State argues that the trial court erred as a matter of law when it granted summary judgment to NCAE and the five teachers who had already earned career status based on its conclusion that the Career Status Repeal violated the Contract Clause. We disagree.

"The standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Hyatt v. Mini Storage on Green*, __ N.C. App. __, __, 763 S.E.2d 166, 169 (2014) (citation, internal quotation marks, and brackets omitted). Summary judgment is proper "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." *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56). This Court applies a *de novo* standard of review to orders granting or denying a motion for summary judgment. *Id.*

To determine whether a state law violates the Contract Clause of the United States Constitution, our State's appellate courts apply a three-factor test that examines: "(1) whether a contractual obligation is present, (2) whether the [S]tate's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (citation omitted).

(1) The Career Status Law creates contractual obligations

In the present case, as to the first factor, the State argues that the trial court erroneously concluded that Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille had contractual rights under the Career Status Law that were substantially impaired by the Career Status Repeal based on a misapplication of the relevant federal and state precedents the court relied on. Specifically, the State contends that *Brand*, *Faulkenbury*, and *Bailey* are easily distinguishable from the present facts because those cases involved benefits that were automatically conferred on public employees by express statutory promises, whereas here, career status depends upon completion of a four-year probationary period and a majority vote of the local school board. According to the State, this makes it more relevant to focus on Plaintiffs' individual employment contracts with their local school boards, which the State is quick to emphasize contain provisions stating that the contracts are, for example, "subject to the availability of federal and local funds" and "subject to the allotment of personnel by the State Board of Education and subject to the condition that the amount paid from State funds shall be within the allotment of funds." Thus, the State contends that even if Plaintiffs did have contractual rights to career status protections, those rights were not substantially impaired by the Career Status Repeal because Plaintiffs were always subject to termination due to the conditional language in their contracts. Our review of the relevant case law leads us to conclude that this argument is totally baseless.

In *Brand*, the United States Supreme Court reviewed a challenge to legislation that partially repealed Indiana's Teachers' Tenure Law, which provided that teachers who had served under annual contracts for five or more successive years and then entered into a new contract would be considered "permanent" teachers with indefinite, continuing contracts which could be terminated only after notice and a hearing and only for statutorily enumerated reasons. 303 U.S. at 102-03, 82 L. Ed. at 692. Indiana's legislature subsequently amended the Teachers' Tenure Law to exclude teachers employed by "township school corporations." *Id.* The plaintiff, who had been employed as a teacher by a township school for long enough to earn "permanent" status prior to the partial repeal, brought suit after her contract was terminated. In holding that the repeal violated the Contract Clause, the Court noted that "it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions." *Id.* at 100, 82 L. Ed. at 690.

In *Faulkenbury*, our Supreme Court held that legislation reducing teachers' and other State employees' retirement benefits violated the Contract Clause. As the Court explained, "[a]t the time the plaintiffs' rights to pensions became vested [after they had been employed more than five years], the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action." 345 N.C. at 690, 483 S.E.2d at 427. In so holding, the Court rejected the State's argument that the statute the plaintiffs relied on only announced a policy subject to change by a later legislature. The Court focused instead on the terms of the statute to conclude:

> We believe that a better analysis is that at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' compensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract.

Id.

Similarly, in *Bailey*, our Supreme Court held that legislation capping the tax exemption for public employee retirement benefits violated the Contract Clause. After tracing the "long demonstrated [] respect" our State's judiciary has shown "for the sanctity of private and public obligations from subsequent legislative infringement," 348 N.C. at 142, 500 S.E.2d at 61, the Court made clear that "[t]he basis of the contractual relationship determinations in these and related cases is the principle that where a party in entering an obligation relies on the State, he or she obtains vested rights that cannot be diminished by subsequent state action." *Id.* at 144, 500 S.E.2d at 62. Furthermore, as the Court noted in rejecting the State's argument that the exemption constituted an unconstitutional contracting away of its power of taxation,

> [t]he rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. In this case, the State created the exemption and then proceeded for decades to represent it as a portion of retirement benefits and to reap its contractual benefits. It is clear from the record evidence that the State used these representations as inducement to employment with the State, and employees relied on these representations in consideration of many years' valuable service

> to and with the State. The State's attempt to find shelter under the North Carolina Constitution must be compelling indeed after such a long history of accepting the benefits of the extension of the exemption in question. We find no such compelling case here.

Id. at 147, 500 S.E.2d at 64 (citation and internal quotation marks omitted). Thus, given that the tax exemption benefit had "helped attract and keep quality public servants in spite of the generally lower wage paid to state and local employees," *id.* at 150, 500 S.E.2d at 65, the Court concluded that the State's retroactive imposition of a cap on the exemption "is not acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees." *Id.* at 150, 500 S.E.2d at 66.

More recently, in *Wiggs*, our Supreme Court again determined that a retroactive change to a statutory employment benefit for public employees violated the Contract Clause. There, the plaintiff was a deputy sheriff who retired early after three decades of service and received a "special separation allowance" pursuant to N.C. Gen. Stat. § 143-166.42 from the county that employed him. He then obtained part-time employment as a police officer with the Raleigh-Durham Airport Authority, which prompted his former county employer to adopt a resolution providing that special separation allowance payments would terminate upon a retiree's re-employment with another local government entity. 361 N.C. at 319, 643 S.E.2d at 905. Drawing on its prior holding in *Faulkenbury*, the Court recognized that the special separation allowance was an employment benefit that was contractual in nature, and concluded that although the county could have acted within its authority "to pass a resolution which would apply prospectively to those whose rights to the special separation allowance had not yet vested," it could not retroactively apply such a resolution "to [the] plaintiff's vested contractual right" to receive the allowance. *Id.* at 324, 643 S.E.2d at 908.

Based on the record and our review of the case law made relevant by the actual arguments of the parties, we conclude that the trial court did not err in its determination that career status rights constitute a valuable employment benefit and that by satisfying the requirements of the Career Status Law prior to the Career Status Repeal, Plaintiffs Nixon, Holmes, Beatty, Wallace, and deVille earned vested contractual rights to the valuable employment benefit that career status protections represent. While the benefits at issue here may not be identical to those at issue in *Faulkenbury*, *Bailey*, and *Wiggs*, we conclude that those cases

demonstrate our Supreme Court's long-standing recognition that when the General Assembly revokes valuable employment benefits that are obtained in reliance on a statute and that offset the relatively low salaries of public employees, it violates the Contract Clause. In reaching this conclusion, we find highly persuasive the affidavit Plaintiffs submitted from labor economist Rothstein, who observes that "[t]here is a useful parallel between job security that derives from a career status award and the economic value of retirement benefits." As Rothstein explains:

> It has long been recognized that the prospect of earning future retirement benefits, including pensions and retiree health coverage, has economic value to workers, even those who are not themselves near retirement age. Workers often choose careers based in part on the retirement benefits that are offered. In the same way, the prospect of earning career protections, and the job security that comes with them, has economic value to teachers, and is an important part of the package of pay and benefits that individuals consider when deciding whether to become teachers.
>
> [] There are several aspects of the teacher employment relationship that make career status protections more valuable than they might otherwise be. First, teachers are relatively poorly paid. Nationally, the average teacher earned about $56,643 in 2011-12 per year, only 67% of the salary earned by the average full-time, full-year college-educated worker. In North Carolina, teacher salaries are even lower than this—the average public school teacher's salary in 2011-12 was $46,605, down over 12% in real terms since 1999-2000. The 2013-14 North Carolina salary schedule for a teacher with a bachelor's degree specifies a maximum salary of $53,180 for a teacher with 36 or more years of experience, less than the average teacher's salary nationally, and even teachers with master's degrees do not reach the national average until they have accumulated 35 years of experience.
>
> [] Second, teacher salaries are typically backloaded. Entering teacher salaries are very low relative to other occupations, as are those with few years of experience, but the growth rate is typically higher than in non-teaching jobs. In North Carolina, teacher salaries rise by a total of only 2.8% over the first seven years, then grow by 15.8%

> over the next four years. Total compensation is even more strongly backloaded than are salaries. Teacher pensions do not vest until ten years (for those hired after 2011), and the pension benefit grows with experience much faster than the base salary. Salary-experience profiles are typically much smoother in the economy at large than is the North Carolina teacher's salary schedule. Backloaded salaries mean that it can be quite costly for an experienced teacher to lose his or her job, as he or she has already borne the cost of teaching through the low-compensation early years but will never be able to amortize this through higher earnings in the later part of the career.
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Based on Rothstein's analysis, we conclude that career status protections have a financial impact that is strongly analogous to, and in some ways directly implicates, the vested contractual rights to benefits as a form of deferred compensation that were at issue in *Faulkenbury*, *Bailey*, and *Wiggs*. We consequently conclude that our Supreme Court's consistent pattern of refusing to allow the State to renege on its statutory promises, after decades of representing the valuable employment benefits conferred by those statutes as inducements to public employment, supports, and even compels, the result we reach here. *See*, *e.g.*, *Bailey*, 348 N.C. at 147, 500 S.E.2d at 64.

In the present case, the record indicates a similar pattern of inducement and reliance, given Plaintiffs' affidavits describing how they relied on the availability of career status protections when they chose to work as teachers in North Carolina's public schools, as well as affidavits from eight public school administrators describing how they have relied on the Career Status Law to attract and retain qualified teachers. Based on this uncontradicted evidence, we cannot escape the conclusion that for the last four decades, the career status protections provided by section 115C-325, the very title of which—"Principal and Teacher Employment Contracts"— purports to govern teachers' employment contracts, have been a fundamental part of the bargain that Plaintiffs and thousands of other teachers across this State accepted when they decided to defer the pursuit of potentially more lucrative professions, as well as the opportunity to work in states that offer better financial compensation to members of their own profession, in order to accept employment in our public schools. We therefore conclude further that, as in *Faulkenbury*, *Bailey*, and *Wiggs*, the State has reaped benefits by using the Career Status Law as an inducement by which to attract and

retain public school teachers in spite of the relatively low wages it pays them. Thus, although the dissent cites our Supreme Court's prior observation in *Taborn v. Hammonds*, 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989), that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons," in support of its conclusion that career status protections were intended merely to advance a policy of providing good teachers "for the children" rather than to provide contractual rights for the teachers, we cannot and will not ignore the thousands of North Carolinians who ended up on the other side of that equation by relying on the inducement of a statutory promise to gain vested rights to valuable employment benefits.

The State's attempt to distinguish the career status protections at issue here from the contractual rights to benefits under the statutory schemes at issue in *Brand*, *Faulkenbury*, and *Bailey* is wholly unpersuasive. Indeed, the State's description of those benefits as being automatically conferred by express statutory guarantees conveniently overlooks striking similarities those statutes share with the Career Status Law. In *Brand*, for example, the granting of tenure, or "permanent" status, was contingent on the teacher successfully completing at least five years of probationary employment and then entering into a new contract. Although the statute did not expressly require approval by the local school board, we can infer that a public school teacher's contract would only be renewed after review by some governmental body or agent with knowledge of Indiana's Teachers' Tenure Law, and we therefore see no meaningful difference between its operation and the procedures by which Plaintiffs earned career status protections under the Career Status Law. In a similar vein, the statutes at issue in *Faulkenbury*, *Bailey*, and *Wiggs* required employees to remain employed for a minimum vesting period before they were entitled to receive any benefits at all; here again, it stands to reason that those employees' performances were evaluated at regular intervals by supervisors with knowledge of the statutory vesting process for retirement benefits and strong incentives to terminate inadequately performing employees before those benefits vested. Therefore, because the State's purported distinctions make no difference, we conclude that these Plaintiffs who relied on the statutory promise offered by the Career Status Law and satisfied its requirements before the Career Status Repeal earned a vested right to career status protections that is every bit as contractual in nature as the plaintiffs' rights in *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*. Indeed, we believe that to hold otherwise would go against nearly two centuries of respect

our State's judiciary has shown for the sanctity of private and public contractual obligations and would thus "not [be] acceptable in a government guided by notions of fairness, consent and mutual respect between government and man, and certainly not between the government of this State and its employees." *Bailey*, 348 N.C. at 150, 500 S.E.2d at 66.

The State's emphasis on Plaintiffs' individual employment contracts with their local school boards is similarly misplaced. First, the State's argument fundamentally misconstrues the basis for Plaintiffs' claims under the Contract Clause. Put simply, Plaintiffs are not suing based on their individual contracts, but instead based on the State's statutory promise, contained in section 115C-325 of our General Statutes, that teachers who satisfied the requirements of the Career Status Law and earned that status would be entitled to its protections, and it is that contractual promise—just like the statutory promises at issue in *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*—that Plaintiffs allege was substantially impaired by the Career Status Repeal. Therefore, the boilerplate disclaimers the State relies on from Plaintiffs' individual employment contracts with local school boards—which do not purport to address the revocation of career status protections in any way but instead merely, and sensibly, recognize that a teacher's salary and continued employment depend on the State not running out of the funds necessary to honor its obligations—have no bearing whatsoever on this litigation.

The State also puts heavy emphasis on a similar provision contained in a sample contract from the Durham Public Schools ("DPS") Board of Education, included in the record with the affidavit from DPS Chair Heidi H. Carter, that specifically refers to the contract as being "subject to the provisions of the school law applicable thereto, which are hereby made a part of this contract." The State contends this language evidences a clear reservation of rights that is consistent with the long-held proposition that one legislature cannot bind another, *see*, *e.g.*, *Town of Shelby v. Cleveland Mill & Power Co.*, 155 N.C. 196, 71 S.E. 218 (1911), and therefore demonstrates that career status protections have always been subject to termination by the General Assembly. But this argument also fails. On the one hand, as noted *supra*, our Supreme Court has already rejected a similar argument in *Faulkenbury*. *See* 345 N.C. at 690, 483 S.E.2d at 427. On the other hand, given the State's intense focus on individual employment contracts, it certainly bears noting that none of these Plaintiffs who had already earned career status worked for DPS, which means that none of them would have been bound by this vague caveat. The State further contends that the sample contract is relevant because Plaintiffs' complaint purported to seek relief on behalf of all

teachers and the trial court's order likewise applies to all teachers, but here again, the State's argument is unavailing because it misconstrues the basis for Plaintiffs' claims under the Contract Clause.

(2) The Career Status Repeal substantially impairs contractual obligations

Having determined that Plaintiffs have contractual rights to career status protections, we turn next to the question of whether those rights were substantially impaired. This is not a difficult question. Under the Career Status Law, these Plaintiffs would have continuing contracts; under the Career Status Repeal, their contracts will be limited to a maximum duration of four years. *Compare* N.C. Gen. Stat. § 115C-325(d)(1), *with* 2013 N.C. Sess. Law 360 § 9.6(b). Moreover, under the Career Status Law, if these Plaintiffs were terminated, demoted, or otherwise disciplined, they would be entitled to a hearing with full due process rights; under the Career Status Repeal, there is no guarantee of a hearing. *Compare* N.C. Gen. Stat. § 115C-325(h), (j), *with* 2013 N.C. Sess. Law 360 § 9.6(b). Thus, in light of the relevant state and federal decisions discussed *supra*, we have no trouble concluding that the trial court was correct in its determination that the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights.

For its part, the State argues that Plaintiffs' vested contractual rights to career status protections are not substantially impaired by the Career Status Repeal based on a misapplication of the Fourth Circuit's recent decision in *Cherry v. Mayor & Balt. City*, 762 F.3d 366 (4th Cir. 2014). There, the plaintiffs sought to challenge a municipal ordinance that made actuarial adjustments to a pension plan by replacing a variable benefit with a cost-of-living adjustment. *Id.* at 369. The Fourth Circuit concluded that the city's modification of its pension plan fell within a state-law contract doctrine permitting "reasonable modifications" to pension plans, which would allow the plaintiffs to challenge the reasonableness of the modification by bringing a breach of contract action for damages. *Id.* at 372-73. Because a city does not commit a Contract Clause violation "merely by breaching one of its contracts," the plaintiffs could not maintain a Contract Clause action in the absence of a showing that the city had somehow foreclosed them from pursuing a breach of contract action for damages. *Id.* at 371. In the present case, the State suggests that *Cherry* should control because the Career Status Repeal was merely a contract modification and Plaintiffs have not asserted any breach of contract claims. There are several reasons why this argument lacks merit. First, the State's claim that the Career Status Repeal is merely a "modification" authorized by Plaintiffs' individual

employment contracts based on the boilerplate disclaimers discussed *supra* once again misconstrues the basis for Plaintiffs' claims under the Contract Clause, and consequently fails. Moreover, the State points to no state-law remedy comparable to the "reasonable modification" doctrine in *Cherry* that would permit Plaintiffs to bring a breach of contract action for damages here. We therefore conclude that *Cherry* is not even remotely applicable to the present facts.

(3) The Career Status Repeal was not reasonable and necessary to serve an important public purpose

Finally, the State has the burden of establishing that the Career Status Repeal was a reasonable and necessary means of furthering an important public purpose. *See Bailey*, 348 N.C. at 151, 500 S.E.2d at 66. Our review as to this third factor involves two steps. First, legislation that substantially impairs contractual rights must have "a legitimate public purpose," which essentially means the State must produce evidence that the purported harm it seeks to address actually exists. *See, e.g.*, *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 74 L. Ed. 2d 569, 581 (1983). Second, if the legislation has a legitimate public purpose, we then examine whether the impairment of contractual rights is a "reasonable and necessary" way to further that purpose or whether the State's objective could have been accomplished through a "less drastic modification" because the State "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *U.S. Trust Co.*, 431 U.S. at 30-31, 52 L. Ed. 2d at 114-15. While the State is typically granted a degree of deference as to what is reasonable and necessary when legislation impairs purely private contracts, *see Energy Reserves Grp., Inc.*, 459 U.S. at 412-13, 74 L. Ed. 2d at 581, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" where, as here, public contracts are at issue "because the State's self-interest is at stake." *U.S. Trust Co.*, 431 U.S. at 26, 52 L. Ed. 2d. at 112.

In the present case, the State contends that even if the Career Status Repeal substantially impaired Plaintiffs' contractual rights, such an impairment is reasonable and necessary to serve the important public purpose of improving the educational experience for North Carolina's public school children. Specifically, citing the North Carolina Constitution's guarantee that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right," N.C. Const. art. I, § 15, the State argues that it is imperative for local school boards to be able to dismiss ineffective teachers, and that the Career Status Repeal is therefore crucially important because it gives

local school boards more flexibility in managing their pool of teachers and increasing the overall quality of the teachers in the pool. The State also urges this Court to consider the Career Status Repeal as just one plank in a broader raft of reforms aimed at improving public education. However, as demonstrated by our review of the record and the relevant case law, this argument is without merit.

While no one can deny the general proposition that improving North Carolina's public schools is an important public purpose, the State's purported rationale for the Career Status Repeal is flatly contradicted by the terms of the Career Status Law itself and the affidavits both parties submitted in response to Plaintiffs' motion for summary judgment. Before its repeal, the Career Status Law already explicitly permitted school districts to terminate career status teachers for "inadequate performance," which the statute defined as "the failure to perform at a proficient level on any standard of the evaluation instrument" or "otherwise performing in a manner that is below standard." N.C. Gen. Stat. § 115C-325(e)(1), (e)(3). Furthermore, Plaintiffs submitted affidavits from eight North Carolina public school administrators, who each confirmed that the Career Status Law is an asset for attracting and retaining quality teachers to serve in our State's public schools; that the four-year probationary period provides more than adequate time for school districts to evaluate teachers, identify performance issues early, provide constructive feedback for improvement, and make informed decisions that ensure career status is only granted to teachers who have proven their effectiveness; and, most importantly, that the Career Status Law effectively provided school administrators with sufficient tools to discipline and/or dismiss teachers who have already earned career status and thus did not impede their ability to remove such teachers for inadequate performance. By contrast, the State submitted affidavits from experts who believe that granting tenure to teachers creates insurmountable obstacles to dismissing ineffective teachers, and that removing those obstacles will therefore help improve student performance. Yet the only support that the State's affidavits offer for this premise consists of vague and sweeping generalizations about tenure as an abstract concept, rather than specific facts regarding the operation of North Carolina's Career Status Law or its allegedly adverse impact on our public schools. Given this Court's prior recognition that "conclusory statements standing alone cannot withstand a motion for summary judgment," *see*, *e.g.*, *Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 309, 515 S.E.2d 244, 246 (1999), we conclude that the vague and conclusory assertions contained in the State's affidavits are plainly insufficient to meet its burden here. Therefore, in light of the unrebutted affidavits concerning real

North Carolina school administrators' actual experiences implementing the Career Status Law, and the statute's explicit inclusion of "inadequate performance" as a ground for dismissal, we conclude that the substantial impairments the Career Status Repeal imposes on Plaintiffs' vested contractual rights for the purported rationale of making it easier to dismiss ineffective teachers serves no public purpose whatsoever.

Moreover, even assuming *arguendo* that making it easier to dismiss ineffective teachers was an important public purpose, we are not persuaded that the Career Status Repeal was a reasonable and necessary means to advance that purpose. Our Supreme Court's prior decisions make clear what a high bar this represents. For example, *Bailey* established that in this context, "[l]egislative convenience is not synonymous with reasonableness" when it comes to legislation that impairs the vested rights of public employees to whom the State has made promises in consideration of their years of public service, and that "necessary" basically means "essential." 348 N.C. at 152, 500 S.E.2d at 67 ("Thus, we hold the Act which placed a cap on tax-exempt benefits was not necessary to a legitimate state or public purpose, *i.e.*, it was not 'essential' because 'a less drastic modification' of the State's exemption plan was available.") (citation omitted; italics added). In *Faulkenbury*, the State argued that lowering the plaintiffs' retirement benefits was reasonable and necessary to ensure the State pension plan's correct operation. 345 N.C. at 694, 483 S.E.2d at 429. In rejecting that argument, the Court explained that "[w]e do not believe that because the pension plan has developed in some ways that were not anticipated when the contract was made, the state or local government is justified in abrogating it. This is not the important public purpose envisioned which justifies the impairment of a contract." *Id.* In *Bailey*, the Court went even further when it rejected the State's argument that capping the tax exemption for public employee retirement benefits was "necessary" to comply with a decision by the United States Supreme Court because there were "numerous ways that the State could have achieved this goal without impairing the contractual obligations of [the] plaintiffs." 348 N.C. at 152, 500 S.E.2d at 67.

In the present case, we are compelled by *Faulkenbury* and *Bailey* to reach a similar conclusion. On the one hand, if ensuring the correct operation of the State's plan was not a sufficient basis for the *Faulkenbury* Court to conclude the substantial impairment of contractual rights was necessary and reasonable, then surely here, the State's decision to totally abolish its plan based on vague generalizations supported by no direct evidence whatsoever must also fail. Moreover, just because the Career Status Repeal might be a convenient way to further the General

Assembly's broader efforts to reform public education does not make the abrogation of Plaintiffs' vested contractual rights reasonable. Further, the record is replete with evidence of less drastic available alternatives. The legislative history of the Career Status Law demonstrates that its provisions have been amended numerous times over the last four decades, most recently in 2011 to expand the definition of "inadequate performance." *See* An Act to Modify the Law Relating to Career Status for Public School Teachers, 2011 N.C. Sess. Law 348. If it had been truly necessary to further augment the ability of local school boards to dismiss teachers for performance-related reasons, our General Assembly could have done so through further reforms; indeed, Plaintiffs' affidavit from Rep. Glazier clearly demonstrates that there was a less drastic alternative available here in the form of H.B. 719, which would have "added definitions of teacher performance evaluation standards, teacher performance ratings, and teacher status, thus creating greater consistency in the determination of career status and revocation of career status based on evaluation ratings," an alternative which enjoyed nearly unanimous bipartisan support. We therefore conclude that the trial court did not err in granting partial summary judgment in favor of NCAE and the five teachers who had already earned career status based on its determination that the Career Status Repeal violated the Contract Clause of the United States Constitution.

B. The Career Status Repeal violated the Law of the Land Clause of the N.C. Constitution

[2] The State also argues that the trial court erred in concluding that the Career Status Repeal violated the Law of the Land Clause found in Article I, Section 19 of the North Carolina Constitution as a separate and independent basis for the court's partial grant of summary judgment to Plaintiffs. We disagree.

The Law of the Land Clause provides in relevant part that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. North Carolina's appellate courts have long held that the clause protects against the taking of property by the State without just compensation. *See, e.g.*, *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982) ("We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is

considered in North Carolina as an integral part of the 'law of the land' within the meaning of Article I, Section 19 of our State Constitution.") (citations omitted); *State ex rel. Utilities Comm'n v. Buck Island, Inc.*, 162 N.C. App. 568, 580, 592 S.E.2d 244, 252 (2004) ("Though the clause does not expressly prohibit the taking of private property for public use without just compensation, our Supreme Court has inferred such a provision as a fundamental right integral to the law of the land.") (citation and internal quotation marks omitted). In *Bailey*, our Supreme Court recognized that because "[t]he privilege of contracting is both a liberty and a property right," 348 N.C. at 154, 500 S.E.2d at 68 (citation omitted), the Law of the Land Clause guarantees that contractual rights, including those created by statute, constitute property rights and are therefore protected against uncompensated takings. *Id.* ("[I]f the Legislature had vested an individual with the property in question, . . . [the Law of the Land Clause] would restrain them from depriving him of such right.") (citation and emphasis omitted).

In the present case, the State contends that, in light of this Court's prior holding in *Shipman v. N.C. Private Protective Servs. Bd.*, 82 N.C. App. 441, 346 S.E.2d 295, *appeal dismissed and disc. review denied*, 318 N.C. 509, 349 S.E.2d 866 (1986), all that is required for a challenged statute to comport with the Law of the Land Clause is that the statute must serve a legitimate purpose of State government and be rationally related to that purpose. Thus, given its duty imposed by Article I, Section 15 of the North Carolina Constitution to guard and maintain the right of the people to public education, the State argues that the Career Status Repeal is rationally related to the legitimate purpose of improving our children's educational experience by providing tools for local school boards to more easily dismiss underperforming teachers in order to serve the paramount goal of staffing the public schools with the best teachers possible. The State also heavily emphasizes the great deference and strong presumption of constitutionality that North Carolina's appellate courts typically afford to legislation enacted by our General Assembly, *see, e.g.*, *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("In determining the constitutionality of a statute we are guided by the following principle: [e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.") (citations, internal quotation marks, and brackets omitted), and implies that by ignoring these presumptions, the trial court violated the doctrine of separation of powers by improperly substituting its views for those of the Legislature. Indeed, while acknowledging that there are differing views on how best to improve public education in North Carolina, the State characterizes the present lawsuit as the sort of partisan policy

dispute that is for the people's elected representatives, rather than the courts, to resolve. Furthermore, the State argues that Plaintiffs cannot meet their burden of proving the Career Status Repeal is unconstitutional beyond reasonable doubt because the statutory grounds for termination remain largely the same as under the Career Status Law and because teachers whose contracts are not renewed can still petition the local school board for a hearing.

There are many reasons why this argument fails. First, the State's reliance on the standard of review this Court utilized in *Shipman* is wholly misplaced. There, we reviewed a challenge to our General Assembly's enactment of legislation to regulate "those professions which charge members of the public a fee for engaging in many activities which overlap the functions of our public police" by, *inter alia*, requiring that private detectives obtain licenses from a state agency. 82 N.C. App. at 443, 346 S.E.2d at 296. Because we determined that regulating such an occupation is clearly a legitimate purpose of state government, and that licensing is rationally related to that purpose, we rejected the plaintiff private investigator's argument that the statute violated the Law of the Land Clause. *Id.* at 444-45, 346 S.E.2d at 297. Significantly, however, *Shipman* did not involve any takings claim by the plaintiff, whose arguments focused exclusively on whether the statute authorizing the Private Protective Service Board to grant, suspend, or revoke licenses violated his right to due process, and we therefore find *Shipman* inapplicable to the present facts.

Instead, we turn for guidance to the model our Supreme Court established in *Bailey*. As the *Bailey* Court made clear, a statutory promise of employment benefits, once vested, confers a contractual right, which is also a property right, the uncompensated impairment of which by subsequent legislation can constitute a taking in violation of the Law of the Land Clause. 348 N.C. at 154-55, 500 S.E.2d at 68-69. Having already determined that the challenged legislation violated the Contract Clause, the *Bailey* Court had no trouble in concluding that

> it is clear that the State has taken [the] plaintiffs' private property by passage of the Act. [The p]laintiffs contracted, as consideration for their employment, that their retirement benefits once vested would be exempt from state taxation. The Act now undertakes to place a cap on the amount available for the exemption, thereby subjecting substantial portions of the retirement benefits to taxation. This is in derogation of [the] plaintiffs' rights established through the retirement benefits contracts and thus

> constitutes a taking of their private property. The State fails to compensate them for such taking through the Act. As such, the act is unconstitutional under the [Law of the Land Clause].

348 N.C. at 155, 500 S.E.2d at 69. Similarly here, having already determined that the Career Status Repeal substantially impairs Plaintiffs' vested rights to career status protections in violation of the Contract Clause, the only remaining issue for our analysis is whether this derogation of Plaintiffs' rights constitutes an unconstitutional taking of property without just compensation. Consistent with *Bailey*, we conclude that it does. Here, as in *Bailey*, Plaintiffs contracted, as consideration for their employment, that after fulfilling the Career Status Law's requirements, they would be entitled to career status protections. Here, as in *Bailey*, the Career Status Repeal purports to abrogate those protections and thus constitutes a taking of Plaintiffs' private property. Here, as in *Bailey*, the Career Status Repeal offers no compensation for this taking. Thus, here, as in *Bailey*, the Career Status Repeal violates the Law of the Land Clause.

The State's argument that Plaintiffs' constitutional rights have not been violated because they retain the same due process protections under the Career Status Repeal fails because it is patently false. While the State may be correct that the statutorily enumerated bases for termination remain largely unchanged, as already discussed *supra*, under the Career Status Law, a teacher who earned career status and was subsequently dismissed or disciplined was entitled to a hearing, whereas under the Career Status Repeal, there is no entitlement to a hearing. *Compare* N.C. Gen. Stat. § 115C-325(h)(2), (3), *with* 2013 N.C. Sess. Law 360 § 9.6 – 9.7; *see also Crump v. Bd. of Educ. of Hickory Admin. School Unit*, 326 N.C. 603, 613-14, 392 S.E.2d 579, 584 (1990) (holding that "a career teacher under [section] 115C-325 . . . ha[s] a cognizable property interest in his continued employment," and is "entitled to a hearing according with principles of due process.") The State's argument also ignores the fact that it is not merely the Career Status Law's due process protections that are at issue here, since the Career Status Repeal also deprives Plaintiffs of their vested rights to continuing employment. Furthermore, the Career Status Repeal makes no provision for justly compensating Plaintiffs for the derogation of their rights to vested career status protections. The 25% Provision might have provided some degree of compensation to a small minority of career status teachers, but its own explicit terms would provide nothing to at least 75% of teachers who had already earned career status. *See* 2013 N.C. Sess. Law 360

§ 9.6(g), (h). In any event, the State makes no argument that the trial court erred in permanently enjoining the 25% Provision's implementation and enforcement based on the court's determination that the provision is inextricably tied to the unconstitutional revocation of career status, as well as unconstitutionally vague.

In light of the preceding analysis, we have no trouble concluding that Plaintiffs have met their burden of proving the Career Status Repeal unconstitutional beyond reasonable doubt and thereby have successfully rebutted the strong presumption of constitutionality this Court typically affords to legislation enacted by our General Assembly. Moreover, contrary to the State's argument, our review of the record and relevant case law makes clear that Plaintiffs are seeking vindication of their constitutional rights, rather than attempting to litigate a partisan policy dispute over education. As such, we hold that the trial court did not err in concluding that the Career Status Repeal violated the Law of the Land Clause of the North Carolina Constitution as a separate and independent basis for its partial grant of summary judgment to Plaintiffs.

C. The trial court did not err in declining to strike certain portions of Plaintiffs' affidavits

[3] Additionally, the State argues that the trial court erred in failing to strike certain portions of Plaintiffs' affidavits that it contends were not properly admissible because they were not based on the affiants' personal knowledge. We disagree.

As this Court has previously recognized, because Rule 56(e) of the North Carolina Rules of Civil Procedure provides in relevant part that affidavits supporting and opposing summary judgment "shall be made on personal knowledge," when an affidavit contains statements not based on an affiant's personal knowledge, the trial court "may not consider" those portions of the affidavit. *Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 776 (1998) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(e) (2013). In the present case, the State complains that there is no possible way that any of Plaintiffs' affiants could have personal knowledge of what motivates the decisions of every public school teacher in North Carolina. Thus, the State contends that the trial court erred by failing to strike those portions of each of these Plaintiffs' affidavits that included statements about the impact of career status on all teachers in the State, as well as certain portions of the affidavits from school administrators that purported to describe what all teachers in the State "relied upon" or "viewed as important" in making their career decisions.

This argument is without merit. On the one hand, we are not convinced that the statements the State contests are beyond the personal knowledge of the affiant teachers and administrators, all of whom are experienced North Carolina educators and are thus sufficiently familiar with the Career Status Law to competently describe its benefits and protections in general terms, as well as the basic economic assumptions that motivate members of their profession. On the other hand, even assuming *arguendo* that the trial court should have excluded these contested statements, in light of the fact that the State is unable to specifically identify any aspect of the court's order that relied on them, we conclude that any error in its failure to strike them was entirely harmless. Indeed, the only portion of the order that deals with the Career Status Law's impact on teachers' motivations and career decisions was the trial court's finding that

> [Plaintiffs] were statutorily promised career status rights in exchange for meeting the requirements of the Career Status Law. When they made their decisions both to accept teaching positions in North Carolina school districts and to remain in those positions, they reasonably relied on the State's statutory promise that career status protections would be available if they fulfilled those requirements. The protections of the Career Status Law are a valuable part of the overall package of compensation and benefits for [P]laintiffs and other teachers, benefits that they bargained for both in accepting employment as teachers in North Carolina school districts and remaining in those positions. From the perspective of school administrators, career status protections help attract and retain teachers despite the low salaries established by State salary schedules.

Our review of the record demonstrates that this finding of fact is well supported by statements in each of the named Plaintiffs' affidavits about how they personally relied on the Career Status Law's statutory promise, and by statements in each of the administrators' affidavits about how they recognized the Career Status Law's benefits based on their own personal experiences.

The premise for the State's argument here appears to be that because these Plaintiffs do not speak for every teacher in North Carolina, the trial court erred by permanently enjoining the State from implementing and enforcing the Career Status Repeal. But here again, the State misconstrues the basis for Plaintiffs' lawsuit. While the State's argument might have some merit if this were a class action, it is totally inapplicable to

the present litigation, in which Plaintiffs contend that the Career Status Repeal is unconstitutional as applied to them, given their vested contractual and property rights in the Career Status Law's protections. Despite the State's claims to the contrary, that does not mean that the trial court erred when it concluded that the Career Status Repeal is equally unconstitutional as applied to all similarly situated public school teachers who have already earned career status. Accordingly, we hold that the trial court did not err in granting summary judgment to NCAE and Plaintiffs Nixon, Holmes, Beatty, deVille, and Wallace.

D. The arguments raised by the dissent are neither persuasive nor properly before this Court

Finally, we are compelled to note that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005); *see also Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C. App. 1, 13, 631 S.E.2d 1, 9, *disc. review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006). We find this well-established maxim especially applicable where, as here, the appellant is the State and the litigation before us involves the State's attempts to revoke the statutorily vested contract and property rights of thousands of North Carolinians.

In the present case, as demonstrated *supra*, the State's appellate brief asks this Court to reverse the trial court's decision based on its arguments that: (1) all acts of our General Assembly are accompanied by a (rebuttable) presumption of constitutionality; (2) the Career Status Repeal did not violate the North Carolina Constitution's Law of the Land Clause because it was enacted for the legitimate government purpose of "fixing" our public schools; and (3) although teachers do have contracts with their local school boards, the Career Status Repeal did not violate the Contract Clause of the United States Constitution because it did not substantially impair those contract rights in light of: (a) conditional language contained in boilerplate disclaimers in Plaintiffs' employment contracts and a sample contract from the DPS Board of Education, (b) purported distinctions between the Career Status Law's vesting mechanism and those of the statutes at issue in *Brand*, *Faulkenbury* and *Bailey*, and (c) the Fourth Circuit's recent decision in *Cherry*. The State also argues that the trial court erred in failing to strike certain portions of Plaintiffs' affidavits. In its reply brief to Plaintiffs' appellee brief, the State reiterated these arguments. Shortly before this case was orally argued, the State submitted a memorandum of additional authority to call this Court's attention to Article I, Section 15 of the North Carolina

Constitution, which obligates the State to guard and maintain its citizens' right to public education, and the United States Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC et al.*, 528 U.S. 377, 145 L. Ed. 2d 886 (2000), which dealt with campaign finance reform. During oral arguments, this Court and both parties properly focused primarily on the issues raised in the State's appellate brief. As discussed *supra*, these arguments are wholly unpersuasive.

Nevertheless, our learned colleague dissents in part from the majority opinion of this Court based on his view that the trial court erred in concluding that the Career Status Repeal violates the Contract Clause for the reasons articulated in the United States Supreme Court's decision in *Brand*. Instead, our learned colleague would resolve this case in the State's favor based on that Court's prior holdings in *Phelps v. Bd. of Educ.*, 300 U.S. 319, 81 L. Ed. 674 (1937) and *Dodge v. Bd. of Educ.*, 302 U.S. 74, 82 L. Ed. 57 (1937). As neither of these cases was cited by either of the parties at any point in this litigation, we do not believe it would be appropriate to resolve this case by essentially constructing the State's argument for it, as to do so would violate the rationale behind our Supreme Court's holding in *Viar* and this Court's subsequent decision in *Hammonds* by leaving Plaintiffs, as appellees, "without notice of the basis upon which [this Court] might rule." *Hammonds*, 178 N.C. App. at 13, 631 S.E.2d at 9 (quoting *Viar*, 359 N.C. at 402, 610 S.E.2d at 361). While we recognize that *Viar* and *Hammonds* dealt with technical violations of N.C. R. App. P. 10 and 28, we find their rationales equally applicable to the substantive errors of omission committed by the State as the appellant here. Rule 28 of our Rules of Appellate Procedure provides in pertinent part that

> [t]he function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and *to present the arguments and authorities upon which the parties rely* in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C. R. App. P. 28(a) (emphasis added). Moreover, Rule 28(b) mandates that an appellant's brief shall include, *inter alia*, "[a]n argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). In the present case, we conclude that, if the analysis

in our learned colleague's dissent is correct, the State has violated Rule 28 by failing to raise any argument on the issue of whether the outcome of this case should be determined based on *Brand* or based on *Phelps* and *Dodge*. We conclude further that to disregard the arguments the State actually made in order to substitute a potentially stronger argument that Plaintiffs have never been given any opportunity to address would fundamentally violate the substance of our Rules and the spirit of basic fairness they aim to preserve, as well as thrust this Court into the improper position of performing as an advocate for one of the parties to this dispute.

Although our Supreme Court held in *Viar* that an appeal that fails to comply with Rule 28 is subject to dismissal, *see* 359 N.C. at 402, 610 S.E.2d at 361, in *Hammonds* this Court made clear that we do not treat violations of our Rules of Appellate Procedure "as grounds for automatic dismissal" but instead apply appropriate sanctions based on the results of a three-factor test that weighs "(1) the impact of the violations on the appellee, (2) the importance of upholding the integrity of the Rules, and (3) the public policy reasons for reaching the merits in a particular case." 178 N.C. App. at 15, 631 S.E.2d at 10. Here, we conclude that the State's failure as the appellant to raise either *Dodge* or *Phelps* as a basis for distinguishing Plaintiffs' and the trial court's reliance on *Brand* substantially prejudiced Plaintiffs as appellees by denying them sufficient notice of the issues to be contested and the basis upon which this Court might rule. Given the circumstances, we believe that the appropriate sanction here is to apply Rule 28's provision that the issue of whether *Dodge* and *Phelps* control the outcome of this case, which was neither presented nor discussed by the State at any point in this litigation, should be deemed abandoned.

In any event, we are also not persuaded by the substantive merits of our learned colleague's dissent. On the one hand, although he attempts to distinguish the Career Status Law from the statute at issue in *Brand* by emphasizing the Supreme Court's finding that the latter was "couched in terms of contract," 303 U.S. at 105, 82 L. Ed. at 693, while the former is not, his analysis overlooks, and for reasons discussed *supra* is significantly undermined by, the fact that the title of section 115C-325 of our General Statutes is "Principal and Teacher Employment Contracts." Furthermore, we are not persuaded by the dissent's efforts to bolster its conclusion that it is within the General Assembly's power to rescind Plaintiffs' vested rights to career status protections based on the Career Status Law's legislative history. Although the Career Status Law has indeed been amended several times since its enactment in 1971, these

amendments focused not on the protections it offers—*i.e.*, a career status teacher's right to a continuing contract and a mandatory hearing—but instead on the performance-based reasons that a career status teacher can be dismissed. Thus, while the dissent is correct that these amendments in some ways increased the discretion of local school boards, they did so in ways that did not substantially impair the benefits the Career Status Law provided to teachers who earned vested rights to career status protections, and their implications were far less drastic than the wholesale elimination of those rights represented by the Career Status Repeal.

Moreover, in reaching its holding in *Phelps*, the United States Supreme Court noted that "where a statute is claimed to create a contractual right we give weight to the construction of the statute by the courts of the state." 300 U.S. at 322, 81 L. Ed. at 677. Thus, while we are certainly impressed by the breadth of our learned colleague's painstaking research into how courts in other states have addressed this issue, we are equally certain that those cases are beside the point. In the present case, we know of no instance in which our Supreme Court has ever previously answered or even been directly asked the question of whether or not teachers who have already earned the protections of the Career Status Law have obtained vested contractual and property rights that, when violated, implicate the Contract Clause of the United States Constitution or the Law of the Land Clause of the North Carolina Constitution.

We are not persuaded by the dissent's suggestion that we base our decision on our Supreme Court's conclusory assertion in *Taborn v. Hammonds*, 324 N.C. 546, 380 S.E.2d 513 (1989), that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary, or discriminatory reasons." *Id.* at 556, 380 S.E.2d at 519. In *Taborn*, the Court addressed the issue of how much process is due when a special education teacher is terminated due to budget cuts necessitating a system-wide workforce reduction, which the then-extant version of the Career Status Law explicitly authorized as one of the reasons a career status teacher could be terminated. The quote the dissent relies on was offered in passing, with scant analytic support apart from a citation to where it originally appeared in the case of *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975), in order to focus the *Taborn* Court's interpretation of the requirement contained in subsection (e)(1)l that any decrease in the number of teaching positions due to a decrease in funding be "justifiable." 324 N.C. at 556, 380 S.E.2d at 519. Moreover, *Taylor* addressed a lawsuit by a public school

principal whose situation in some ways mirrors that of Plaintiff Link in the present case: when the Career Status Law was originally enacted, he had completed three years of probationary employment as a public school principal, and thus was only a year away from potentially earning career status protections, but his local school board voted against the recommendations of his superintendent and declined to renew his contract for a fourth probationary year. 286 N.C. at 493-94, 212 S.E.2d at 384-85. The plaintiff's challenge centered on whether or not the school board should be bound by the superintendent's recommendation, and that is the context in which the Court opined, without any citation or support, on the purpose of the Career Status Law. *Id.* at 496, 212 S.E.2d at 386. Because neither *Taborn* nor *Taylor* addressed any claims under the Contract Clause, we decline to adopt our learned colleague's conclusion, especially when our Supreme Court, as demonstrated by its holdings in *Faulkenbury*, *Bailey*, and *Wiggs*, has repeatedly held that the State violates the Contract Clause when it attempts to revoke public employees' vested rights to valuable employment benefits provided by statutes that the State has encouraged reliance on as an inducement to public employment.

We also take issue with the dissent's conclusion that even if the Career Status Law does give rise to individual contract rights, the Career Status Repeal does not substantially impair those rights except insofar as it fails to provide for a hearing. We do not believe this conclusion is supported by the record given the affidavits from Plaintiffs, public school administrators, and labor economist Rothstein describing how the Career Status Law's protections provide North Carolina's public school teachers with the valuable employment benefit of job security by providing them with continuing contracts. The dissent insists that although the Career Status Repeal eliminates Plaintiffs' continuing contracts in favor of one-, two-, or four-year terms, their rights have not been substantially impaired because the reasons they can be terminated or non-renewed at the end of each term remain largely unchanged. But this argument totally ignores the obvious fundamental differences between a continuing contract of indefinite duration and a contract that must be renewed every one, two, or four years, as well as the constrictive impact that the latter will have on the opportunities North Carolina's teachers will have to grow and improve by being innovative in the classroom, as well as their abilities to advocate for their students by raising concerns about instructional issues to administrators without fear of losing their jobs. To put this point in another context, consider the differences in the relative levels of job security enjoyed by North Carolina's appellate judges, who must face reelection at the end of each term, and federal

judges, who are appointed for life: while reasonable minds may differ over the wisdom of lifetime tenure, no one would dispute that it is a valuable employment benefit and that federal judges therefore enjoy far more job security than their counterparts in our State's elected appellate judiciary. To take this example a step further, imagine what would happen if our General Assembly decided, for whatever reason, to enact legislation purporting to strip all federal judges within our State's borders of their lifetime tenure and force them to stand for reelection periodically just like state judges. A reviewing court would undoubtedly find such a flagrant violation of Article III and basic premises of federalism unconstitutional—and it would also violate the Contract Clause because the revocation of lifetime tenure would substantially impair the affected judges' rights under their employment contracts. This is an imperfect and perhaps absurd example, offered for purely illustrative rather than substantive analytical purposes, but we nevertheless find it broadly analogous to the predicament North Carolina's teachers face regarding the sense of job security they enjoyed prior to the Career Status Repeal by virtue of their vested contractual rights to career status protections. We therefore decline to join the dissent in its conclusion that career status rights are not substantially impaired by a law that explicitly repeals career status rights.

III. Plaintiffs' Appeal

[4] Plaintiffs contend that the trial court erred in denying summary judgment to Plaintiff Link based on its conclusion that, as a probationary teacher who had not yet earned career status, he lacked standing to challenge the Career Status Repeal. The central thrust of Plaintiffs' argument here is that the logic of *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs*—which the trial court relied on for its determination that teachers who have already earned career status have contractual rights to its protections—should apply with equal force to probationary teachers. Specifically, Plaintiffs argue that all teachers who accepted employment while the Career Status Law was in full effect, and relied upon the availability of career status protections when accepting employment with a school district and remaining employed, gained a contractual right to the continuing *availability* of those protections upon satisfaction of the requirements of section 115C-325. Thus, Plaintiffs insist that the trial court erred in concluding that under the Career Status Law, probationary teachers do not have contractual rights to career status protections. We disagree.

Our review of the relevant case law demonstrates that Plaintiffs' reliance on *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* is misplaced.

While these cases do support Plaintiffs' general argument that statutory promises of benefits that public employees can earn as part of their overall compensation packages by satisfying certain requirements are contractual in nature, they also fatally undermine Plaintiffs' claim that probationary teachers have contractual rights when, by definition, they have not yet satisfied the Career Status Law's requirements. Put simply, *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* only dealt with plaintiffs whose contractual rights had already vested before the Legislature changed or repealed the statutes from which those rights arose. Indeed, it was the vesting of those rights that proved determinative in each case.

In *Brand*, the United States Supreme Court concluded that the plaintiff had a contractual right to "permanent" teacher status because she had already satisfied the statutory requirement of teaching for five years and then entering into a new contract prior to the partial repeal of the Teachers' Tenure Law. 303 U.S. at 104, 82 L. Ed. at 693. Likewise, in *Faulkenbury*, our Supreme Court's conclusion that the legislation at issue violated the Contract Clause was based on the fact that "*[a]t the time the plaintiffs' rights to pensions became vested*, the law provided that they would have disability retirement benefits calculated in a certain way. These were rights that they had earned and that may not be taken from them by legislative action." 345 N.C. at 690, 483 S.E.2d at 427 (emphasis added). The *Faulkenbury* Court further explained that

> [w]e believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits if those persons fulfilled the conditions. When they did so, the contract was formed.

Id. at 691, 483 S.E.2d at 427. Moreover, in assessing whether the plaintiffs in *Bailey* had contractual rights that were substantially impaired by the General Assembly's enactment of legislation to cap tax exemptions on public employee retirement benefits, the Court provided an extensive analysis of nearly two centuries' worth of state and federal decisions "rooted in the protection of expectational interests upon which individuals have relied through their actions, thus gaining a vested right." 348 N.C. at 145, 500 S.E.2d at 62-63. Ultimately, the *Bailey* Court held that the legislation at issue violated both the Contract Clause and the Law of the Land Clause because, before the General Assembly enacted it, the plaintiffs had already earned vested contractual rights to receive

tax-exempt retirement benefits based on their having satisfied the statutory requirement preconditioning their receipt of those benefits on working for a minimum term of years. *Id.* at 150, 500 S.E.2d at 66. Perhaps most damning for Plaintiffs' argument here, our Supreme Court's decision in *Wiggs* clarified that although the government cannot retroactively abrogate an employee's vested contractual right to benefits, it would not violate the Contract Clause "to pass a resolution which would apply prospectively to those whose rights [to benefits] had not yet vested." 361 N.C. at 324, 643 S.E.2d at 908.

In the present case, the Career Status Law preconditions a public school teacher's right to career status protections on working four consecutive years as a probationary teacher and then passing a majority vote by the local school board. N.C. Gen. Stat. § 115C-325(c)(1). Our review of the relevant case law demonstrates that only then can a teacher's contractual right to career status protections be considered vested. As such, we conclude that *Brand*, *Faulkenbury*, *Bailey*, and *Wiggs* provide no support for Plaintiffs' argument that despite the Career Status Repeal, a probationary teacher has a vested right in the opportunity to earn career status. We are sympathetic to Plaintiff Link's argument that he relied on the availability of career status protections upon satisfaction of the Career Status Law's requirements when he chose to work as a public school teacher in North Carolina instead of accepting a job in another state, and we empathize with the thousands of other similarly situated probationary teachers across this State who no doubt share his skepticism regarding the wisdom of legislation that purports to enhance the educational experience of our State's public school children by essentially yanking the rug out from beneath the feet of those most directly responsible for educating those children in a manner that experienced educators have warned will make it more difficult for North Carolina school districts to attract and retain quality teachers in the future. Nevertheless, this Court may not substitute its views for those of our General Assembly, and we are bound by the aforementioned precedents from our Supreme Court. We therefore hold that the trial court did not err in granting partial summary judgment to the State based on its conclusion that, as a probationary teacher, Plaintiff Link lacked standing to challenge the Career Status Repeal because he had not yet acquired a contractual right to career status protections. Accordingly, the trial court's order is

AFFIRMED.

Judge GEER concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

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

This case involves an issue important to the educational system of our State. However, as our Supreme Court has stated, "[a]s to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts – it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts." *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960).

The majority holds that the Career Status Repeal is constitutional as applied to probationary teachers. I concur fully with this holding and, therefore, do not address any issues raised in that portion of the majority opinion.

The majority also holds that the Career Status Repeal is unconstitutional *in toto* as applied to teachers who have attained career status under the Career Status Law ("career teachers"). I concur in part and dissent in part with this holding for the reasons stated in this opinion.

I. Summary of Opinion

I disagree with the majority's conclusions that the Career Status Law created a constitutionally protected *contractual right* to continued employment (i.e., tenure) for career teachers and that the Career Status Repeal impermissibly impairs that contract right, in violation of the Contract Clause of the United States Constitution.

Notwithstanding, based on our Supreme Court's decision in *Crump v. Bd. of Educ.*, 326 N.C. 603, 392 S.E.2d 579 (1990), career teachers do have a constitutionally protected *property interest* in continued employment under the Career Status Law. *Id.* at 614, 392 S.E.2d at 584. Therefore, I conclude that N.C. Gen. Stat. § 115C-325.3(e) of the Career Status Repeal is *un*constitutional to the extent that it allows a local school board to deprive a career teacher of this property interest without a hearing. However, I do not believe that the Career Status Law is, otherwise, unconstitutional on its face.

II. Analysis

It has long been recognized in this State that courts have the power to declare an act of the General Assembly unconstitutional. *See Dickson v. Rucho*, 367 N.C. 542, 549, 766 S.E.2d 238, 244 (2014), *vacated and*

remanded on other grounds, 2015 U.S. LEXIS 2744 (2015); *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). However, it has also long been recognized "that great deference will be paid [by courts] to the acts of the legislature," *see State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), and that "where a statute may be construed [in a way] . . . which would make it constitutional, [our courts] will give it that construction rather than a contrary one[.]" *Commissioners v. Ballard*, 69 N.C. 18 (1873).

In this opinion, I address my conclusions that (A) the Career Status Law does not create a constitutionally protected *contract right* to continued employment (i.e., tenure); (B) the Career Status Repeal is unconstitutional to the extent that it grants local school boards the authority to strip career teachers of their constitutionally protected *property interest* without first holding a hearing; and (C) the Career Status Repeal, on its face, is not otherwise unconstitutional.

A. The Career Status Law Did Not Create Contract Rights

The United States Supreme Court has stated: "[t]he presumption is that . . . [a statute enacted by a legislature] is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise," *see Dodge v. Bd. of Educ.*, 302 U.S. 74, 79, 58 S. Ct. 98, 100 (1937), and further that generally "an act fixing the term or tenure of . . . an employe[e] of a state agency" is the type which "may be altered at the will of the Legislature." *Id.* at 78-79, 58 S. Ct. at 100. This "well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state." *Nat'l R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451 (1985). "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of the legislative body." *Id.*

In the same year that *Dodge* was decided, the Supreme Court followed this presumption by concluding that a New Jersey statute establishing tenure rights for teachers who had completed a number of years of service[1] did *not* create a contract right and, therefore, was not subject

1. The New Jersey statute at issue was very similar to the Career Status Law, providing that any teacher completing three years of service would not be subject to a contract for a specific term but rather could only be dismissed for cause. *See Phelps*, 300 U.S. at 320-21, 57 S. Ct. at 484.

to the protections of the Contract Clause. *Phelps v. Bd. of Educ.*, 300 U.S. 319, 323, 57 S. Ct. 483, 485 (1937). Accordingly, the Court held that this New Jersey tenure statute could be changed by a subsequent legislature:

> Although the [A]ct of 1909 prohibited [a local school board] . . . from reducing [a] teacher's salary or discharging him without cause, we agree with the courts below that this was *but a regulation of the conduct of the [local school] board* and not a term of a continuing contract of indefinite duration with the individual teacher.

Id. (emphasis added). The Court found no error in the lower court's conclusion that the New Jersey statute "established a *legislative status* for teachers" rather than "a contractual one that the Legislature may not modify[.]" *Id.* at 322, 57 S. Ct. at 484 (emphasis added).

I find the *Phelps* decision by the United States Supreme Court extremely persuasive, if not controlling, in deciding the Contract Clause issue in the present case.[2] Like the statute at issue in *Phelps*, language in the Career Status Law is simply not presented in clear and unequivocal language to overcome the strong presumption against finding contract rights. For example, there is no language in the Law which states that contracts with career teachers must contain a provision which grants those teachers the right to continued employment. In fact, the word "contract" almost never appears in the Law – and never in N.C. Gen. Stat. § 115C-325(c1), the section in the Law which established tenure. Rather, the language in the Law is clearly couched in terms of establishing a "legislative status for teachers," *see Phelps*, 300 U.S. at 322, 57 S. Ct. at 484, prominently employing the phrase "career status" all throughout as a label for teachers retained after four years of service.

I am also persuaded by the decisions from the highest courts of the other states which have seemingly universally concluded that statutes establishing tenure for public employees do not create constitutionally protected contract rights. *See, e.g.*, *Proska v. Arizona State Sch. for the Deaf and Blind*, 74 P.3d 939, 943-44 (2003) (Arizona Supreme Court); *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1306 (1990) (Illinois Supreme Court); *Pineman v. Oechslin*, 488 A.2d 803, 808-10 (1985) (Connecticut Supreme Court); *Washington Fed. of State Emps.*,

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2. The majority is troubled by my reliance on *Phelps* and *Dodge* since these cases were not cited or argued by the State. However, the State does argue that the Repeal does not violate the Contract Clause, and I believe it is appropriate for this Court to rely on Supreme Court opinions and other legal authority which may be controlling or relevant in determining the law on a constitutional issue raised by a party.

AFL-CIO v. State, 682 P.2d 869, 872 (1984) (Washington Supreme Court); *Crawford v. Sadler*, 34 So.2d 38, 39 (1948) (Florida Supreme Court); *Morrison v. Bd. of Educ. of City of West Allis*, 297 N.W. 383, 386 (1941) (Wisconsin Supreme Court); *State ex rel. Munsch v. Bd. of Comm'rs of Port of New Orleans*, 3 So.2d 622, 624-25 (1941) (Louisiana Supreme Court); *Lapolla v. Bd. of Educ. of City of New York*, 26 N.E.2d 807 (1940) (New York Court of Appeals, that state's highest court); *Malone v. Hayden*, 197 A. 344, 352-53 (1938) (Pennsylvania Supreme Court).

The majority and the trial court below rely on what seems to be one of the only – if not the only – reported cases in America where the repeal of a tenure statute was declared unconstitutional based on the Contract Clause, the case of *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S. Ct. 443 (1938), decided by the United States Supreme Court during the same term it decided *Dodge* and the year after it decided *Phelps*. *Id.* at 107-08, 58 S. Ct. at 449. However, I believe *Brand* is clearly distinguishable.

In *Brand*, the Court determined that an Indiana tenure statute for teachers *did* create *a contract right* to continued employment, subject to the protections of the Contract Clause. *Id.* at 105, 58 S. Ct. at 448. After recognizing the presumption that statutes do not create contracts, the Court concluded that the particular language of the Indiana statute did evince an intention to create contract rights. *Id.* at 104-05, 58 S. Ct. at 448. The Court homed in on the fact that the Indiana statute – unlike the Career Status Law – was "couched in terms of contract," pointing out that the word "contract" appears more than 25 times therein. *Id.* at 105, 58 S. Ct. at 448. The Court quoted much of the Indiana statute, which described the contract itself, including that the contract "shall be deemed to continue in effect for an indefinite period and shall be known as an indefinite contract." *Id.* Also, the Court found persuasive that the Indiana Supreme Court had held on a number of occasions that the Indiana statute created contract rights. *Id.* at 100, 58 S. Ct. at 446 (stating that "respectful consideration and great weight [should be given] to the views of the state's highest court").[3]

Brand is still "good law" in that a state *could* employ statutory language which "unequivocally and clearly" demonstrates an intent

3. Our high court has never held that the Career Status Law creates a *contract right* in continued employment subject to the Contract Clause of the United States Constitution, but rather that the Law creates a property interest subject to the Due Process Clause of the Fourteenth Amendment. *See Crump*, 326 N.C. at 613-14, 392 S.E.2d at 584.

to create contract rights rather than merely providing for a status. However, the result reached in *Brand* is somewhat of an outlier, due to the language employed in the Indiana statute at issue. An American Law Reports annotation on this issue cites *Brand*, along with *Phelps*, *Dodge*, and many of the state cases cited above and describes the holding in *Brand* as an anomaly:

> It is quite generally conceded that a teachers' tenure statute may be so worded as to disclose a legislative intention to confer upon the teachers coming within the provisions of the act contractual rights which may not be taken away from them by subsequent legislation . . . . (See, for example, [*Brand*], *which is cited and distinguished on this ground in most of the cases cited in this annotation.*)
>
> *On the other hand it is almost unanimously recognized* that in the absence of any language in the act evincing an intention to confer upon the teacher a contractual right, the mere recognition by such acts of the status of permanency of tenure does not create in the teachers . . . vested contractual rights immune from legislative encroachment by subsequent repealing or modifying statutes, but merely declares a legislative policy, to continue so long as the legislature may ordain, for the protection of such teachers[.]

147 A.L.R. 293 (1943) (emphasis added). In fact, the article does not cite to a single case reaching the same result as was reached in *Brand*. *See id.*

Based on my conclusion that the language of the Career Status Law is clearly more analogous to the statute at issue in *Phelps* than the statute at issue in *Brand*; and on the presumption against finding contractual rights in statutes; and on the overwhelming weight of authority from across the country, I do not believe that the General Assembly was prohibited *by the Contract Clause* to modify or repeal the laws enacted concerning career status of teachers established by that body in 1971.[4]

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4. Indeed, prior to enactment of the Career Status Repeal, the General Assembly had amended the Career Status Law on a number of occasions, some in ways to increase the discretion of local school boards, as has been done in the Repeal. For example, the General Assembly originally only provided 12 grounds for which a local school board could dismiss a career teacher. N.C. Gen. Stat. § 115-142(e)(1) (1971). Over the next several decades, however, the General Assembly expanded the local school board's power by adding three additional grounds – bringing the total to 15 – most recently, in 1991. N.C. Gen. Stat. § 115C-325(e) (2013). Plaintiffs' counsel conceded during oral argument that *all* 15 grounds applied equally to *all* career teachers, even teachers who attained career status prior to 1991.

In addition to relying on *Brand*, the majority and the trial court rely on decisions from our Supreme Court which held that statutes allowing public employees to earn deferred compensation benefits in various forms (e.g., pension and benefits) created contract rights and were, therefore, protected by the Contract Clause, citing *Faulkenbury v. Teachers' and State Emps.' Ret. Sys. of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997), *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998), and *Wiggs v. Edgecombe Cnty.*, 361 N.C. 318, 643 S.E.2d 904 (2007). However, those cases are clearly distinguishable. In my view, a statutory right to deferred compensation which has vested based on work performed is fundamentally different from statutory tenure status (the right to continue to work in the future and earn additional compensation for that future work). *See Bailey*, 348 N.C. at 141, 500 S.E.2d at 60 (stating that pension benefits are "a deferred portion of the compensation earned for services rendered"). In *Faulkenbury*, for example, the Supreme Court held that disability benefits provided by a statute were benefits that were promised in exchange for five years of service. 345 N.C. at 691, 483 S.E.2d at 427. Under the Career Status Law, however, teachers did not "earn" a benefit of continued employment by completing four years of service. They only *became eligible* to be elected to "career status" at the end of four years.

I find persuasive that other states have treated statutes defining deferred compensation differently from statutes defining tenure rights in the context of the Contract Clause. *See*, *e.g.*, *Washington Fed. of State Emps.*, 682 P.2d at 872 (Washington Supreme Court—distinguishing between pension statutes, which do create contract rights and tenure statutes, which do not); *Kern v. City of Long Beach*, 179 P.2d 799, 801-03 (1947) (California Supreme Court—same).

In conclusion, in my view the presumption - that the Career Status Law was "not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise" - has not been overcome. *Dodge*, 302 U.S. at 79, 58 S. Ct. at 100. In fact, the language of the Career Status Law compels a conclusion that a status was created for career teachers rather than a contract right. As such, I believe the General Assembly is not restricted by the Contract Clause from modifying the Law as it has done so on several occasions since its passage in 1971.[5]

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5. Assuming, *arguendo*, that the Career Status Law did create individual contract rights, I do not believe that the Career Status Repeal significantly impairs those rights. Our Supreme Court has held that the purpose of the Career Status Law was "to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal

B. Property Interest—The Right to a Hearing

Our Supreme Court has held that a career teacher has a property interest in continued employment. *Crump*, 326 N.C. at 613-14, 392 S.E.2d at 584. S*ee also Peace v. Emp't Sec. Comm'n of North Carolina*, 349 N.C. 315, 321-22, 507 S.E.2d 272, 281-82 (1998) (citing *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705-06 (1972)). Therefore, I conclude that N.C. Gen. Stat. § 115C-325.3(e) (2013) – which is part of the Career Status Repeal – is unconstitutional in that it does not provide a career teacher the right to a hearing *before* a local school board may act on a decision not to retain the teacher, but rather grants a local school board *the discretion* whether to conduct a hearing.

Regarding the *timing* of the hearing, there are situations where the United States Supreme Court has held that a hearing can be held *after* the deprivation of certain property rights has occurred. *See*, *e.g.*, *Dixon v. Love*, 431 U.S. 105, 113-15, 97 S. Ct. 1723, 1727-29 (1977) (truck drivers' license). However, that Court has held that where a public employee's job is at stake, the hearing must come *before* the employee is deprived of his right to continued employment. *Cleveland Bd. of Ed. v. Lowdermill*, 470 U.S. 532, 542-44, 105 S. Ct. 1487, 1493-94 (1985). Therefore, a career teacher is entitled to a hearing before a local school board acts not to renew that teacher's contract. *See id.*

C. The Career Status Repeal is Otherwise Constitutional

Except for its failure to provide a career teacher a hearing, as described above, I believe the Career Status Repeal is constitutional.

Under the Career Status Repeal, career teachers will no longer have contracts with an unspecified duration, but rather their contracts will be subject to renewal at the end of a 1, 2 or 4 year term, as approved by their respective local school boards. N.C. Gen. Stat. § 115C-325.3(a) (2013). At the end of any contract term, a local school board has some discretion not to renew a teacher's contract. However, prior to the Repeal, the

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for political, personal, arbitrary or discriminatory reasons." *Taborn v. Hammonds*, 324 N.C. 546, 556, 380 S.E.2d 513, 519 (1989). It could be argued that this purpose statement supports the conclusion that the Law was intended as a regulation of the local school boards to advance a policy of providing good teachers "for the children," rather than to create contract rights for the teachers. In any event, assuming that the Law created a contract right, the Repeal does not substantially impair this right. Specifically, under the Repeal, a career teacher is still not subject to dismissal except for reasons which are not "political, personal, arbitrary or discriminatory." *See* N.C. Gen. Stat. § 325.3(e) (2013) (local school board is powerless in choosing not to retain a teacher for a reason which is "arbitrary, capricious, discriminatory, [or] for personal or political reasons").

local school board already had a measure of discretion to terminate a career teacher. Any increase in this discretion as a result of the enactment of the Repeal appears slight. Specifically, under the Repeal, local school boards do not have the discretion to dismiss a career teacher (by choosing not to renew the contract) for any reason which would be considered "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." N.C. Gen. Stat. § 115C-325.3(e) (2013). As such, I do not believe the Repeal is unconstitutional on its face. Of course, legitimate "as applied" challenges to the Law may be raised in the future. However, that is not the case before us today.

III. Conclusion

My vote would be to uphold the Career Status Repeal except for that portion of N.C. Gen. Stat. § 115C-325.3(a) that provides a local school board the discretion whether to hold a hearing before depriving a career teacher of his or her property interest in continued employment. In my view, local school boards *must* provide pre-deprivation hearings for career teachers.

PATRICK B. OLTMANNS, PLAINTIFF
v.
BABETTE R. OLTMANNS, DEFENDANT

No. COA14-690

Filed 2 June 2015

1. Appeal and Error—mootness—determined at time of rendition

In a domestic action in which an absolute divorce was granted, an issue involving a divorce from bed and board was moot. The determination of mootness is made at the time of rendition, not entry of judgement.

2. Child Custody and Support—award of child custody to defendant—plaintiff's active role

The trial court acted within its discretion in awarding primary child custody to defendant, as supported by its findings of fact, despite making findings that plaintiff maintains an active role in the lives of the minor children.

3. Child Custody and Support—parent-time right of first refusal—not addressed

The question in a domestic action of whether the trial court improperly denied each party's request for a parenting-time right of first refusal was not addressed where the appellate court was not provided with supporting guidance as to how or why the trial court was required to make such a finding. Moreover, the trial court noted orally that it would not entertain a parent-time right of first refusal as being in the best interests of the minor and it was within the discretion of the court not to include such a provision in its order.

4. Child Custody and Support—travel restrictions—passports

The trial court did not err in a child custody action in the travel restrictions on the children, including maintenance of their passports. Both parties requested the passport arrangement.

5. Child Custody and Support—plaintiff's monthly gross income—over-assessed trivial amount

The trial court erred in its award of child support where it over-assessed plaintiff's monthly gross income by $4.00. Although the difference was trivial and did not change the trial court's determination of child support, the case was remanded for correction of the error.

6. Child Custody and Support—negative income level of party—supported by evidence

The trial court acted within its discretion in a child support case by setting defendant's negative income level at $1,063.18 per month, as this figure was supported by the evidence.

7. Child Custody and Support—uneven allocation of support—mortgages and maintenance expenses of marital home and vacation home

The plaintiff's contention in a child support case that the trial court erred by not making an even 50/50 allocation as to child support was without merit. Defendant's evidence showed that defendant incurred significantly higher monthly expenses than plaintiff due to defendant having to pay the mortgages and maintenance expenses on the marital home and the vacation home. It was appropriate for the trial court to consider defendant's increased expenses relating to the two homes in determining its award of child support.

8. Child Custody and Support—effective date of permanent award—not modified

The trial court did not abuse its discretion it its award of child support by choosing not to modify the effective date of the permanent award based on the evidence before it.

9. Child Custody and Support—marital property—houses—post-separation depreciation

The trial court did not err in a child support action by classifying the post-separation depreciation of two houses as marital property. Plaintiff argued that the trial court failed to make any findings of fact as to why the depreciation of the two homes constituted divisible property, but plaintiff failed to cite any case law which supported his assertion.

Appeal by plaintiff from orders entered 20 February 2012, 7 November 2012, and 31 July 2013 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 6 January 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, for plaintiff-appellant.

Jonathan McGirt for defendant-appellee.

BRYANT, Judge.

Where the record indicates that both an absolute divorce and a divorce from bed and board were granted, plaintiff's argument that the trial court improperly granted a divorce from bed and board is moot. The trial court did not abuse its discretion in its award of child custody and child support where the trial court made findings of fact and conclusions of law in support of its decisions. Where plaintiff failed to rebut the presumption that a depreciation in certain property was not divisible, the trial court acted within its discretion to classify the depreciation of certain property as divisible.

Plaintiff Patrick B. Oltmanns ("plaintiff") and defendant Babette R. Oltmanns ("defendant") married on 21 December 2001. Two minor children were born of the marriage.

On 28 December 2010, plaintiff filed a complaint against defendant for equitable distribution, post-separation support, alimony, child custody, child support, and attorneys' fees. Defendant filed her answer,

defenses, counterclaims, and motions requesting, *inter alia*, divorce from bed and board, equitable distribution, child support, child custody, post-separation support, alimony, attorneys' fees, Rule 11 sanctions against plaintiff, and a temporary restraining order and preliminary injunction against plaintiff.

Plaintiff failed to reply to defendant's counterclaims. However, plaintiff filed a motion for judgment on the pleadings concerning defendant's counterclaim for divorce from bed and board. On 20 February 2012, the trial court entered an order "grant[ing plaintiff's motion] in favor of Defendant." The trial court also noted in its findings and conclusions that, as plaintiff had not filed a reply to defendant's counterclaims, the allegations in those counterclaims would be deemed admitted. That same day, the trial court entered orders granting defendant's motion to compel discovery and awarding temporary child custody and attorney's fees to defendant.

On 7 November 2012, the trial court entered an order for permanent child custody, granting primary custody to defendant and secondary custody to plaintiff. On 31 July 2013, the trial court entered an order and judgment for permanent child support and equitable distribution, and reserved judgment as to each party's claim for attorney's fees concerning child support. Plaintiff appeals.

Plaintiff raises four issues on appeal as to whether the trial court (I) erred in granting judgment on the pleadings as to defendant's counterclaim for divorce from bed and board; (II) erred in its child custody ruling; (III) erred in its award of child support; and (IV) erred in classifying the post-separation depreciation of two houses as marital property.

I.

[1] Plaintiff argues that the trial court erred in granting judgment on the pleadings as to defendant's counterclaim for divorce from bed and board. We disagree.

Plaintiff contends the trial court erred in granting judgment in favor of defendant on plaintiff's motion for judgment on the pleadings as to defendant's counterclaim for divorce from bed and board. Plaintiff's argument first claims error based upon the trial court's deeming the allegations of defendant's counterclaim as to divorce from bed and board to be true based upon plaintiff's motion for judgment on the pleadings, since N.C. Gen. Stat. § 50-10(a) provides that the "material facts" of the

counterclaim are "deemed to be denied . . . whether the same shall be actually denied by pleading or not[.]" N.C.G.S. § 50-10(a) (2014). Plaintiff further argues that defendant's counterclaim for divorce from bed and board became moot after rendition and that the trial court should not have entered judgment upon the claim for divorce from bed and board because, in the time between rendition and entry, the parties had been granted an absolute divorce. We address plaintiff's second argument first as we find the issue of mootness to be dispositive, although not exactly in the manner as claimed by plaintiff.

The trial court heard the motion for judgment on the pleadings on 3 January 2012, and rendered the ruling in open court that same day. Judgment for an absolute divorce was entered on 16 February 2012. The written order granting judgment on the pleadings for divorce from bed and board was entered on 20 February 2012.

Plaintiff's argument that the 20 February 2012 order is moot highlights the difference between "rendition" of judgment and "entry" of judgment.

> Under Rule 58 of the North Carolina Rules of Civil Procedure, a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment. Entry of judgment by the trial court is the event which vests jurisdiction in this Court.

Mastin v. Griffith, 133 N.C. App. 345, 346, 515 S.E.2d 494, 494-95 (1999) (citations and quotations omitted).

Although the written entry of judgment is the controlling event for purposes of appellate review, rendition is not irrelevant. The determination of mootness is made at the time of rendition, not entry of judgment. A trial court has an affirmative duty to enter a written order reflecting any judgment which has been orally rendered; failure to enter a written order deprives the parties of the ability to have appellate review. *See In re T.H.T.*, 362 N.C. 446, 456, 665 S.E.2d 54, 60 (2008) ("[A] failure to proceed to judgment within a reasonable time deprives the parties of an adequate remedy at law, including the right to appeal a judgment entered. This Court does not have the authority to tell the trial court what judgment it should enter. We do, however, have the authority and the obligation to require the trial court to proceed to judgment when judgment has not been entered within the statutory time lines."). If a trial court fails to

enter a written order, a party may apply to this Court for a writ of mandamus to compel entry of an order. *See* N.C. R. App. P. 22 (2014); *see also In re T.H.T*, 362 N.C. at 454, 665 S.E.2d at 60 ("In *Stevens v. Guzman*, [this] Court . . . concluded that a writ of mandamus is the proper remedy for a trial court's failure to enter a written order." (citation omitted)). When the trial court *rendered* judgment on the divorce from bed and board, no absolute divorce had occurred. When the order based upon this rendition was entered, the absolute divorce had been granted and the divorce from bed and board no longer had any practical use. But if we were to accept plaintiff's argument that the trial court should not have entered a written order based upon a rendition which occurred prior to another event which rendered the claim moot, this would essentially eliminate the possibility of appellate review of a trial court's decision which was rendered prior to an event which might moot the order. Thus, the trial court must still retain the authority to enter an order accurately reflecting the judgment previously rendered, if only to permit appellate review of the trial court's action. Perhaps this is the meaning of the statement in *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, that "[a] case is 'moot' when a determination is sought on a matter which, *when rendered*, cannot have any practical effect on the existing controversy." 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (emphasis added) (citation omitted).

Plaintiff's argument also highlights the fact that the order granting divorce from bed and board is now moot for purposes of appellate review.

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978) (citations omitted). In addition, as no motion to dismiss for mootness is required, this Court can dismiss this issue on appeal *ex mero motu*. *See State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 426, 383 S.E.2d 923, 925 (1989) ("As

no motion to dismiss for mootness has been filed herein, as is usually the case, we dismiss the appeal *ex mero motu*.")

In the instant case, there is no need for this Court to consider the interaction of N.C. Gen. Stat. § 50-10(a) and a motion for judgment on the pleadings under N.C. Gen. Stat. § 1A-1, Rule 12(c) because our ruling on this issue "cannot have any practical effect on the existing controversy" and would be a determination of an "abstract proposition[] of law." *Roberts*, 344 N.C. at 398-99, 474 S.E.2d at 787. Plaintiff has not made any argument as to how the trial court's determination as to divorce from bed and board has had any effect upon the remaining issues which are in controversy in this appeal, specifically, child custody, child support, and classification of post-separation depreciation of real property. None of the orders relevant to these issues which are under consideration on appeal rely upon or reference any findings or conclusions from the divorce from bed and board order. Now that the parties are absolutely divorced, the divorce from bed and board has no remaining legal relevance. "A divorce from bed and board is nothing more than a judicial separation; that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond." *Schlagel v. Schlagel*, 253 N.C. 787, 790, 117 S.E.2d 790, 793 (1961) (citation omitted). Plaintiff has made no showing as to why it still matters, legally or practically, that the claim for divorce from bed and board was granted, nor has he put forth any arguments regarding collateral consequences that may arise from that order in the future. The parties are now divorced absolutely and there is no dispute regarding the divorce itself. Thus, as the issue regarding the order granting divorce from bed and board is now moot, we, therefore, dismiss plaintiff's appeal as to this issue.

II.

[2] Plaintiff argues that the trial court erred in its child custody ruling. We disagree.

When the trial court makes a determination as to child custody, it must "consider all relevant factors" and grant custody to the party who will "better promote the interest and welfare of the child[ren]." N.C. Gen. Stat. § 50-13.2(a) (2013). As such, a trial court's findings of fact are conclusive on appeal if supported by competent evidence, *In re Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667-68 (1982), and the trial court's decision as to child custody "should not be upset on appeal absent a clear showing of abuse of discretion." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000) (citation omitted).

Plaintiff contends the trial court erred because it awarded primary legal custody to defendant and secondary legal custody to plaintiff, despite making findings that plaintiff maintains an active role in the lives of the minor children and should, therefore, have been granted a joint legal custody arrangement. In its order for permanent child custody, the trial court made findings that plaintiff has "continued to be involved in the children's education and medical treatment[,]" "has been largely responsible for arranging [the minor daughter's] carpool to and from school[,]" and has arranged "fun activities" for the minor children "[d]uring his time with [them.]" However, the trial court also made findings of fact that: the parties have disputed school choices for the children; plaintiff struck defendant in the face while defendant was pregnant with their son; plaintiff hid a recording device in defendant's bedroom without her knowledge or consent; plaintiff sued both of defendant's parents, who provide the minor children with childcare, and defendant's paramour, for alienation of affection; defendant "has handled the lion's share" of the minor children's educational and medical treatment issues; defendant "continues to encourage [plaintiff's] relationship with the children[;]" and that the parties can no longer communicate by telephone due to arguments concerning plaintiff's lawsuits against defendant's parents and paramour. Moreover, the trial court made the following findings of fact, based upon a co-parenting counseling session the parties underwent in June 2011:

> 27. "Given that [the] parents have some differing belief systems, values and priorities, there are numerous areas where they might disagree on what is best for the children. Ongoing tension between them over decisions about the children's upbringing would have a more damaging effect on the children than the unilateral decisions of either parent. If the children sense or perceive that their upbringing is a source of animosity between their parents, there is the danger that the children will internalize responsibility about the tension. They might also use the "power struggle" between the parent[s] as a way to bring their own leverage to the situation and manipulate one [or] both parents."
>
> 28. [The counselor's] comments to the parties regarding their struggle to make joint decisions summarizes the Court's concerns in that regard. Due to the lack of trust between the parents, the differing values and parenting styles between them, and the fact that both parents are

> extremely intelligent, the Court finds that the parties are unable to make decisions of significance for the children together and that the power struggle between them is more detrimental to the children than unilateral decision-making authority to one parent would be. As a result, joint decision-making authority is not in the children's best interests. [Defendant] has demonstrated her willingness to rise above animosity and foster the children's relationship with [Plaintiff] and to genuinely consider his point of view in making decisions for the children. Accordingly, it is in the best interests of the minor children that [Defendant] be awarded primary legal custody of the children and have the authority to make decisions of significance for the children in the event there is disagreement between [Defendant] and [Plaintiff] regarding [the] same.

The trial court mirrored these findings of fact in its conclusions of law, noting multiple times that "[Defendant] is a fit and proper person" to have and be awarded the "primary legal care, custody, and control of the minor children[,]" while "[Plaintiff] is a fit and proper person" to have the "secondary legal care, custody, and control of the minor children." As such, the trial court acted within its discretion in awarding primary legal custody to defendant, as supported by its findings of fact. *Cf. Diehl v. Diehl*, 177 N.C. App. 642, 646-48, 630 S.E.2d 25, 27-29 (2006) (remanding for further findings of fact by the trial court where the child custody order awarded primary legal custody to the defendant-mother despite also indicating that "[b]oth parties are fit and proper to have joint legal custody of the minor children[.]").

[3] Plaintiff further argues the trial court erred in "improperly den[ying] each party's request for a parenting-time right of first refusal." However, plaintiff has provided this Court with no supporting guidance as to how or why the trial court was required to make such a finding and, as such, we decline to address this contention. *See* N.C. R. App. P. 28 (2014) (declining to address arguments on appeal which are not supported by case law). Moreover, as the trial court orally noted that it would not entertain a parenting-time right of first refusal as being in the best interests of the minor children, it was within the discretion of the trial court to not include such a provision, either to its granting or denial, in the child custody order.

[4] In addition, plaintiff argues that the trial court erred in its child custody order by imposing "unsupported travel restrictions" on the minor children. Specifically, plaintiff contends the trial court's custody order

"lacks factual findings supporting such restrictions," which requires plaintiff to maintain the children's German passports and defendant to maintain the children's American passports. Plaintiff's argument is baseless however, as a review of the record indicates that both parties requested this arrangement for the children's passports in their proposed child custody orders. As such, plaintiff complains on appeal of an action which he himself requested from the trial court. *See Romulus v. Romulus*, 215 N.C. App. 495, 528-29, 715 S.E.2d 308, 329 (2011) ("A party may not complain [on appeal] of [an] action which he induced." (citations omitted)). Plaintiff's argument is overruled.

III.

[5] Plaintiff contends the trial court erred in its award of child support.

> In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

Spicer v. Spicer, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citation omitted).

Plaintiff argues that the trial court erred in its award of child support because the permanent support award "improperly determine[d] each party's gross monthly income." Specifically, plaintiff contends his total monthly gross income was over-assessed by $4.00. Plaintiff is correct in his assertion, as plaintiff's total gross monthly income should be $7,269.08, rather than $7,273.08, as calculated by the trial court. Although such a difference is trivial and does not change the trial court's determination of child support, we remand for correction of this $4.00 error. *See Peters v. Pennington*, 210 N.C. App. 1, 26, 707 S.E.2d 724, 742 (2011) (remanding for the trial court to correct a calculation error of $0.50).

[6] Plaintiff also argues that the trial court erred in its calculation of defendant's gross monthly income. Plaintiff contends the trial court's consideration of "negative rental income" generated by a condominium held by defendant lacked sufficient evidentiary support. This contention is without merit. The evidence presented by defendant in her financial

affidavits at trial indicated that the condominium's negative rental income fluctuated between 2006 and 2010, and that defendant listed this negative income as costing her $1,063.18 monthly in her most recent financial affidavit. As such, the trial court acted within its discretion in setting defendant's negative income level at $1,063.18 per month, as this figure was supported by the evidence.

[7] Plaintiff further contends the permanent child support award "improperly determine[d] and apportion[ed] the children's reasonable needs and expenses." Plaintiff argues that the trial court's determination of child support, which orders plaintiff to pay 19% of the minor children's combined monthly needs, was erroneous because the expenses of plaintiff and defendant were not considered equally.

Pursuant to North Carolina General Statutes, section 50-13.4,

> [p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2013).

In its calculation of child support, the trial court relied on the financial affidavits of both parties to determine each party's average monthly shared family and individual expenses. Although plaintiff contends the trial court erred in its calculation of defendant's expenses, defendant's evidence showed that defendant incurred significantly higher monthly expenses than plaintiff due to defendant having to pay the mortgages and maintenance expenses on the marital home and the vacation home. As N.C.G.S. § 50-13.4(c) requires the trial court to have "due regard to the estates . . . of the child and the parties," it was appropriate for the trial court to consider defendant's increased expenses relating to the two homes in determining its award of child support. As such, plaintiff's contention that the trial court erred in not making an even 50/50 allocation as to child support is without merit. *See Brind'Amour v. Brind'Amour*, 196 N.C. App. 322, 329, 674 S.E.2d 448, 452 (2009) (where this Court's analysis determined that the trial court did not abuse its discretion in its award of child support where the trial court carefully reviewed all of the evidence before it regarding the children's standard of living and the reasonable needs and expenses of both parties, before affirming the

trial court's decision which denied part of the defendant-mother's claim for expenses).

[8] Additionally, plaintiff contends the trial court erred in its award of child support because the permanent award should have been made effective from January 2011, rather than from January 2013. However, it is well-established by this Court that a trial court has not abused its discretion where, based on the evidence before it, the trial court chose not to modify the effective date of a permanent award. *See Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 611, 596 S.E.2d 285, 291 (2004) ("[The] [d]efendant finally contends that the trial court abused its discretion in making his child support obligations retroactive only until 1 February 2002. Prior to the entry of the permanent child support order, [the] defendant had been ordered to pay temporary child support in a greater amount than finally ordered. [The] [d]efendant argues that the trial court erred by not using its discretion to set an even earlier retroactive date for his permanent child support obligation. *We conclude that although the prior temporary child support order was subject to modification, the trial court did not abuse its discretion in failing to modify that . . . order to set an earlier retroactive effective date for permanent child support.*" (citation omitted) (emphasis added)). Plaintiff's argument is overruled.

IV.

[9] Finally, plaintiff contends the trial court erred in classifying the post-separation depreciation of two houses as marital property. We disagree.

The classification of property in an equitable distribution hearing is reviewed by this Court *de novo*. *Romulus*, 215 N.C. App. at 500, 715 S.E.2d at 312 (citations omitted).

Plaintiff argues that the trial court erred because it failed to make any findings of fact as to why the depreciation of the two homes constituted divisible property. However, as plaintiff fails to cite any case law which supports his assertion, we decline to address this issue. *See* N.C. R. App. P. 28(a) (2014) (holding that arguments not supported by appropriate authority will be deemed abandoned).

Accordingly, we affirm in part and remand in part for correction of the $4.00 error in the calculation of plaintiff's gross monthly income.

AFFIRMED IN PART; REMANDED IN PART.

Judges STROUD and HUNTER, Jr., concur.

KATHRYN SHORT, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT,
AND SMOKY MOUNTAIN CENTER, RESPONDENT-INTERVENOR

No. COA14-1042

Filed 2 June 2015

1. Administrative Law—petition for judicial review—North Carolina Innovations Waiver—personal care services

The superior court did not err by affirming the Administrative Law Judge's final decision denying petitioner personal care services in excess of the maximum allowed under the North Carolina Innovations Waiver policy because substantial evidence in the record supported the court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Any purported risk of institutionalization was caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home.

2. Appeal and Error—preservation of issues—failure to argue

Petitioner's argument that the superior court erred by affirming the Administrative Law Judge's (ALJ) final decision, including the 84 hour per week service limit, by denying petitioner's rights to maintain her level of services under her CAP-MR/DD budget was dismissed because it was not preserved for appellate review. Petitioner did not advance the argument before the ALJ, in her petition for judicial review, or in her brief to the superior court. As such, the CAP-MR/DD budget argument was not properly before the superior court or the Court of Appeals for review.

Appeal by petitioner from order entered 9 June 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 18 March 2015.

WILLIAMS MULLEN, by Mark S. Thomas and Gordon & Rees, LLP, by Knicole C. Emanuel and Robert W. Shaw, for petitioner Kathryn Short.

Attorney General Roy Cooper, by Assistant Attorney General Neal T. McHenry, for respondent North Carolina Department of Health and Human Services.

Nelson Mullins Riley & Scarborough, LLP, by Stephen D. Martin and Thomas E. Kelly, for respondent-intervenor Smoky Mountain Center.

ELMORE, Judge.

Petitioner appeals from a Superior Court order entered pursuant to a Petition For Judicial Review affirming a Final Decision by Administrative Law Judge Robin Anderson. After careful consideration, we affirm.

I. Background

Kathryn Short ("petitioner") is an adult woman diagnosed with Tuberous Sclerosis Complex, a rare genetic disorder that significantly impacts her mental capacity and functional skill level. Petitioner receives Medicaid and also receives behavioral healthcare services pursuant to the North Carolina Innovations Waiver ("the Waiver"). The Waiver is a Medicaid managed health care plan for qualified consumers who require behavioral healthcare services for certain disabilities. Smoky Mountain Center ("SMC" or "respondent-intervenor") operates the Waiver as a Pre-Paid Inpatient Health Plan ("PIHP") in twenty-three counties in western North Carolina, including Alexander County where petitioner lives, pursuant to an agreement with the North Carolina Department of Health and Human Services, Division of Medical Assistance ("DMA" or "respondent").

The Waiver places limits on specific services, including: "Adult participants who live in private homes: No more than 84 hours per week is authorized for any combination of Community Networking, Day Supports, Supported Employment, Personal Care, and/or In-Home Skill Building." In October 2012, SMC received a service authorization request from petitioner for the plan year of 1 November 2012 through 31 October 2013. Petitioner requested Personal Care Services for 12 hours per day and In-Home Skill Building for 4 hours per day, for a total of 16 hours per day (112 hours per week) of combined services. SMC granted petitioner's request, in part, allowing her to receive the maximum of 84 service hours per week (12 hours per day) as authorized by the Waiver. However, SMC denied petitioner's request for an additional 28 hours of services per week.

Petitioner timely appealed the decision through SMC's reconsideration review process, and after the decision was upheld, petitioner filed for a Contested Case in the Office of Administrative Hearings. On 18 November 2013, Administrative Law Judge Robin Adams Anderson

("the ALJ") entered a Final Decision determining that respondents "did not substantially prejudice Petitioner's rights nor act outside its authority, act erroneously, act arbitrarily and capriciously, use improper procedure, or fail to act as required by rule or law when it denied Petitioner Personal Care Services in excess of the maximum allowed under t[he] DMA policy."

Petitioner filed a Petition for Judicial Review of the ALJ's Final decision on 17 December 2013 in Wake County Superior Court on the grounds that the ALJ "erroneously upheld the reduction of Medicaid services to Petitioner." On 9 June 2014, Superior Court Judge Michael R. Morgan affirmed the ALJ's Final Decision. Petitioner now appeals to this Court.

II. Analysis

a.) Significant Risk of Institutionalization

[1] Petitioner contends the trial court erred by affirming the ALJ's Final Decision to deny, in part, her request for 112 hours of services per week. Specifically, petitioner argues no substantial evidence supported the Superior Court's finding that she failed to demonstrate that "in the absence of receiving 112 hours per week of paid services, she would be at a significant risk of institutionalization." We disagree.

Upon appeal of a superior court judge's order pursuant to a review of an ALJ's Final Decision, we must "determine whether [the superior court judge] utilized the appropriate scope of review and, if so, whether the [superior court judge] did so correctly." *Dillingham v. N.C. Dep't of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). Our standard of review depends on the type of error asserted by appellant:

> [I]f the appellant contends the agency's decision was affected by a legal error, G.S. § 150B-51(b)(1)(2)(3) & (4), *de novo* review is required; if the appellant contends the agency decision was not supported by the evidence, G.S. § 150B-51(b)(5), or was arbitrary or capricious, G.S. § 150B-51(b)(6), the whole record test is utilized.

Id. We review defendant's issue under the whole record test. Under the whole record test, we "must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quotation marks omitted). We cannot substitute our judgment in place of the agency's "even though th[is] court could justifiably have reached a different result

had the matter been before it *de novo*." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

North Carolina participates in the federal Medicaid Program. *See* N.C. Gen. Stat. § 108A-54 (2013). As such, this State "must comply with the requirements of federal law." *Lackey v. N.C. Dep't of Human Res., Div. of Med. Assistance*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982). Title II of the Americans With Disabilities Act (ADA), in pertinent part, states: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. As such, the ADA provides, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The "most integrated settings" consist of "those that enable individuals with disabilities to interact with nondisabled persons to the fullest extent possible." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (internal citations and quotation marks omitted).

The Supreme Court has recognized "unjustified institutional isolation of persons with disabilities [as] a form of discrimination[.]" *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600, 119 S. Ct. 2176, 2187, 144 L. Ed. 2d 540 (1999). One method to establish that such a discriminatory violation has occurred is for a petitioner to demonstrate that she faces a "significant risk of institutionalization due to the termination of [her services]." *See Pashby*, 709 F.3d at 322. A causal relationship between the modification of services and the significant risk of institutionalization must be present. *Clinton L. v. Wos*, No. 1:10CV123, 2014 WL 4274251, at *8 (M.D.N.C. Aug. 28, 2014). The determination of whether a "significant risk of institutionalization" exists is "fact-intensive and is affected by numerous variables." *Id.* at *6. The dispositive inquiry is "whether the reduction in [services] will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." *Id.* at *7 (internal quotation marks omitted).

The crux of petitioner's argument is that the 84 hours per week service limit created a 4 hour per day shortfall in her provider-supervised care. In support of petitioner's contention that the shortfall in the additional supervision service hours would place her at a significant risk of institutionalization, her mother testified:

> Q: Can you explain why that four hours would cause Institutionalization?

> MOTHER: Right. Without 16 hours a day of paid support, as legal guardian, I can't account for four hours a day that aren't being provided by anybody. As legal guardian, my primary responsibility is to see that care is provided. It's not to provide care. I have the legal responsibility. So the way [SMC] approved the plan where [petitioner is] alone four hours a day, suddenly, I am very aware that care isn't being provided four hours a day. So, through the appeals process and the continuation of services, we're good to go. But as soon as that's gone, then as legal guardian, I will again be aware that she is unsupervised for four hours a day. So, as a legal guardian, I will have no choice but to resign my legal guardianship, and the new legal guardian will have to figure out where it is she's going to live, because it's not with me.
>
> . . .
>
> So [petitioner's] services—if it's upheld, then I will resign my guardianship, and the new guardian will have some decisions to make.
>
> . . .
>
> Q: Is it your anticipation that, if you had to resign your guardianship, that [petitioner] would be placed in a residential setting?
>
> MOTHER: It's whatever the legal—legal guardian would decide, because it's the legal—it's somebody else. It wouldn't be me making those decisions. . . . We get to have a service plan meeting—a service team meeting, and they get to decide the services they're going to apply for.

Petitioner also offered an affidavit of her primary care physician, Dr. Gina Licause, which stated:

> It is my professional medical opinion that [petitioner] requires 24-hour a day supervision for health and safety and total care for activities of daily living and [incidental activities of daily living]. . . . [Petitioner] resides with her mother, Mary Short, who is her main caretaker and guardian. [Petitioner] does not attend a day program and, therefore, her home supports, personal care services and in-home skill building are responsible for all of her personal care and habilitative training[.]

The significant risk of institutionalization, according to petitioner, occurs because the Waiver constraints only allow her to receive 12 hours of paid support each day instead of 16 hours. Due to this shortfall in service hours, petitioner argues, her mother would make the choice to resign guardianship, require petitioner to live outside her home, and allow a new guardian to make placement decisions, which might include community-care options or possible institutionalization. Thus, to the extent petitioner has exhibited any risk of institutionalization, petitioner has failed to show it was caused by SMC's actions. Rather, petitioner's mother's own potential actions would create any purported risk of institutionalization. Moreover, the speculative nature of what might happen in the future as a consequence of petitioner's mother's actions might provide some evidence of the possibility of institutionalization, but it lacks the specificity to meet the "significant risk" standard.

Substantial evidence also establishes that petitioner has other 24 hour per day community-based placements available to safeguard against her purported significant risk of institutionalization. Although petitioner argues on appeal that community-based placement in a group home setting would be inappropriate for her, SMC denied petitioner's request for the additional service hours under the Waiver because her "request for 24 hours per day of supports under the [Waiver] would be appropriately met through residential supports in a group home setting." At the hearing before the ALJ, petitioner presented no evidence that a group home would be inappropriate to meet her needs. Rather, the record reflects that petitioner had previously lived in a group home for five years in California, but petitioner's mother took her out of the home because she "was so afraid of [petitioner] being an institutional child, jumping from one group home to another" and was concerned about potential abuse by staff members. Although petitioner's mother testified that petitioner suffered abuse in North Carolina while she was placed in an Intermediate Care Facilities for Individuals with Mental Retardation (an institutional/non-community placement), the evidence presented did not indicate that the available *community based options* in this State would fail such that petitioner would face a significant risk of institutionalization.

Additionally, as previously discussed, in order for petitioner to succeed on appeal, the significant risk of institutionalization must be causally related to SMC's reduction in available service hours per day. *Clinton L.*, at *8. The test is whether SMC's actions are "substantially related" to petitioner's significant risk of institutionalization. *Id.*

A provision of the Waiver states: "Adult and child participants who live in private homes with intensive support needs: These participants may receive up to an additional 12 hours per day in-home intensive supports to allow for 24 hours per day of support with the prior approval of THE PIHP." Thus, despite SMC's decision to only grant petitioner with 84 hours of services pursuant to the Waiver limitations, an explicit exception would have allowed petitioner to receive 24 hours of "in-home" support services. However, the petitioner never applied for the additional hours. As a result, SMC denied the personal care service request in excess of the 84 hour limit set by the Waiver. Thus, any purported risk of institutionalization was also caused by petitioner's failure to take advantage of the 24 hour support exception that would keep her in the home.

For the foregoing reasons, we hold that substantial evidence in the record supports the Superior Court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. As such, the Superior Court did not err by affirming the ALJ's Final Decision to deny, in part, petitioner's request for 112 hours of services per week.

b.) CAP-MR/DD Transition

[2] Petitioner also argues the Superior Court erred by affirming the ALJ's Final Decision, including the 84 hour per week service limit, by denying petitioner's rights to maintain her level of services under her CAP-MR/DD budget.

"When a superior court exercises judicial review over an [ALJ's] final decision, it acts in the capacity of an appellate court." *Bernold v. Bd. of Governors of Univ. of N.C.*, 200 N.C. App. 295, 297, 683 S.E.2d 428, 430 (2009) (quotation marks omitted). A superior court can affirm, remand, reverse, or modify the ALJ's final decision. *Id.* "It is a well-established rule in our appellate courts that a contention not raised and argued in the trial court may not be raised and argued for the first time on appeal." *Robinson v. Shanahan*, __ N.C. App. __, __, 755 S.E.2d 398, 400 (2014) (internal quotation marks omitted). "The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions." *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (internal quotation marks omitted).

At the review hearing before the Superior Court, it is uncontested that petitioner raised the CAP-MR/DD budget argument for the first time. Petitioner did not advance the argument before the ALJ, in her Petition For Judicial Review, or in her brief to the Superior Court. Because petitioner did not argue said theory to the ALJ, the ALJ necessarily never

ruled on it. As such, the CAP-MR/DD budget argument was not properly before the Superior Court, nor is it properly before this Court for review. *See* N.C. R. App. P. R. 10(a)(1) ("In order to preserve an issue for appellate review, a party must . . . obtain a ruling upon the party's request, objection, or motion."). We dismiss this argument on appeal.

III. Conclusion

In sum, we affirm the Superior Court's order affirming the ALJ's Final Decision because substantial evidence in the record supports the Superior Court's finding that petitioner failed to establish that absent the 112 hours per week of paid services, she would be at a significant risk of institutionalization. Additionally, we dismiss petitioner's second issue on appeal because it is not preserved for our review.

AFFIRMED.

Judges GEER and INMAN concur.

STATE OF NORTH CAROLINA
v.
EDWARD DURANT HICKS, DEFENDANT

No. COA 14-1175

Filed 2 June 2015

1. Homicide—first-degree murder—failure to disclose felony murder theory—not required

The trial court did not abuse its discretion in a first-degree murder case by refusing to require the State to disclose its felony murder theory before the jury was empaneled. When the State's indictment language sufficiently charges a defendant with first degree murder, it is not required to elect between theories of prosecution prior to trial. The State's legal theories are not "factual information" subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial. Further, defendant failed to establish that he could not adequately prepare his defense without knowledge of the State's legal theory.

2. Evidence—hearsay—out-of-court statement—nonprejudicial

The trial court did not err in a first-degree murder case by admitting an out-of-court statement made by Scott through the testimony

of Boyce. Assuming arguendo that the trial court erred by allowing Boyce to testify about a purported hearsay statement made by Scott or by refusing to instruct the jury on the lesser included offense of second-degree murder, any such error was nonprejudicial. Boyce's testimony alone that he saw defendant pull out a gun renders the admission of Scott's out-of-court statement to defendant as non-prejudicial.

3. Homicide—first-degree murder—felony murder rule—motion to dismiss—discharging firearm into occupied property

The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge under the felony murder rule for insufficient evidence. The State presented sufficient evidence to support the felony charge of discharging a firearm into occupied property even though there was conflicting evidence as to whether defendant fired the shots from inside or outside the vehicle. Contradictions and discrepancies do not warrant dismissal of the case and are for the jury to resolve.

4. Homicide—first-degree murder—motion to dismiss—premeditation and deliberation

The trial court did not err by denying defendant's motion to dismiss the first-degree murder charge based upon alleged insufficient evidence of premeditation and deliberation. In the light most favorable to the State, the State presented sufficient evidence to put the issue of premeditation and deliberation before the jury.

5. Homicide—first-degree murder—denial of request for instruction on lesser included offense—second-degree murder

The trial court did not err by denying defendant's request for an instruction on the lesser included offense of second-degree murder. The evidence showed that defendant acted with premeditation and deliberation and there was no evidence in the record to suggest a lack thereof. Further, defendant cannot show a reasonable possibility that had the second-degree murder instruction been given, a different result would have been reached at trial.

Appeal by defendant from judgment entered 19 March 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Nicholaos G. Vlahos, for the State.

DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC, by Rudolph A. Ashton, III, for defendant.

ELMORE, Judge.

On 19 March 2014, a jury found defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and under the first degree felony murder rule. The trial court sentenced defendant to life imprisonment without parole. After careful consideration, we hold that defendant received a trial free from prejudicial error.

I. Background

The State's evidence at trial tended to show the following: On 12 May 2012, Raymond Boyce (Boyce) was inside his residence on Zircon Street in Charlotte. Boyce looked outside his bedroom window and observed a Jaguar parked in the yard of his residence. Shortly thereafter, a minivan parked next to the Jaguar. Boyce recognized an individual named Calvin Scott (Scott) exit the Jaguar and walk towards the street while speaking on a cell phone. Scott returned to the Jaguar and sat in the driver's seat. Another person, who was unidentified at trial, exited the back seat of the Jaguar and left the area.

A third vehicle then arrived, and Boyce saw a man he knew to be Edward Durant Hicks (defendant) exit the third vehicle and walk towards the Jaguar while speaking to Scott. Beverly McHam (McHam) had previously seen defendant travel towards the direction of Zircon Street in a car driven by a white female who was later identified as April Bittle (Bittle).

Boyce saw defendant pull out a gun from his back pocket and heard Scott say, "man, what you doing, put that shit up." Defendant put the gun back in his pocket and appeared to walk away from the Jaguar. However, defendant then turned back towards the Jaguar, opened the rear driver's side door, and began shooting the front seat passenger, Nakio Cousart (the victim). Defendant fired at least four shots, each of which struck the victim and caused his death.

II. Analysis

a.) Disclosure of Felony Murder Theory

[1] First, defendant argues the trial court erred by refusing to require the State to disclose its felony murder theory before the jury was empaneled. Specifically, defendant avers that because the State used

a short-form indictment to charge him with murder, he lacked notice as to which underlying felony supported the felony murder charge. We disagree.

We review a trial court's denial of a motion for a bill of particulars for an abuse of discretion[1]. *State v. Garcia*, 358 N.C. 382, 390, 597 S.E.2d 724, 733 (2004). "A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information." N.C. Gen. Stat. § 15A-925(b) (2013). Legal theories, however, do not constitute "factual information" as contemplated by N.C. Gen. Stat. § 15A-925. *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. N.C. Gen. Stat. § 15-144 (2013) by its very terms authorize a short-form indictments for a murder charge:

> In indictments for murder . . . it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law[.] . . . [A]ny bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder[.]

Additionally, our Supreme Court "has consistently held that murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of *any theory* set forth in N.C.G.S. § 14-17." *Garcia*, 358 N.C. at 388, 597 S.E.2d at 731 (emphasis in original). N.C. Gen. Stat. § 14-17 (2013), in relevant part, classifies first degree murder as "[a] murder . . . by . . . willful, deliberate, and premeditated killing, or . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" A murder committed in the perpetration of the crime of discharging a firearm into an occupied vehicle will also support a conviction of felony

1. Defendant argues that the standard of review should be *de novo*. We disagree and note that even under a *de novo* review of this issue, defendant would not prevail.

murder under N.C. Gen. Stat. § 14-17. *See State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982).

When the State's indictment language sufficiently charges a defendant with first degree murder, it "is not required to elect between theories of prosecution prior to trial." *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. Rather, "a defendant must be prepared to defend against any and all legal theories which the facts may support." *Id.* (citations and quotation marks omitted).

On the day of trial, and prior to jury selection, defendant made a motion to compel the State to disclose the felony it intended to use to support its felony murder theory. The trial court denied defendant's motion and noted defendant's objection to its ruling. Defendant, in essence, requested to learn about the State's theory of the case by a bill of particulars. However, the State pled facts sufficient to support the charge of first degree murder pursuant to N.C. Gen. Stat. § 14-17 by alleging in its indictment that defendant "unlawfully, willfully, and feloniously and of malice aforethought kill[ed] and murder[ed] Nakio Terrill Cousart." *See* N.C. Gen. Stat. § 14-17. According to the provisions of N.C. Gen. Stat. § 14-17, the State was authorized to present evidence at trial sufficient to support a first degree murder conviction under the theories of premeditation and deliberation, felony murder, or both. *See* N.C. Gen. Stat. § 14-17. As our case law makes clear, the State's legal theories are not "factual information" subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial. *See Garcia*, *supra*.

Moreover, defendant has failed to establish that he could not adequately prepare his defense without knowledge of the State's legal theory. At trial, the State, in part, proceeded under a theory of felony murder, presenting evidence that defendant committed the murder during the perpetration of feloniously discharging a firearm into a vehicle occupied by the victim. Before trial, the State complied with the open discovery rule: "Everything in [the State's] file has been turned over to [defendant]. . . . Every information we have about [the victim] that is part of the investigation of this matter has been provided to [defendant]." *See* N.C. Gen. Stat. § 15A-903 (2013). Prior to trial, the State also provided defendant with a copy of Boyce's recorded statement to officers in which he described what he saw and heard relating to the shooting. Furthermore, defendant's attorney indicated his knowledge that an alleged shooting had occurred in or around a vehicle:

> Just so the Court's aware that many parties state in this case that the defendant allegedly was in the car, that [the victim] was allegedly in the car and Mr. Scott was in the car. So we would certainly argue that their statements would tend to be testimonial and self-serving on the part of Mr. Scott to basically help tie the story where he was indeed to be the shooter.

Based on the foregoing analysis, we hold that the trial court did not err by refusing defendant's request to require the State to disclose its felony murder theory before the jury was empaneled.

b.) Scott's Out-of-Court Statement

[2] Next, defendant argues the trial court erred by admitting an out-of-court statement made by Scott through the testimony of Boyce. Specifically, defendant avers that the admission of Scott's out-of-court statement constituted prejudicial hearsay because it "basically accused [defendant] of being the shooter." We disagree.

We review this issue *de novo*. *See State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) ("The admissibility of evidence at trial is a question of law and is reviewed *de novo*.").

The out-of-court statement at issue is Boyce's testimony that "[Scott] said [to defendant], 'man, what you doing, put that shit up.' " At trial the following colloquy occurred:

> PROSECUTOR: And on the 12th of May 2012 who was-- what happened on that day?
>
> BOYCE: Well, I was sitting up there in my window picking wild hairs from my face. A Jaguar pulled up, backed into the yard.
>
> PROSECUTOR: Who did?
>
> BOYCE: A Jaguar.
>
> PROSECUTOR: Oh, I'm sorry.
>
> BOYCE: There was another van was [sic] behind him backing up into the yard. So I was sitting at the window talking to a friend of mine in my bedroom. [Scott] got out of his car, he was on the phone walking to the front of the car to the street.
>
> PROSECUTOR: You said [Scott] was on the phone?

BOYCE: Yes.

PROSECUTOR: What car did he get out of?

BOYCE: The Jaguar.

PROSECUTOR: He walked towards the street on the phone?

BOYCE: Yes.

PROSECUTOR: Then what happened?

BOYCE: [He] [c]ome back to the Jaguar, was on the phone, got back in his car, and after a while then this SUV or another kind of van pulled up. A dude jumped out of it, walked to the Jaguar, talking to [Scott], reached in his back right pocket, pulled out a gun. [Scott] said man, what you doing, put that shit up. So he put it back in his pocket.

DEFENDANT'S ATTORNEY: Objection, Your Honor.

BOYCE: Huh?

THE COURT: To?

DEFENDANT'S ATTORNEY: [Scott's] statement. Motion to strike.

PROSECUTOR: Your Honor, the State would contend that that's an excited utterance or present sense impression. They both apply. Nor is it a statement necessarily offered for the truth of the matter.

THE COURT: Which is it?

PROSECUTOR: I think it falls under all three of those, frankly.

THE COURT: You're not offering it for the truth of the matter?

DEFENDANT'S ATTORNEY: No.

THE COURT: All right.

Even if we presume *arguendo* that Boyce's testimony regarding Scott's out-of-court statement constituted inadmissible hearsay, any purported error arising from its admission was non-prejudicial. *See State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010) ("Evidentiary

errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.").

Boyce testified that from his window bedroom he observed a Jaguar parked in the yard of his residence. A minivan immediately parked next to the Jaguar. Boyce then observed Scott exit the Jaguar and walk towards the street while speaking on a cell phone. Scott returned to the Jaguar and sat back inside the vehicle. Another person, who was not identified at trial, exited the Jaguar and left the scene. A third vehicle then arrived, and Boyce saw defendant exit the third vehicle and walk towards the Jaguar, reach into his back pocket, pull out a gun, open the vehicle's rear left door, and shoot into the vehicle multiple times. He further testified that the shooter never went inside the Jaguar. Boyce made an in-court identification of defendant as the sole shooter and recognized him as being a member of his neighborhood. Boyce's testimony alone that he saw defendant pull out a gun renders the admission of Scott's out-of-court statement to defendant as non-prejudicial.

However, George Potts also corroborated Boyce's account. Potts testified that he looked outside a window from his house and observed an individual exit a vehicle that was driven by a white female. The individual walked towards the Jaguar, opened the "back end of the back door" of the Jaguar, and shot "four times in the car." He also stated that the shooter never went inside the Jaguar.

McHam had known defendant for a year or two before the date of trial. She testified that she was in her front yard and observed the victim drive past her. Approximately twenty minutes later, she saw defendant in a vehicle with a white female and subsequently heard "some shots, three shots." She walked towards the direction of the gun shot sounds and saw defendant "running towards . . . other apartments."

The first responding officer found the victim unresponsive in the front passenger seat of the Jaguar, with his head "to the left and leaning back in the seat[.]" The State's forensic pathologist testified that all of defendant's four gunshot wounds were consistent with being shot from outside the vehicle's rear driver's side door.

Based on the foregoing evidence, defendant has failed to show that the admission of Scott's lone out-of-court statement could have affected the result of the trial. As such, we hold that the purported erroneous admission of Scott's statement was not prejudicial to defendant.

c.) Motion to Dismiss Murder Charge Under the Felony Murder Rule

[3] Defendant argues the trial court erred by denying his motion to dismiss the first degree murder charge under the felony murder rule for insufficient evidence. Specifically, defendant argues the State failed to present sufficient evidence to support the felony charge of discharging a firearm into occupied property because there was conflicting evidence as to whether defendant fired the shots from inside or outside the vehicle. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). This Court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Clagon*, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (citation and quotation marks omitted). "In ruling on a motion to dismiss, [we] must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom." *Id.* (citation and quotation marks omitted).

> The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is evidence which tends to prove the fact or facts in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture.

State v. Jones, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (citations and quotation marks omitted). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve." *State v. Agustin*, __ N.C. App. __, __, 747 S.E.2d 316, 318, *review denied*, __, N.C. App. __, __, 749 S.E.2d 864, 865 (2013) (quotation marks omitted).

The felonious crime of discharging a firearm into occupied property, in relevant part, requires that an individual "willfully or wantonly discharges . . . any firearm . . . into any . . . vehicle . . . while it is occupied[.]" N.C. Gen. Stat. § 14-34.1 (2013). An individual discharges a firearm "into" an occupied vehicle under the statute even if the firearm is inside the vehicle, as long as the individual is outside the vehicle when discharging the firearm. *See State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988).

Contrary to defendant's assertion, mere contradictions in the evidence do not warrant a dismissal of the case. *See Agustin*, __ N.C. App.

at __, 747 S.E.2d at 318. Rather, our inquiry is whether the State presented sufficient evidence that defendant was outside the vehicle when he discharged the firearm. In the light most favorable to the State, the State presented sufficient evidence to withstand defendant's motion to dismiss. Boyce testified that defendant was the shooter, and although defendant opened the Jaguar's rear driver's side door, defendant never went inside the vehicle. Potts stated that the shooter never went inside the vehicle when he discharged the firearm. Additionally, the State's forensic pathologist provided testimony to indicate that defendant was outside the vehicle when he shot the victim. Accordingly, the trial court did not err by denying defendant's motion to dismiss the first degree murder charge based on the underlying felony of discharging a firearm into an occupied property.

d.) Motion to Dismiss Murder Charge Based on Premeditation and Deliberation

[4] Defendant also argues the trial court erred by denying his motion to dismiss the first degree murder charge based upon the insufficiency of evidence of premeditation and deliberation. We disagree.

> Premeditation means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Clark, __ N.C. App. __, __, 752 S.E.2d 709, 711 (2013), *review denied*, 367 N.C. 322, 755 S.E.2d 619 (2014) (quotation marks omitted). However, "if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated." *Id.* (quotation marks omitted).

The State must generally prove both premeditation and deliberation by circumstantial evidence. *See id.* Our Courts have articulated situations from which premeditation and deliberation can be implied under the circumstances:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the

> defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

The evidence presented at trial shows the absence of provocation on the part of the victim. No evidence indicated that the victim exited the Jaguar or interacted with defendant at all. No weapons were found in the Jaguar or on the victim's person when law enforcement officers investigated the scene post mortem, indicating that the victim was unarmed when defendant allegedly shot him. The fact that defendant shot the victim at least four times is further evidence of premeditation and deliberation.

Defendant's actions before the shooting also establish premeditation and deliberation. Bittle testified that she had previously traded her car for drugs. She met an unfamiliar individual on 12 May 2012 to retrieve her car. That individual returned her vehicle and subsequently asked Bittle for a ride home, but gave her the location of Boyce's residence. Bittle dropped the individual at that location and observed him get inside the back seat of another vehicle. As she drove away, she heard shots fired. Bittle was unable to identify defendant as the individual in her car because she "didn't have a clear memory the night that it happened" and had never previously met defendant on the day of the shooting. However, Bittle noticed a beer can in her car on 12 May 2012 that had not been there when she loaned her car. A subsequent DNA swab of the can matched defendant's DNA profile.

Boyce testified that defendant brandished a gun from his back pocket, exchanged a few words with Scott, put the gun back in his pocket as if he was about "to walk off[,]" and then "turned around, [came] back, opened the back driver's door, and . . . just started shooting." Thus, the circumstances would indicate, at a minimum, that defendant formed the specific intent to kill the victim over some period of time before the shooting. *See State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (asserting that arriving to the scene of a murder with a weapon "supports an inference of premeditation and deliberation"); *see also State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) ("[N]o particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing.").

Defendant's actions after the shooting provide additional evidence of premeditation and deliberation. After the shooting occurred, the witnesses testified that defendant immediately left the scene. Such evidence would allow the jury to infer that defendant did not attempt to assist the victim. *See State v. Horskins*, __ N.C. App. __, __, 743 S.E.2d 704, 709, *review denied*, __ N.C. __, 752 S.E.2d 481 (2013) (acknowledging that a defendant's failure to attempt "to obtain assistance for the deceased" is a relevant consideration of premeditation and deliberation).

In the light most favorable to the State, the State presented sufficient evidence to put the issue of premeditation and deliberation before the jury. As such, the trial court did not err by denying defendant's motion to dismiss the first degree murder charge based upon the theory of premeditation and deliberation.

e.) Second Degree Murder Instruction

[5] Finally, defendant argues the trial court erred by denying his request for an instruction on the lesser included offense of second degree murder. We disagree.

"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). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quotation marks omitted).

> An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime, an instruction on lesser included offenses is not required.

State v. Northington, __ N.C. App. __, __, 749 S.E.2d 925, 927 (2013), *appeal dismissed*, 367 N.C. 331, 755 S.E.2d 622 (2014) (citations and internal quotation marks omitted). A trial court's failure to instruct on a lesser-included offense "constitutes reversible error not cured by

a verdict of guilty of the offense charged." *State v. Tillery*, 186 N.C. App. 447, 449-50, 651 S.E.2d 291, 293 (2007) (quotation marks omitted). Second degree murder requires "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000).

Here, defendant requested the second degree murder instruction based on two theories: 1.) evidence from which the jury could find a lack of premeditation and deliberation and 2.) sufficient evidence that the shooting occurred inside the vehicle, and therefore the defendant would not be guilty of felony murder. We limit our analysis to a discussion of whether the State presented sufficient evidence of premeditation and deliberation because such an inquiry is dispositive to the question of whether the trial court erred by failing to instruct the jury on second degree murder. *See State v. Rogers*, __ N.C. App. __, __, 742 S.E.2d 622, 629 (2013) ("Given that the State presented evidence of premeditation and deliberation, and there is no evidence in the record to suggest a lack thereof, we hold that the trial court did not err in denying defendant's request for an instruction on the lesser included offense of second-degree murder.").

Here, the evidence shows that defendant acted with premeditation and deliberation and there is no evidence in the record to suggest a lack thereof. As previously discussed, defendant asked Bittle for a ride home but provided her with the location of Boyce's residence where victim was located. Defendant removed a gun from his pocket, put the gun back in his pocket, and appeared to walk away from the Jaguar. However, he returned to the vehicle, fired at least four shots at the victim, and fled the scene.

Moreover, defendant has failed to direct us to conflicting evidence in the record with regard to premeditation and deliberation. Defendant merely points out that there was "no evidence that defendant knew [the victim], that there was any ill will between them, that there was a prior argument, or that the underlying felony was based upon premeditation and deliberation."

Accordingly, defendant was not entitled to a second degree murder instruction under a theory of premeditation and deliberation because the State's evidence is positive as to premeditation and deliberation and there is no conflicting evidence on those elements. *See State v. Laurean*, 220 N.C. App. 342, 348, 724 S.E.2d 657, 661-62 (2012) (rejecting defendant's argument that he was entitled to an instruction on second degree murder where evidence was sufficient to support a first degree murder

charge and defendant did "not deny that he committed a homicide, he simply challenge[d] what he refer[ed] to as a lack of evidence of premeditation and deliberation"). In sum, the evidence would not permit the jury rationally to find defendant guilty of second degree murder and to acquit him of first degree murder under a theory of premeditation and deliberation.

Based on our analysis with regard to premeditation and deliberation, we need not address the merits of defendant's argument that a second degree murder instruction was necessary under the felony murder theory because of the alleged conflicting evidence regarding defendant's location during the shooting. In *State v. Phipps*, the defendant argued on appeal that the trial court erred by failing to instruct the jury on second degree murder. 331 N.C. 427, 457, 418 S.E.2d 178, 194 (1992). Our Supreme Court ruled that the trial court erred because "the State's evidence would have permitted a rational jury to convict him of second-degree murder" based on a lack of premeditation and deliberation. *Id.* at 457-59, 418 S.E.2d at 194-95. Importantly, however, our Supreme Court upheld defendant's conviction for first degree murder "because the jury based its verdict on both premeditation and deliberation and the felony murder rule[,]" and "[d]efendant's first-degree murder conviction under the felony murder rule [was] without error[.]" *Id.* at 459, 418 S.E.2d at 195.

Similar to *Phipps*, the jury in the case *sub judice* convicted defendant on the basis of "malice, premeditation and deliberation" as well as felony murder. Because the first degree murder conviction under a theory of premeditation and deliberation was without error for the reasons previously discussed, any purported error related to the trial court's failure to instruct on second degree murder with regard to the felony murder charge would be non-prejudicial. Defendant cannot show a reasonable possibility that had the second degree murder instruction been given, a different result would have been reached at trial. *See State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770-71 (2002) ("[I]f a defendant is convicted of first-degree murder on the basis of both premeditation and deliberation and felony murder, then premeditated and deliberate murder alone supports the conviction[.]"). Accordingly, the trial court did not err by failing to provide the jury with a second degree murder instruction.

III. Conclusion

In sum, the trial court did not err by: refusing to require the State to disclose its felony murder theory before the jury was empaneled, denying defendant's motion to dismiss the first degree murder charge under

the felony murder theory, or denying defendant's motion to dismiss the first degree murder charge under a theory of premeditation and deliberation. If the trial court erred by allowing Boyce to testify about a purported hearsay statement made by Scott or by refusing to instruct the jury on the lesser included offense of second degree murder, any such error was non-prejudicial.

NO PREJUDICIAL ERROR.

Judges GEER and DILLON concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
KEITH A. LEAK, DEFENDANT

No. COA14-591

Filed 2 June 2015

Search and Seizure—seizure of license and registration—no reasonable suspicion—violation of Fourth Amendment

Defendant was seized in violation of the Fourth Amendment when a police officer, with no reasonable suspicion, took defendant's vehicle registration and driver's license to his patrol vehicle to conduct a check on his computer. The trial court erred by denying defendant's motion to suppress.

Appeal by defendant from judgment entered 14 November 2013 by Judge Mark E. Klass in Anson County Superior Court, that reserved defendant's right to appeal the order entered 7 August 2013 by Judge Tanya Wallace denying his motion to suppress. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper by Assistant Attorney General Ebony J. Pittman for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

STEELMAN, Judge.

When a law enforcement officer took defendant's driver's license to the officer's patrol vehicle to conduct computer research into the status of defendant's driver's license, this amounted to a seizure under the Fourth Amendment to the U.S. Constitution. In *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015), the United States Supreme Court rejected the argument that an otherwise unconstitutional seizure may be justified simply by characterizing it as a brief or "*de minimus*" violation of a defendant's rights under the Fourth Amendment.

I. Factual and Procedural History

At 11:30 p.m. on 30 April 2012, Lilesville Police Chief Bobby Gallimore was on patrol. He noticed a parked car in a gravel area near Highway 74, and stopped to see if the driver needed assistance. Before approaching the car, Chief Gallimore ran the vehicle's license plate through his computer and was advised that the car was owned by Keith Leak (defendant). Chief Gallimore spoke with defendant, who told him that he did not need assistance, and had pulled off the road to return a text message. Chief Gallimore then asked to see defendant's driver's license, and determined that the name on the license – Keith Leak – matched the information he had obtained concerning the car's license plate.

After examining defendant's driver's license, Chief Gallimore took it to his patrol vehicle to investigate the status of defendant's driver's license. It was undisputed that Chief Gallimore had no suspicion that defendant was involved in criminal activity. Defendant remained in his car while Chief Gallimore ran a check on his license and confirmed that his license was valid. However, the computer search revealed that there was an outstanding 2007 warrant for defendant's arrest. Chief Gallimore asked defendant to step out of his car, at which point, defendant informed Chief Gallimore that he "had a .22 pistol in his pocket." Defendant was arrested for possession of a firearm by a convicted felon; the record does not indicate whether defendant was ever prosecuted for the offense alleged in the 2007 arrest warrant.

On 4 June 2012 defendant was indicted for possession of a firearm by a felon and for the related misdemeanor of carrying a concealed weapon. On 5 August 2013 defendant filed a motion to suppress evidence obtained at the time of his arrest, on the grounds that the evidence had been "seized in or as a result of" a seizure in "violation of his rights under the Fourth Amendment of the U.S. Constitution and similar provisions in the North Carolina Constitution[.]" The motion to suppress was heard by Judge Tanya Wallace on 5 August 2013. Chief Gallimore testified for

the State at the suppression hearing. Defendant did not present evidence. On 7 August 2013 Judge Wallace entered an order denying defendant's motion. On 14 November 2013 defendant entered a plea of guilty to possession of a firearm by a felon pursuant to a plea agreement, reserving his right to appeal the denial of his suppression motion. The trial court determined defendant's prior record level to be II, imposed a suspended sentence of nine to twenty months imprisonment, and placed defendant on supervised probation for twelve months.

Defendant appeals.

II. Denial of Suppression Motion

The sole issue raised on appeal is whether Judge Wallace erred by denying defendant's motion to suppress evidence. Defendant argues that he was effectively seized when Chief Gallimore took his driver's license to the patrol vehicle in order to conduct a computer search and that, because Chief Gallimore had no suspicion that defendant was engaged in criminal activity, the seizure violated his rights under the Fourth Amendment to the United States Constitution. We are compelled to agree.

A. Standard of Review

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994), and *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (other citations omitted)). " '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The issue in this case is whether there was a violation of defendant's rights under the Fourth Amendment to the U.S. Constitution.

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court. We also look for guidance to the decisions of the North Carolina Supreme Court construing federal constitutional and State

> constitutional provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

Johnston v. State, __ N.C. App. __, __, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749, (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)), *affd*, 367 N.C. 164, 749 S.E.2d 278 (2013).

B. Discussion

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV.

> The fourth amendment protects individuals against unreasonable searches and seizures. Not every police encounter, however, warrants fourth amendment scrutiny. Under *Terry v. Ohio* and its progeny, a three-tiered standard has developed by which to measure the need to investigate possible criminal activity against the intrusion on individual freedom which the investigation may entail:
>
> (1) Communication between police and citizens involving no coercion or detention are outside the scope of the fourth amendment.
>
> (2) Seizures must be based on reasonable suspicion.
>
> (3) Arrests must be based on probable cause.

State v. Harrell, 67 N.C. App. 57, 60-61, 312 S.E.2d 230, 234 (1984) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968) (other citation omitted)).

Chief Gallimore's initial contact with defendant was consensual, as indicated in several of the trial court's findings of fact:

> . . .
>
> (4) Initially Chief Gallimore was concerned about the safety of the vehicle's occupant or occupants, whether the vehicle had broken down or whether the occupants needed other assistance.

> (5) The only occupant of the vehicle was the Defendant Keith Leak. Mr. Leak assured the officer he did not need assistance, but told Chief Gallimore that he pulled over to text, since he knew he could not text while driving.
>
> (6) When approaching the vehicle, the officer had run the tag on the vehicle, discovering the vehicle to be registered to Keith Leak. . . .
>
> (7) The Chief approached, in uniform, and does not recall whether or not his blue lights were on. He had a service revolver, but it was not displayed. The officer requested the driver's license and registration from Mr. Leak, which were produced. The officer confirmed that Keith Leak was the name on the driver's license.

"'Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.'" *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (internal quotation omitted)). Chief Gallimore required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing Chief Gallimore to examine his driver's license and registration.

In its order denying defendant's suppression motion, the court stated two alternative conclusions of law "[t]hat any seizure that occurred was deminimus. [sic] But the court finds that there was no seizure in this instance, based on the facts and circumstances surrounding this encounter." Defendant argues that Chief Gallimore's conduct in taking defendant's driver's license back to his patrol car in order to investigate the status of defendant's license constituted a seizure that was not justified in the absence of reasonable suspicion of criminal activity. We agree and hold that, under binding precedent of this Court, defendant was seized when Chief Gallimore took his license and registration back to the patrol car for investigation.

> An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct "would have communicated to a reasonable

> person that he was not at liberty to ignore the police presence and go about his business." . . . Moreover, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" or otherwise terminate the encounter.

State v. Icard, 363 N.C. 303,308-09, 677 S.E.2d 822, 826-27 (2009) (quoting *Bostick*, 501 U.S. at 437, 115 L. Ed. 2d at 400 (1991) (internal quotation omitted), and *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984) (internal quotation omitted)).

Chief Gallimore testified that he did not consider defendant to be free to leave when he took his driver's license back to his patrol car:

> PROSECUTOR: And when you asked him for his driver's license and registration, why did you do that?
>
> CHIEF GALLIMORE: I asked for his driver's license to – I asked him if he had a valid license, and he said he did. And I said, "Well, may I see your license?" And he handed me his license. And then that's when I ran them to make sure that they were valid.
>
> . . .
>
> Q And why is that?
>
> A Because we seem to have a lot of people that drive while license revoked. And I felt obligated -- If I would have released - you know, if I told him he's free to leave from there and he's okay to drive from there, and he got in a wreck, then I'd be liable for it because he didn't have a license. (emphasis added).

In *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), a prior panel of this Court held that a reasonable person would not feel free to drive away while a law enforcement officer retains possession of his driver's license. In *Jackson* a car was stopped based upon the officer's belief that the driver did not have a valid driver's license. After dispelling this suspicion, the officer continued to question the driver and his passenger (the defendant) about whether there were drugs or weapons in the car. We held that this "interrogation was indeed an extension of the detention beyond the scope of the original traffic stop as

the interrogation was not necessary to confirm or dispel [the officer's] suspicion that [the driver] was operating [a motor vehicle] without a valid driver's license[.] . . . Accordingly, for this extended detention to have been constitutional, [the officer] must have had grounds which provided a reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 242, 681 S.E.2d at 496-97 (citation omitted). After holding that the detention was not justified by reasonable suspicion of criminal activity, we held that it constituted an unconstitutional seizure:

> Furthermore, there is no evidence that the encounter became consensual after [the officer's] suspicion that [the driver] was operating without a license was dispelled. Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration. . . . [The officer] took [the driver's] driver's license to her patrol car and . . . [another officer] brought the vehicle registration card to the patrol car. However, there is no evidence in the record that [the driver's] documentation was ever returned. As a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration, [the officer's] continued detention and questioning of [the driver] after determining that [he] had a valid driver's license was not a consensual encounter. Accordingly, the extended detention of Defendant was unconstitutional[.]

Jackson at 243, 681 S.E.2d at 497 (citing *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (other citation omitted) (emphasis added). On the basis of Chief Gallimore's testimony, the holding of *Jackson*, and our analysis of the totality of the circumstances, we hold that a seizure occurred when Chief Gallimore took defendant's license back to his patrol car. The trial court erred in ruling that defendant was not seized.

Our conclusion is neither novel nor unusual. *See*, *e.g.*, *United States v. Jones*, 701 F.3d 1300, 1315 (10th Cir. Kan. 2012) ("the government acknowledges that Mr. Jones was seized once the officers took Mr. Jones's license and proceeded to conduct a records check based upon it") (citing *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995)); *United States v. Farrior*, 535 F.3d 210, 219 (4th Cir. 2008) ("The fact that Officer Morris had returned Farrior's license and registration

also strongly indicates that the encounter was consensual and that no seizure occurred within the meaning of the Fourth Amendment."); and *Liberal v. Estrada*, 632 F.3d 1064, 1083 (9th Cir. 2011) (noting that the case before it was "like [*United States v.*] *Chan-Jimenez*, 125 F.3d [1324,] 1326 [(9th Cir. 1997)] in which we held that the motorist had been seized because the police officer had retained possession of his driver's license and vehicle's registration").

The trial court's alternative conclusion of law that "any seizure that occurred was [*de minimus*] was also contrary to law and was error. In the recent United States Supreme Court case, *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015),[1] the United States Supreme Court held that continued detention of a motorist beyond the scope of the initial reason for the stop was unconstitutional unless justified by reasonable suspicion. In *Rodriguez*, a law enforcement officer stopped a motorist to issue a citation for swerving off the highway. After issuing the driver a warning ticket, the officer detained the driver until the arrival of a drug-sniffing dog. The 8th Circuit Court of Appeals held that the "resulting seven- or eight-minute delay . . . constituted a *de minimus* intrusion on Rodriguez's personal liberty[.]" *United States v. Rodriguez*, 741 F.3d 905, 907-08 (8th Cir. 2014). The Supreme Court "granted *certiorari* to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff" and held that "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, __ U.S. __, 191 L. Ed. 2d at 495. The Court vacated the judgment of the Eighth Circuit Court of Appeals and remanded for determination of "whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation[.]" *Rodriguez* at __, 191 L. Ed. 2d at 496, rejecting the *de minimus* analysis of the 8th Circuit.

In this case, there is no factual dispute that Chief Gallimore did not have a reasonable suspicion that defendant was engaged in criminal activity. "An officer has reasonable suspicion if a 'reasonable, cautious officer, guided by his experience and training,' would believe that criminal activity is afoot 'based on specific and articulable facts, as well as

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1. *Rodriguez* was decided after the suppression hearing in this case. "Because defendant had entered notice of appeal and his case was pending when [*Rodriguez*] was issued, that decision applies to defendant's case." *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (citing *Griffith v. Kentucky*, 479 U.S. 314, 322-23, 93 L. Ed. 2d 649, 658 (1987)).

the rational inferences from those facts.' " *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (quoting *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994), and citing *Terry*). Chief Gallimore described his interaction with defendant as "a routine conversation" and testified that his reason for approaching defendant was to ascertain if he needed assistance with a disabled vehicle. Defendant was not parked illegally, and Chief Gallimore did not smell alcohol or discern any other indicia of criminal activity. The trial court found as a fact that "[b]etween the time of the initial speaking with the Defendant and the time that the first hit on the Defendant's name alerted [Chief Gallimore to the outstanding arrest warrant] there was no actual suspicion of criminal activity." We hold that defendant was seized in violation of his rights under the Fourth Amendment to the United States Constitution.

"Evidence that is discovered as a direct result of an illegal search or seizure is generally excluded at trial as fruit of the poisonous tree unless it would have been discovered regardless of the unconstitutional search." *Jackson* at 244, 681 S.E.2d at 497 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L.Ed.2d 441, 455 (1963)). In this case, Chief Gallimore's seizure of defendant for purposes of conducting an investigation into his driver's license led to his arrest and the discovery of the firearm in his possession. There was no evidence that defendant's pistol was or could have been discovered "by means sufficiently distinguishable to be purged of the primary taint" of the unlawful seizure. *Wong Sun*, 371 U.S. at 487-88, 9 L.Ed.2d at 455. We reverse and remand to the trial court for entry of an order vacating defendant's guilty plea.

REVERSED AND VACATED.

Judge CALABRIA concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCULLOUGH, Judge, dissents.

From the majority opinion's conclusion that an officer conducts an impermissible seizure under the rationale of *Rodriguez v. United States*, 575 U.S. __, (2015), when that officer conducts a computer search of the driver's license of an individual that the officer approached to determine if the driver needed assistance, I respectfully dissent.

In the case at bar, Lilesville Police Chief Gallimore was on patrol when he noticed a car parked in a gravel lot just off of Highway 74.

Chief Gallimore approached the car to determine if the driver needed assistance. Before approaching the car the officer checked the vehicle's license plate and determined that the car was owned by the defendant, Keith Leak. Upon approaching the car, Chief Gallimore requested the driver's identification. The driver provided the Chief with his driver's license which identified him as the registered owner, Keith Leak.

The defendant advised Chief Gallimore that he was texting and thus did not need any assistance. Under the majority's reading of *Rodriguez*, any further investigative activity is prohibited as an impermissible seizure and violates the Fourth Amendment. I do not read *Rodriguez* so narrowly.

In this case, once defendant provided Chief Gallimore with his driver's license, the officer returned to his patrol car, checked to see if Mr. Leak had any outstanding warrants or was carrying insurance as required by law. The computer check showed the license was valid but there was an outstanding 2007 warrant and defendant was asked to exit the vehicle whereupon defendant informed Chief Gallimore that he had a loaded pistol in his pants pocket. Based on his status as a convicted felon defendant was eventually indicted on that charge.

I recognize that *Rodriguez* involved a traffic stop where there was an actual traffic violation committed in the officer's presence while the encounter in this case began as an inquiry to see if the motorist needed assistance. The reality of traffic enforcement shows officers encounter many different circumstances along our highways. They may encounter abandoned vehicles, vandalized vehicles, occupied vehicles where the driver is ill or incapacitated, vehicles where the driver needs assistance due to a mechanical failure, or recently crashed vehicles. In this case, no one disputes the fact that Chief Gallimore approached defendant's vehicle to see if assistance was required. Instead of holding that an officer may not conduct any investigation of a driver when the purpose of the approach is non-criminal such as here where the motive was to offer assistance, I would hold that regardless of why an officer approaches a vehicle (assuming it is for a legitimate reason), that the officer can perform the routine functions we associate with a traffic stop for a traffic violation. The majority would leave police officer's having two standards for investigative activity, one when a violation occurs, another when the approach to a vehicle is to see if assistance is needed. I do not believe that is what *Rodriguez* requires.

Specifically, the majority opinion states "Defendant argues that Chief Gallimore's conduct in taking defendant's license constituted a

seizure that was not justified in the absence of reasonable suspicion of criminal activity. We agree and hold . . . defendant was seized when Chief Gallimore took his license and registration back to the patrol car for investigation." I would hold that so long as an officer's approach to a vehicle is for a valid purpose, including the possibility of rendering assistance, he is able to take the same routine steps that he would be allowed to do if he had observed an actual traffic violation. In fact, the colloquy between the prosecutor and Chief Gallimore quoted in the majority opinion articulates why such action is reasonable. The majority does not dispute that an officer has the right to ask the operator of a vehicle to identify himself. Once the driver is so identified, Chief Gallimore did not actually need the physical license to run defendant's name, he undoubtedly could have done that without the license in front of him, although it is certainly an easier task to perform if one has the license nearby. Thus I believe that the act of checking a driver's license is permissible, so long as the approach to the vehicle is for a valid purpose such as offering assistance. The majority concedes an officer can ask the driver to identify himself. I maintain an officer has the right to ask the driver to identify himself to ensure that the driver is the owner and the right to check that driver's record for insurance or warrants. In other words, I believe that in the area of traffic enforcement and management, the reduced expectations of privacy in the operation of vehicles, that the police in any such encounter do not run afoul of the Fourth Amendment when they take the actions Chief Gallimore took here.

I find support for this view in the *Rodriguez* opinion itself. In *Rodriguez*, Justice Ginsburg recognized that certain actions officers take during traffic stops are warranted on the basis of officer safety and that this doctrine provides an independent ground to make a driver's license check citing to *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001). *Rodriguez*, 575 U.S. at __. Justice Ginsburg then went on to recognize the actions an officer is authorized to take during a traffic stop where an officer is determining whether or not to issue a ticket, saying:

> Beyond determining whether to issue a traffic ticket an officer's mission includes "ordinary inquiries incident to [the traffic] stop." Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

Rodriguez, 575 U.S. at ___ (internal citations omitted) (alteration in original) (emphasis added).

I would merely hold that when the traffic encounter is for the purpose of rendering assistance the officer may still verify that the car is properly registered, that the operator is the registered owner or is using the vehicle with permission and that the driver has a valid license and no outstanding warrants just as was done here. While *Rodriguez* was a traffic violation case, officers encounter motorists on the highways and byways in a variety of circumstances and I would hold that an officer who approaches a vehicle where the operator has parked his car in such a way as to raise a question as to whether he needs aid has the same right to conduct the limited checks we associate with stops for traffic violations. Therefore I would uphold defendant's conviction and affirm the denial of the motion to suppress.

STATE OF NORTH CAROLINA
v.
ADOLFO REYES MALDONADO

No. COA14-1119

Filed 2 June 2015

1. Firearms and Other Weapons—discharging a firearm into occupied property—diminished capacity instruction

The trial court did not err by declining to give a diminished capacity instruction on defendant's charge for discharging a firearm into occupied property. The "willful" element did not subject the offense to the diminished capacity instruction.

2. Homicide—felony murder—discharging a firearm into occupied property—single transaction

In defendant's trial resulting in his conviction for felony murder, the trial court did not err by allowing the offense of discharging a firearm into occupied property to serve as the predicate felony for the felony murder conviction. The shooting and the resulting death occurred in a time frame in which they could be perceived as a single transaction.

3. Homicide—felony murder—jury instruction—no prejudicial error

In defendant's trial resulting in his conviction for felony murder, there was no prejudicial error in the trial court's failure to instruct the jury on voluntary manslaughter as a lesser-included offense of first-degree murder by premeditation and deliberation. The jury found defendant not guilty of first-degree murder by premeditation and deliberation.

Appeal by Defendant from judgment entered 19 December 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 2 March 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Mark Montgomery for Defendant.

McGEE, Chief Judge.

Adolfo Reyes Maldonado ("Defendant") appeals from his conviction of felony murder, with the predicate felony being discharging a firearm into occupied property. Defendant contends that the trial court erred (1) by not instructing the jury on diminished capacity on the charge of discharging a firearm into occupied property, (2) by instructing the jury that discharging a firearm into occupied property could serve as the predicate felony to Defendant's felony murder conviction, and (3) by not submitting voluntary manslaughter to the jury as a lesser-included offense of first-degree murder by premeditation and deliberation. We find no error as to Defendant's first two challenges and no prejudicial error as to the third.

I. Background

Defendant and his estranged wife, Elizabeth Reyes ("Ms. Reyes"), had a tumultuous relationship. The police regularly were called to intervene in their personal disputes. Defendant sought medical treatment for serious knife wounds inflicted by Ms. Reyes on multiple occasions. Defendant maintains that Ms. Reyes – who was approximately six feet tall and almost three hundred pounds, who was diagnosed with bipolar disorder, and who had a history of alcohol dependency, anger issues, and paranoid ideation – was abusive throughout their relationship. Officer Steve Little ("Officer Little"), who was "routinely involved in domestic

calls" between Ms. Reyes and Defendant, testified that he never saw Ms. Reyes with anything more than superficial injuries and that she always appeared to be the aggressor in her altercations with Defendant.

However, the State also elicited testimony from Officer Little that, during a previous interview, he stated that both Ms. Reyes and Defendant drank to excess and Ms. Reyes "beat him as much as he beat her[.]" Additionally, Christy Metzger ("Ms. Metzger"), an investigator for the Johnston County Department of Social Services, testified about an interview she had with Ms. Reyes on 10 May 2010, during which Ms. Reyes asserted that Defendant was controlling and would not let her have money, friends, a phone, a car, or a job when they were together.

The couple separated in May 2010, and Ms. Reyes moved in with her mother and stepfather, Sandra and John Benjamin Croft ("Ms. Croft" and "Mr. Croft"), along with the eleven-month-old son ("the Child") of Ms. Reyes and Defendant. Thereafter, according to Ms. Metzger, Defendant began calling Ms. Reyes upwards of ten times a day while Ms. Reyes was at work, and sometimes at night. Ms. Reyes and Defendant were engaged in an ongoing child support dispute.

Defendant went to Mr. and Ms. Croft's house ("the house") on 1 July 2010. A child support hearing was scheduled for the following day. Defendant argued with Ms. Reyes and Mr. Croft in front of the house. Defendant then went to his truck, loaded his shotgun, and returned to the house. Ms. Reyes had gone inside the house. Mr. Croft testified he ran into the house, closed the front door, and said to Ms. Reyes, who was in the kitchen with the Child: "Your old man's trying to kill us. Run."

Defendant shot the front door and then entered the house. Mr. Croft ran into the master bedroom and, as he was closing the bedroom door, was shot by Defendant. Mr. Croft then jumped out a window and ran to a neighbor's house for help. There was a subsequent confrontation inside the house between Defendant and Ms. Reyes that resulted in Ms. Reyes' death and Defendant being non-critically shot in the face. Ms. Reyes suffered gunshots to her upper left buttock, upper right chest, and the back of her head. Defendant called 911 and was taken into custody when the police arrived.

At trial, Defendant presented a number of character witnesses who testified to his peaceful nature. Defendant also presented the expert testimony of Dr. Ginger Calloway ("Dr. Calloway"). Dr. Calloway testified that, on the night of Ms. Reyes' death, Defendant was suffering from post-traumatic stress disorder ("PTSD") as the victim of ongoing abuse from Ms. Reyes.

During the charge conference, Defendant requested diminished capacity instructions on the charges of first-degree murder by premeditation and deliberation of Ms. Reyes, assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Croft, attempted murder of Mr. Croft, felony breaking and entering, and discharging a firearm into occupied property. The trial court ruled that it would instruct on diminished capacity only on the charges of first-degree murder by premeditation and deliberation of Ms. Reyes, attempted murder of Mr. Croft, and felony breaking and entering. However, the trial court ruled that it would not give diminished capacity instructions on discharging a firearm into occupied property or assault with a deadly weapon inflicting serious injury on Mr. Croft. Defendant also argued that discharging a firearm into occupied property could not serve as a predicate felony to felony murder, on the grounds that there was an insufficient relationship between Ms. Reyes' death and Defendant's shooting into the house. The trial court disagreed.

The jury found Defendant guilty of misdemeanor breaking and entering and felony murder, with the predicate felony being discharging a firearm into occupied property.[1] Defendant appeals from his conviction for felony murder.

II. Standard of Review

This Court reviews challenges to the trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

III. Diminished Capacity

[1] Defendant first challenges the trial court's instructions on the charge of "willfully" discharging a firearm into occupied property. Specifically, Defendant argues that the "willful" element of this offense necessarily was subject to a diminished capacity instruction at trial. *See generally* N.C. Gen. Stat. § 14-34.1 (2013). We disagree.

"Diminished capacity is a means of negating . . . specific intent" by a defendant. *State v. Roache*, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (citation and internal quotation marks omitted). It is not a defense to

1. The jury also found Defendant guilty of discharging a firearm into occupied property, but the trial court arrested judgment on that conviction. *See State v. Best*, 196 N.C. App. 220, 229, 674 S.E.2d 467, 474 (2009) ("Under the Double Jeopardy Clause, a defendant may not be punished both for felony murder and for the underlying, predicate felony, even in a single prosecution." (citation and internal quotation marks omitted)).

general intent crimes. *State v. Childers*, 154 N.C. App. 375, 382, 572 S.E.2d 207, 212 (2002). "[S]pecific-intent crimes are crimes which have as an essential element a specific intent that a *result* be reached, while [g]eneral-intent crimes are crimes which only require the doing of some act." *State v. Barnes*, __ N.C. App. __, __,747 S.E.2d 912, 916 (2013), *aff'd per curiam*, 367 N.C. 453, 756 S.E.2d 38 (2014) (emphasis added). The North Carolina Supreme Court also has recognized the existence of "malice type" crimes, which are "neither [ ] specific nor [ ] general intent offense[s] but require[ ] *willful* and malicious conduct" by a defendant. *State v. Jones*, 353 N.C. 159, 167, 538 S.E.2d 917, 924 (2000) (internal quotation marks omitted). Our caselaw has interpreted "willful" to mean "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law. [It] means something more than an intention to commit the offense." *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citations and internal quotation marks omitted).

N.C.G.S. § 14-34.1, which defines discharging a firearm into occupied property, provides that

> [a]ny person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

Because general intent crimes "only require the doing of some act" proscribed by law, *Barnes*, __ N.C. App. at __, 747 S.E.2d at 916, whereas the willful conduct in N.C.G.S. § 14-34.1 requires "something more than an intention to commit" such an act, *see Ramos*, 363 N.C. at 355, 678 S.E.2d at 226, Defendant urges this Court to view discharging a firearm into occupied property as neither a specific nor general intent crime, but rather as a "malice type" crime. Defendant further urges this Court to require diminished capacity instructions on "malice type" crimes when evidence of diminished capacity has been presented at trial.

Defendant's argument fails on both fronts. His brief correctly notes that our North Carolina Supreme Court recognized the existence of "malice type" crimes in *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. However, we are also bound by *State v. Byrd*, 132 N.C. App. 220, 222, 510 S.E.2d 410, 412 (1999), which held that "discharging a firearm into occupied property is a general intent crime[.]" *See In re Civil Penalty*, 324 N.C. 373,

384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Even if we were to entertain the contention, *arguendo*, that our Supreme Court's post-*Byrd* recognition of "malice type" crimes in *Jones* might prompt this Court to view discharging a firearm into occupied property as a "malice type" crime, the end result for Defendant would be no different. Defendant has provided no authority holding that "malice type" crimes are subject to diminished capacity instructions.[2] Moreover, in other crimes requiring malicious conduct, such as second-degree murder, see N.C. Gen. Stat. § 14-17(b)(1) (2013), it is well-established that "[d]iminished capacity that does not amount to legal insanity is not . . . a defense to the element of malice." *See State v. West*, 180 N.C. App. 664, 668, 638 S.E.2d 508, 511 (2006) (citing *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997)). As such, to the extent that there may be a meaningful distinction between general intent and "malice type" crimes, this distinction does not seem to come into play in the realm of diminished capacity instructions. "Diminished capacity is a means of negating . . . specific intent" only. *See Roache*, 358 N.C. at 282, 595 S.E.2d at 407. Therefore, the trial court did not err by declining to give a diminished capacity instruction on the charge of discharging a firearm into occupied property.[3]

IV. "Interrelationship" Between the Predicate Felony and Homicide

[2] Defendant challenges the use of discharging a firearm into occupied property as the predicate felony to his felony murder conviction.

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2. Defendant does cite *State v. Gunn*, 24 N.C. App. 561, 211 S.E.2d 508 (1975), for the contention that diminished capacity can negate the willfulness requirement of N.C.G.S. § 14-34.1. In *Gunn*, the trial court instructed the jury that discharging a firearm into occupied property was a specific intent crime. *Id.* at 563, 211 S.E.2d at 510. The jury still found the *Gunn* defendant guilty of this offense. *Id.* On appeal, this Court did not endorse the trial court's classification of discharging a firearm into occupied property as a specific intent crime, but rather it found that there was no prejudicial error because the specific intent instruction only made the State overcome an even higher burden at trial. *Id.*

3. Also, contrary to Defendant's position, it is not the case that "eliminat[ing] diminished capacity as a defense" here transformed discharging a firearm into occupied property into a strict liability offense by "effectively negat[ing] the statutory requirement that the discharge be willful [or] wanton." The act that is proscribed by N.C.G.S. § 14-34.1 is not simply discharging a firearm into occupied property. It is "*willfully or wantonly*" discharging a firearm into occupied property, N.C.G.S. § 14-34.1 (emphasis added), and the State had the burden of proving this at trial.

Specifically, Defendant argues that there was an insufficient "interrelationship" between the death of Ms. Reyes and Defendant's shooting into the house to support his felony murder conviction in the present case. We disagree.

The elements of felony murder are (1) that a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a) (2013);[4] (2) that a killing occurred "in the perpetration or attempted perpetration" of that felony; and (3) that the killing was caused by the defendant or a co-felon. *See State v. Williams*, 185 N.C. App. 318, 329, 332, 648 S.E.2d 896, 904, 906 (2007). Regarding the second element, that the killing must occur "in the perpetration or attempted perpetration" of a predicate felony, *id.*, "[t]he law does not require that the homicide be committed to escape or to complete the underlying felony." *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723 (1994). Indeed, "there need not be a 'causal relationship' between the underlying felony and the homicide, only an 'interrelationship.' " *Id.* at 622, 447 S.E.2d at 724. "[A]ll that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction." *State v. Moore*, 339 N.C. 456, 462, 451 S.E.2d 232, 234 (1994) (citation and internal quotation marks omitted). Otherwise, there must be a "break in the chain of events leading from the initial felony to the act causing death" in order to render the felony murder rule inapplicable in a particular case. *Cf. id.* at 461, 451 S.E.2d at 234.

In *Moore*, the defendant assaulted his girlfriend at the home of her sister and her sister's boyfriend. *Id.* at 460, 451 S.E.2d at 233. The defendant left the sister's house but returned later in the day. *Id.* After the defendant's girlfriend repeatedly refused to speak to him, the defendant began shooting into the sister's house. *Id.* This prompted the sister's boyfriend to go outside, confront the defendant, and exchange gunfire. *Id.* The sister's boyfriend returned to the house – with serious gunshot wounds – and reloaded his gun, but he was unable to go back outside because the defendant continued to shoot into the house until police

4. The predicate felonies under this section are "any arson, rape or a sex offense, robbery, kidnapping, burglary, or *other felony committed or attempted with the use of a deadly weapon*[.]" *Id.* (emphasis added). In order to support a felony murder conviction, these predicate felonies also must be committed with "a level of intent greater than culpable negligence," regardless of "[w]hether [they are] 'general intent,' 'specific intent,' or 'malice [type]' crimes[.]" *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. In the present case, the jury found that Defendant acted willfully, which "means [he acted with] something more than an intention to commit the offense." *See Ramos*, 363 N.C. at 355, 678 S.E.2d at 226.

arrived. *Id.* at 460, 451 S.E.2d at 234. The sister's boyfriend later died from his injuries, and the defendant was found guilty of felony murder at trial; the predicate felony was discharging a firearm into occupied property. *Id.* at 459, 451 S.E.2d at 233.

On appeal, the *Moore* defendant argued that the sister's boyfriend's going outside to confront him constituted a break in the chain of events between the defendant's firing into the house and the death of the sister's boyfriend. *Id.* at 461, 451 S.E.2d at 234. However, our Supreme Court held that the requirement under N.C.G.S. § 14-17(a), that the killing be committed in the perpetration of a predicate felony was "sufficiently broad to include the entire series of relevant events beginning with the original shooting into the house and continuing until the sirens were heard and the shooting ceased." *Id.* at 462, 451 S.E.2d at 235.

The present case is distinguishable from *Moore* to an extent, in that the *Moore* defendant shot into the house before and after his direct confrontation with the sister's boyfriend. *See id* at 460, 451 S.E.2d at 233–34. In the present case, Defendant stopped shooting *into* the house once he forced his way through the front door and continued shooting *inside* the house. Defendant also argues that, once he was inside the house, Ms. Reyes attempted to take the gun from him and that this confrontation by Ms. Reyes constituted a break in the chain of events that led to her death. Even taking Defendant's account of the events as true, just as the *Moore* Court held that the sister's boyfriend "did not break the chain of events by going outside to defend his home," *id.* at 462, 451 S.E.2d at 235, Ms. Reyes did not break the chain of events by defending herself inside her home after Defendant continued his assault indoors. Therefore, Defendant's shooting into the house and Ms. Reyes' subsequent death inside the house "occur[red] in a time frame that can be perceived as a single transaction." *See id.* at 462, 451 S.E.2d at 234. The trial court did not err by allowing the discharging of a firearm into occupied property to serve as the predicate felony to Defendant's felony murder conviction.

V. The Trial Court Not Instructing the Jury On Voluntary Manslaughter

[3] Defendant contends the trial court erred by not providing the jury with an instruction on voluntary manslaughter as a lesser-included offense of first-degree murder by premeditation and deliberation. Specifically, Defendant argues that the jury should have received an instruction on voluntary manslaughter based on the theory of imperfect self-defense. We find no prejudicial error by the trial court.

> A defendant is entitled to a charge on a lesser-included offense when there is some evidence in the record

> supporting the lesser offense. Conversely, [w]here the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser[-] included offense is required.

State v. James, 342 N.C. 589, 594, 466 S.E.2d 710, 713-14 (1996) (citations and internal quotation marks omitted). An instruction of voluntary manslaughter, based on the theory of imperfect self-defense, is appropriate where there is evidence that a defendant (1) believed it was necessary to kill the deceased in order to save himself from death or great bodily harm; (2) the belief was reasonable; and (3) although initially acting without murderous intent, the defendant was the original aggressor in the circumstance. *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 573 (1981).

In the present case, Defendant points out that the jury acquitted him of all charges requiring specific intent. This included convicting Defendant of misdemeanor breaking and entering, but acquitting Defendant of felony breaking and entering, which had the added element of entering the house with felonious intent. *See generally* N.C. Gen. Stat. § 14-54 (2013). Thus, Defendant maintains that the jury could reasonably have concluded that, although he was the original aggressor, Defendant entered the house without the felonious intent to seriously injure anyone inside,[5] and that it became reasonably necessary for him to defend himself – lethally – during the subsequent confrontation with Ms. Reyes inside the house. Assuming *arguendo* that this would support an instruction on voluntary manslaughter, the trial court's failure to give such an instruction did not amount to prejudicial error.

In *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976), the North Carolina Supreme Court held

> [i]t is a well[-]established rule that when the law and evidence justify the use of the felony[ ]murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it.

Following *Swift*, "[t]he application of this standard . . . resulted in divergent lines of cases in the context of felony murder." *State v. Millsaps*,

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5. When the jury was instructed on felony breaking and entering, the only felonious intent the jury was instructed to consider was whether Defendant intended to commit an assault with a deadly weapon inflicting serious injury when he entered the house.

356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). For example,

> [i]n one group of cases, the Court has simply found that, applying the applicable evidentiary standard, the evidence did not support submission of a lesser-included offense. Another group of cases suggests that if any evidence is presented to negate first-degree murder, then the jury must be instructed on the lesser-included offenses supported by the evidence. Yet another group of cases holds or suggests *in dicta* that if the evidence supports a conviction based on felony murder, the failure to instruct on [lesser-included offenses] is not error or not prejudicial error.

Id. After examining each of these lines of cases, our Supreme Court in *Millsaps* articulated the following principles regarding felony murder.

> (i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555. (ii) If the State tries the case on both premeditation and deliberation and felony murder and the evidence supports not only first-degree premeditated and deliberate murder but also second-degree murder, or another lesser offense included within premeditated and deliberate murder, the trial court must submit the lesser-included offenses within premeditated and deliberate murder irrespective of whether all the evidence would support felony murder. *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178; *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68; *see also State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (holding that the failure to submit second-degree murder and involuntary manslaughter was not prejudicial error where the trial court submitted premeditation and deliberation, voluntary manslaughter, and felony murder; and the jury did not find premeditation and deliberation). (iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and deliberate murder if the case is

submitted on felony murder only. *See State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

Id. at 565, 572 S.E.2d at 773-74. Pursuant to the second principle in *Millsaps*, the trial court erred if it submitted both felony murder and murder by premedication and deliberation to the jury but did not instruct on voluntary manslaughter, *assuming arguendo* it was supported by the evidence. *See id.* However, because "[D]efendant was found guilty of murder in the first degree on the theory of felony murder and was found not guilty on the charge of first-degree murder [by] premeditation and deliberation, no prejudice resulted from the court's failure to charge on voluntary manslaughter." *See Wall*, 304 N.C. at 621, 286 S.E.2d at 75.[6]

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
DEXTER LEON SURRATT, DEFENDANT

No. COA14-1150

Filed 2 June 2015

1. Sexual Offenders—registration—actual release date and not paper release date—consecutive prison terms calculated as single term

The trial court did not err by failing to grant defendant's motion to dismiss on the basis that the State failed to prove that he was required to register as a sex offender. It is defendant's actual release date of 24 January 1999 that controls the sentencing outcome of the instant case, not the "on paper" release date of 24 September 1995. When a defendant is sentenced to consecutive prison terms, the sentences are to be calculated as a single term and the effective release date for purposes of parole eligibility and the like is the date on which a defendant is physically released from incarceration.

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6. Defendant also contends that he was entitled to an instruction on voluntary manslaughter under a "heat of passion" theory. For similar reasons, we find no prejudicial error by the trial court.

2. Sexual Offenders—registration—falsification of information—executed verification form required

The trial court erred by failing to grant defendant's motion to dismiss on the basis that he falsified information for purposes of being charged with violating N.C.G.S. § 14-208.11. There was no evidence presented by the State that he willfully gave an address he knew to be false when he registered his address in Catawba County. The purpose of the statute cannot be extended to punish offenders for untruths they may tell law enforcement. An executed verification form is required before one can be charged with falsifying or forging the document.

Appeal by defendant from judgment entered 29 April 2014 by Judge Yvonne Mims Evans in Catawba County Superior Court. Heard in the Court of Appeals 7 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Laura Askins, for the State.

James W. Carter for defendant.

ELMORE, Judge.

On 7 January 2013, Dexter Leon Surratt, Jr. (defendant) was indicted in 13 CRS 01017 for failing to change his address as a sex offender pursuant to N.C Gen. Stat. § 14-208.11. On 20 May 2013, defendant was indicted in 13 CRS 51481 for falsification of information under N.C. Gen. Stat. § 14-208.11. Following a jury trial, defendant was found guilty of both charges on 29 April 2014. The trial court consolidated the offenses for sentencing and imposed an active sentence with a minimum term of eighteen months and a maximum term of thirty-one months imprisonment. On appeal, defendant argues that the trial court erred in failing to grant his motions to dismiss on the basis that the State failed to prove that (1) he was required to register as a sex offender, and (2) that he falsified information for purposes of being charged with violating N.C. Gen. Stat. § 14-208.11. After careful consideration, we hold that the trial court did not err in failing to grant defendant's motion to dismiss based on his contention that he was not required to register as a sex offender. However, we agree with defendant that the trial court erred in denying his motion to dismiss the charge of falsifying information. Accordingly, we vacate defendant's convictions, in part, and remand for a new sentencing hearing.

II. Background

On 14 June 1994, defendant was convicted of the sexual offense of taking indecent liberties with a child. Defendant was sentenced to a three-year active sentence under the Fair Sentencing Act. After his release, defendant was required to register his address in the sheriff's office in the county in which he lived in order to be included in the sex offender registry. According to the sex offender registration records, defendant first registered as a sex offender on 24 January 1999.

On 7 September 2012, defendant registered a change in his address from 238 32nd Street Southwest to 1470 14th Avenue Northeast in Hickory (the address)—his father's residence. The SBI sent a certified verification letter to the address and requested that the postal service return it to the Catawba County Sheriff's Office if it could not be delivered. The letter was returned "undeliverable." Law enforcement made several unsuccessful attempts to contact defendant at the address. Specifically, on 17 November 2012, Officer James Mathis of the Hickory Police Department went to the address and spoke with defendant's sister, Tiara Rippy. Ms. Rippy informed Officer Mathis that defendant and his father had had an argument a month prior and that defendant's father banished defendant from the residence. Ms. Rippy testified that she visited the residence two or three times per week and on weekends and defendant was never present in the residence after the argument with his father.

Lieutenant Lynn Baker testified that he encountered defendant at the Sheriff's Office in February 2013. At that time, defendant maintained that he was residing at 1470 14th Avenue Northeast and claimed that he was mistakenly charged with failing to register a change in his address. Lieutenant Baker stated that defendant did not execute an address verification form, or any other forms, during the encounter.

Between 11 March and 15 March 2013, Deputy Tom Scarborough attempted to make contact with defendant at 147 14th Avenue Northeast. Upon visiting the address, Deputy Scarborough encountered defendant's father, Mr. Stanley Johnson. Deputy Scarborough provided Mr. Johnson with an address verification form. Mr. Johnson signed the form, marking that defendant did not reside at the residence. Mr. Johnson testified that he lived alone, but he admitted that defendant stayed with him for several weeks. Mr. Johnson recalled arguing with defendant and asking defendant to vacate the residence.

Defendant testified on his own behalf at trial. Defendant alleged that he moved into his father's residence in September 2012, at which

time he registered 1470 14th Avenue Northeast as his address with the Sheriff's Office. Defendant stated that he continued to reside at that address with his father until March 2013. Defendant acknowledged that he and his father had argued, but he denied leaving the residence and residing elsewhere.

II. Analysis

A. Sex Offender Registration Requirements

[1] Defendant argues that the trial court erred in failing to grant his motion to dismiss because the State presented insufficient evidence that defendant was required to register as a sex offender. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

> In 1995, North Carolina enacted the Amy Jackson Law, N.C. Gen. Stat. § 14–208.5 (2003) *et seq.* ('Article 27A'), requiring individuals convicted of certain sex-related offenses to register their addresses and other information with law enforcement agencies. The stated purpose of the law [was] to curtail recidivism because sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest.

State v. White, 162 N.C. App. 183, 185, 590 S.E.2d 448, 450 (2004) (quoting N.C. Gen. Stat. § 14–208.5).

Article 27A applied to all offenders convicted of a sex offense on or after 1 January 1996 and to all offenders who were presently serving an active sentence. *Id. see also* 1995 N.C. Sess. Laws ch. 545, § 3. North Carolina codified the requirements for registration under N.C. Gen. Stat. § 14-208.7 (1996), which provided that a current resident of North Carolina must register within 10 days of release from a penal institution and maintain that registration for 10 years following his or her release from a penal institution. *Id.* (emphasis added). If no active term of imprisonment was imposed, registration was to be maintained for a period of 10 years following each conviction for a reportable offense. *Id.*

The registration law was revised in 2006 to require that registration on the sex offender registry be maintained for a period of 10 years following the *date of the initial county registration*. N.C. Gen. Stat. § 14-208.7(a) (2006). This statute became effective on 1 December 2006. In *In re Hamilton*, this Court clarified that the 2006 amendment "plainly and explicitly" applied retroactively to those offenders presently serving time for a sexual offense. 220 N.C. App. 350, 355, 725 S.E.2d 393, 397 (2012) This Court held:

> The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14–208.7 *in pari materia* with section 14–208.12A, we must construe the abolition of the automatic termination provision as applying to persons for whom the period of registration would terminate on or after 1 December 2006.

Id. at 355-56, 725 S.E.2d at 397.

In 2008, the registration law was amended once more. The revision increased the registration period from ten to thirty years following the date of initial county registration, unless the defendant, after ten years of registration, successfully petitioned the court to shorten his or her registration period. N.C. Gen. Stat. § 14-208.7 (2008) as amended by 2008 N.C. Sess. Laws ch. 117 §. 8.

Here, defendant was convicted of failing to change his address as a sex offender under N.C Gen. Stat § 14.208.11. This charge stemmed from defendant's 14 June 1994 conviction of taking indecent liberties with a child—a reportable offense. On appeal, defendant notes that the Amy Jackson Law was not in effect when defendant was convicted of the indecent liberties charge, and he argues that the State presented insufficient evidence at trial that he was required to register a change in his address on the basis that the sex offender registration program did not apply to him. More specifically, defendant contends that the State failed to prove that defendant was released from prison for a reportable offense on or after 1 January 1996.

Defendant is correct in that the record on appeal is devoid of defendant's release date for the June 1994 indecent liberties conviction. Defendant was sentenced to three years imprisonment for the offense, but the record contains only the date on which defendant first registered as a sex offender, which was 24 January 1999. However, the fact that the release date is not part of the record does not automatically warrant

the conclusion that defendant was not required to register when he was indicted in January 2013 for failing to change his address under N.C. Gen. Stat. § 14A-208.11.

Pursuant to the North Carolina Rules of Evidence, Rule 201, this Court elects to take judicial notice of defendant's release date for the indecent liberties conviction, which was 24 September 1995. We also take judicial notice of the fact that defendant was not actually released from incarceration on 24 September 1995. This date was merely defendant's "on paper" release date or "paper parole" date. Defendant remained incarcerated after being "released" from the indecent liberties conviction in order to serve a consecutive sentence resulting from a conviction for committing a crime against nature. Defendant was not physically released from prison and placed on parole until 24 January 1999. Again, the record shows that it was on this date that defendant first registered as a sex offender.

Upon review, this Court holds that it is defendant's actual release date of 24 January 1999 that controls the sentencing outcome of the instant case, not the "on paper" release date of 24 September 1995. In making such a determination, we look to N.C. Gen. Stat. § 15A-1354(b) (2013), which provides: "In determining the effect of consecutive sentences . . . the Division of Adult Correction of the Department of Public Safety must treat the defendant as though he has been committed for a single term[.]"; *see also Robbins v. Freeman*, 127 N.C. App. 162, 164-65, 487 S.E.2d 771, 773, *review allowed*, *writ allowed*, 347 N.C. 270, 493 S.E.2d 746 (1997) *and aff'd*, 347 N.C. 664, 496 S.E.2d 375 (1998) (concluding that under N.C. Gen. Stat. § 15A-1354, an inmate serving consecutive sentences shall have the date of his parole eligibility calculated as if the inmate were serving a single term). Accordingly, when a defendant is sentenced to consecutive prison terms, the sentences are to be calculated as a single term and the effective release date for purposes of parole eligibility and the like is the date on which a defendant is physically released from incarceration.

In this case, the Amy Jackson Law was applicable to defendant because it took effect in January 1996 and applied to offenders who were then serving time for a reportable sexual offense. Defendant remained incarcerated until January 1999. Importantly, defendant was required to register as a sex offender when the 2008 amendment was passed. Again, the 2008 amendment increased the registration period from ten to thirty years following the date of initial county registration, unless after ten years of registration, the offender successfully petitioned the court to shorten the registration period. Just as this Court held that the 2006 amendment

applied retroactively to those offenders who were required to register when the amendment took effect, this Court is of the opinion that the 2008 amendment likewise applies retroactively. *See Hamilton*, *supra*. Accordingly, defendant was required to maintain his registration for a period of thirty years from the date of his initial county registration in 1999.

We recognize that the 2008 amendment affords a sex offender the opportunity to petition the trial court to shorten his or her registration period after meeting the ten-year registration requirement. As such, defendant could have been granted an early release from the sex offender registry had he taken advantage of his right to petition for a lesser registration period. He elected not to do so. Further, this Court has recently held that when a person claims that he or she was never required to register in the first place, as defendant argues here, a declaratory judgment action is a more appropriate way of obtaining a ruling upon the registration requirement. *In re Bunch*, ___ N.C. App. ___, ___, 742 S.E.2d 596, 599, *review denied*, 747 S.E.2d 541 (2013). In lieu of bringing a declaratory judgment action, it is unlikely that an offender can successfully petition this Court to find that he or she was never required to register provided the State objects to such argument. *See id.* (cautioning those who "seek to terminate registration as a sex offender under N.C. Gen. Stat. § 14–208.12A, for any reason other than fulfillment of the ten years of registration and other requirements of N.C. Gen. Stat. § 14–208.12A in the future will probably not succeed if the State does raise any objection or argument in opposition to the request").

Given this, defendant should have considered filing a declaratory judgment action to raise the issue that is now before us on appeal. As it stands, we hold that the trial court did not err in denying defendant's motion to dismiss. Defendant was required to register a change in his address at the time he was indicted for the crime charged. We overrule defendant's argument.

B. Falsification of Information

[2] Defendant argues that the trial court erred by denying his motion to dismiss the charge of submitting information under false pretenses to the sex offender registry where there was no evidence presented by the State that he willfully gave an address he knew to be false when he registered his address in Catawba County. We agree.

Defendant was charged with submitting information under false pretenses in violation of N.C. Gen. Stat. § 14-208.11(a)(4), which is a

crime that is subject to the North Carolina's Sex Offender Registration Act. According to N.C. Gen. Stat. § 14-208.9A(a)(1), each year on the anniversary of the person's initial registration date, and again six months later, the Division of Criminal Information is required to send a nonforwardable verification form to the registrant at the last reported address to verify his or her address. N.C. Gen. Stat. § 14-208.9A(a)(1) (2013). The form must be signed and must indicate "[w]hether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address." N.C. Gen. Stat. § 14-208.9A. The statute defendant was charged with violating, N.C. Gen. Stat. § 14-208.11, also provides, in part, that:

> A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . .
>
> (4) Forges or submits under false pretenses the information or verification notices required under this Article.

N.C. Gen. Stat. § 14-208.11(a)(4) (2013).

The issue before this Court is whether defendant's oral verification to law enforcement that he continued to reside at his registered address warranted a charge of forging or falsifying information. On appeal, defendant admits that he told Lieutenant Baker in their February 2013 encounter at the Sheriff's Office that he continued to reside at 1470 14th Avenue Northeast. However, as defendant never executed a verification during the meeting or at any other time, he contends that it was error for the State to charge him with falsifying information under N.C. Gen. Stat. § 14-208.9A(a)(4). More specifically, defendant argues, "[t]he information [defendant] verbally provided to Lt. Baker was not required. It was not a verification form nor was it information for a verification form. Therefore it could not have qualified as a verification notice 'required' under Article 27A."

Alternatively, the State's position is that defendant is guilty of the charged crime because he willfully made a false statement to Lieutenant Baker at the Sheriff's Office in February 2013—stating that he continued to reside at 1470 14th Avenue Northeast. On appeal, the State argues:

> Defendant did not live at 1470 14th Avenue Northeast at the time that he verified his address to Lt. Baker. The false information he provided led Deputy Scarborough to attempt to contact Defendant at the address multiple

> times, eventually resulting in a verification form signed by Mr. Johnson saying that defendant did not live at that address. Therefore, . . . [d]efendant provided false information for a verification notice.

The evidence in the instant case shows that defendant met with Lieutenant Baker of the Catawba County Sheriff's Department in February 2013, several months after being charged with failing to register a change of address. According to Lieutenant Baker, defendant verbally informed Lieutenant Baker that defendant was living at the address he had registered in September 2012. However, defendant neither filled out an address verification form during the encounter nor did he otherwise indicate in writing that he continued to reside at his registered address.

On 15 March 2013, in an attempt to verify defendant's address, Deputy Scarborough went to the address in search of defendant. Mr. Johnson, defendant's father, was at the residence and informed Deputy Scarborough that defendant did not reside there. Mr. Johnson executed an address verification form indicating such. At no time during February or March 2013 did defendant himself execute the address verification form.

In *State v. Pressley*, this Court held that "[t]he only rational reading of N.C. Gen. Stat. § 14–208.11 is that it criminalizes the provision of false or misleading information on *forms* submitted pursuant to the Act—regardless of when these forms are submitted." ___ N.C. App. ___, ___, 762 S.E.2d 374, 377 (2014), *review denied*, ___ N.C. App. ___, ___, 763 S.E.2d 382 (2014) (emphasis added). In the instant case, the State was unable to present any evidence that defendant provided false or misleading information on a verification form. In fact, Lieutenant Baker admitted at trial that he never requested that defendant execute the verification form. Thus, there is no indication that defendant ever executed a verification form—and, more importantly, no evidence that defendant forged or submitted under false pretenses the verification notice required by N.C. Gen. Stat. § 14-208.9A.

Should we rule in favor of the State, this Court would be extending the scope of N.C. Gen. Stat. § 14-208.9A beyond its intended purpose such that a defendant could be charged with falsifying or forging information merely by telling a lie to an officer about his current address. Again, the intent of the statute is to insure that officers possess complete and accurate information as to the addresses of registered sex offenders. We cannot extend the purpose of the statute to punish offenders for untruths they may tell law enforcement. An executed verification form is required before one can be charged with falsifying or forging the document. Accordingly, we hold that the trial court erred in denying

defendant's motion to dismiss this charge based on the State's failure to prove that defendant submitted under false pretenses the verification notice required under Article 27A.

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

Judges GEER and DILLON concur.

JONATHAN WILNER, ET. AL., AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
CEDARS OF CHAPEL HILL, LLC, ET. AL., DEFENDANTS

No. COA14-380

Filed 2 June 2015

1. Contracts—condominium residents—continuing care retirement community—not unconscionable—no violation of prohibition against transfer fees—Marketable Title Act

The trial court erred by finding the membership fee and overhead payments in an agreement between condominium residents and a continuing care retirement community unenforceable. The provisions of the agreement were not unconscionable and did not violate the prohibition against transfer fees in Chapter 39A or the provisions of the Marketable Title Act, Chapter 47B of the North Carolina General Statutes.

2. Contracts—fees—covenants running with land—traditional contract law

Where plaintiffs agreed to the payment of fees in a contract, the trial court erred in holding them unenforceable pursuant to an analysis of covenants running with the land. Under traditional contract law, parties that agree to contracts are bound by them.

3. Injunctions—failure to describe particularity—acts being enjoined

The trial court erred in entering an injunction without describing with particularity the acts being enjoined. The order granting summary judgment and the injunction were remanded to the trial court for a trial by jury.

Appeal by defendants from order entered 10 January 2014 by Judge William R. Pittman in Orange County Superior Court. Heard in the Court of Appeals 20 November 2014.

Ragsdale Liggett PLLC, by Benjamin R. Kuhn, Amie C. Sivon, and R. Michael Pipkin, for plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James T. Williams, Jr., Jennifer K. Van Zant, and D.J. O'Brien III, for defendant-appellants.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, and Barringer & Sasser, LLP, by Brent D. Barringer and Robert H. Sasser, III, for amici curiae The Cypress of Charlotte and The Cypress of Raleigh.

STEELMAN, Judge.

Where the provisions of an agreement between condominium residents and a continuing care retirement community were not unconscionable, and did not violate the prohibition against transfer fees in Chapter 39A of the North Carolina General Statutes, or the provisions of the Marketable Title Act, Chapter 47B of the North Carolina General Statutes, the trial court erred in finding the agreements unenforceable. Where plaintiffs agreed to the payment of fees in a contract, the trial court erred in holding them unenforceable pursuant to an analysis of covenants running with the land. The trial court erred in entering an injunction without describing with particularity the acts being enjoined.

I. Factual and Procedural Background

The Cedars of Chapel Hill, LLC (the Cedars) is a continuing care retirement community (CCRC) located in Chapel Hill, North Carolina. Residents at the Cedars purchase individual condominium units within the community, and pay an additional membership fee. This fee is calculated as ten percent of the gross purchase price of a housing unit, and is paid at closing as part of the purchase price. If a resident inherits the unit or receives it as a gift, the resident pays the fee, calculated as ten percent of the unit's fair market value. If the unit is resold, the ten percent fee is deducted from the gross sales price and paid at closing. The payment of this fee is clearly set forth in the membership agreement. Membership entitles residents to access to the common property of the Cedars, including a clubhouse and health center. Residents who become

incapable of independent living may move into the health center, and remain eligible to use the facilities for the remainder of their lives.

In addition to the initial membership fee, members make monthly payments to the Cedars Club (the Club), which cover the cost of various amenities. These monthly payments include a payment to the Cedars for overhead expenses, which is described in the membership agreement, disclosure statements, declaration, and bylaws of the condominium association.

On 29 June 2011, Jonathan Wilner and Diane Wilner filed this lawsuit seeking: (1) a declaratory judgment that the covenants requiring membership and a membership fee, and requiring payment of an overhead fee, do not run with the land, and are therefore unenforceable; (2) a declaratory judgment that the preliminary membership fee is a "transfer fee" prohibited under N.C. Gen. Stat. § 39A-3; (3) a judgment that the preliminary membership fee violates the Marketable Title Act, N.C. Gen. Stat. § 47B; and (4) a temporary restraining order and preliminary injunction to prohibit the collection of the membership fee and overhead payment.[1] On 23 August 2011, the Wilners filed an amended complaint, joining as plaintiffs Edwin B. Hoel, Per Ole Hoel, and Linda Leekley (with Jonathan Wilner and Diane Wilner, plaintiffs). Plaintiffs' amended complaint included additional factual allegations, and an additional cause of action for breach of the declaration and bylaws of the condominium association. On 7 November 2011, plaintiffs filed a motion for class certification. On 24 August 2012, the trial court granted plaintiffs' motion to certify a class.[2]

The parties each filed motions for summary judgment. Plaintiffs' summary judgment motion also included new language not previously used in their complaint, alleging that the membership agreements were unconscionable, and seeking a permanent injunction.

On 10 January 2014, the trial court granted summary judgment in favor of plaintiffs as to plaintiffs' claims asserting that the covenants were unenforceable, that they violated Chapter 39A of the North Carolina General Statutes, and that they violated N.C. Gen. Stat. § 47B, the Real Property Marketable Title Act, and plaintiffs' request for a temporary restraining order and preliminary injunction. The trial court

1. Plaintiffs brought additional claims, but dismissed them two days before the hearing on their motion for class certification.

2. The class action is not the subject of this appeal.

denied defendants' motions for summary judgment. This order did not address the unconscionability language contained in plaintiffs' motion for summary judgment.

Defendants appeal. On 28 January 2014, the trial court granted defendants' motion to stay judgment pending appeal, and certified its order to this Court pursuant to Rules 54 and 62 of the North Carolina Rules of Civil Procedure.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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 re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Enforceability of Membership Agreement

[1] In their first argument, defendants contend that the trial court erred in ruling that the membership fee and overhead payments were unenforceable. We agree.

Because the order did not specify the basis by which the trial court held the fee and payments unenforceable, we examine in turn each of the various arguments made by plaintiffs at the summary judgment hearing before the trial court.

A. Unconscionability

Plaintiffs alleged in their motion for summary judgment that the contracts they signed were unconscionable. In order to establish unconscionability, plaintiffs had to show both procedural unconscionability and substantive unconscionability. *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 80, 721 S.E.2d 712, 717 (2012).

Procedural unconscionability involves "bargaining naughtiness in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Id.* at 81, 721 S.E.2d at 717 (quotations and citations omitted). Plaintiffs, raising this argument in their motion for summary judgment, contended that:

> [T]he bargaining power between the Plaintiffs and Defendants . . . was unquestionably unequal in that the Plaintiffs as a whole are relatively unsophisticated in terms of the complex real estate and financial machinations

> at play while contracting with the Defendants who engaged counsel experienced in complex real property transactions and condominium governance to draft the covenant clauses requiring payment of the Challenged Fees, along with the numerous other documents such as Condo Bylaws, Membership Agreements, Purchase and Sale Agreements, Resale Purchase and Sale Agreements, Guarantees, Indemnities, each of which include detailed provisions as to the payment and collection of the Challenged Fees.

We find that these contentions were insufficient to establish procedural unconscionability. The contracts at issue were signed at a real estate closing, meaning that plaintiffs had counsel present. The contracts had detailed, bolded notes in the margins, explaining what each contract provision entailed. Plaintiffs did not allege that they were rushed through the process, nor that they were tricked or deprived of opportunity to speak with counsel or consider their options; plaintiffs alleged only that defendants were more sophisticated and drafted the contracts to their own benefit. This alone does not rise to the level of procedural unconscionability. We held in *Westmoreland* that "bargaining inequality alone generally cannot establish procedural unconscionability. Otherwise, procedural unconscionability would exist in most contracts between corporations and consumers." *Id.*

Substantive unconscionability "refers to harsh, one-sided, and oppressive contract terms." *Id.* at 84, 721 S.E.2d at 719 (quotations and citations omitted). The terms must be "so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *Brenner v. Little Red Sch. House Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981). Plaintiffs, in raising this issue, contended that the fees in question were "exorbitantly high," that the documents at issue were "decidedly one-sided in favor of the Company," and that plaintiffs lacked "ability . . . to negotiate any of the terms of the covenants and conditions in question in this case." Plaintiffs further noted that the market for CCRCs in Chapel Hill is very small, leaving few alternatives.

Again, we find plaintiffs' arguments unavailing. We recently held that "the times in which consumer contracts were anything other than adhesive are long past." *Torrence v. Nationwide Budget Fin.*, ___ N.C. App. ___, ___, 753 S.E.2d 802, 812 (quoting *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, ___, 179 L.Ed.2d 742, 755 (2011)), *review denied*, *cert. denied*, ___ N.C. ___, 759 S.E.2d 88 (2014). The mere fact

that plaintiffs lacked the ability to negotiate contract terms does not create substantive unconscionability, nor does the fact that defendants were among the only providers of CCRC facilities. We hold that plaintiffs did not adequately demonstrate unconscionability as a matter of law, and that a genuine issue of material fact existed as to unconscionability, which precluded summary judgment.

B. Transfer Fees

Plaintiffs also alleged that the membership fee constituted an unlawful transfer fee. Chapter 39A of the North Carolina General Statutes provides that a transfer fee violates North Carolina's public policy in favor of the alienability of real property "by impairing the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation and transferability of property, regardless of the duration of the covenant or the amount of the transfer fee set forth in the covenant." N.C. Gen. Stat. § 39A-1(b) (2013). Chapter 39A defines a transfer fee as "a fee or charge payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer." N.C. Gen. Stat. § 39A-2(2).

However, there exists an exception to the provisions in Chapter 39A. Chapter 58, Article 64 of the North Carolina General Statutes deals with CCRCs. According to N.C. Gen. Stat. § 58-64-85:

> Facilities and providers licensed under this Article that also are subject to the provisions of the North Carolina Condominium Act under Chapter 47C of the General Statutes *shall not be subject to the provisions of Chapter 39A of the General Statutes*, provided that the facility's declaration of condominium does not require the payment of any fee or charge not otherwise provided for in a resident's contract for continuing care, or other separate contract for the provisions of membership or services.

N.C. Gen. Stat. § 58-64-85(b) (2013) (emphasis added). The specific provision of this statute overrules the general provision of Chapter 39A. Provided that the condominium declaration requires only fees outlined in other contracts signed by the resident, those fees are not barred by the provisions of Chapter 39A, even though they might otherwise be considered transfer fees.

In the instant case, all fees, including the membership fee, were described in detail in contracts and agreements signed by all residents of the Cedars. Because the declaration required only those fees which were provided for in contracts signed by the residents, they are exempt from the provisions of Chapter 39A prohibiting transfer fees.

C. Marketable Title Act

Plaintiffs also alleged that the agreements at issue violate the Marketable Title Act. Chapter 47B of the North Carolina General Statutes codifies North Carolina policy in favor of quieting title when a person can demonstrate 30 years of continuous ownership of real property. *See* N.C. Gen. Stat. § 47B-1 *et seq* (2013).

The Marketable Title Act deals with actions to quiet title. In the instant case, there is no issue as to who owns the various units and common elements of the Cedars CCRC; these issues of ownership are explicitly detailed in the ownership agreements signed by the parties. The Act does not authorize a cause of action where, as here, parties are under a contractual obligation to pay fees pursuant to contract.

IV. Enforceability of Covenants

[2] In their second argument, defendants contend that the trial court erred in finding the challenged covenants unenforceable. We agree.

All purchasers of property at the Cedars are required to sign a membership agreement, a separate document that is part of the purchase and sale agreement, at the time of closing. This agreement provides that all residents must be members, that membership is non-transferable, and that the membership fee is included in and deducted from the purchase price of a unit. Plaintiffs, in their initial complaint, which was incorporated by reference in their amended complaint, contend that they represent all persons who purchase, sell, or own a Unit at the Cedars, all who enter into a membership agreement with the Cedars, and all who are currently or may in the future enter into a membership agreement with the Cedars. We note that any such plaintiff, including the named plaintiffs in the instant case, would have in common the fact that either they or their buyers would have signed the membership agreement providing for the deduction of membership fees from the purchase price of a unit.

Plaintiffs contend that the covenants at issue do not run with the land, and are therefore unenforceable against subsequent purchasers. In *Runyon v. Paley*, the seminal case on covenants running with the land in North Carolina, our Supreme Court held that a party seeking to

enforce a covenant as one running with the land had to prove that the covenant in question "touches and concerns" the land, the existence of both horizontal and vertical privity of estate, and the intent of the original parties to create a covenant running with the land. 331 N.C. 293, 416 S.E.2d 177 (1992). Black's Law Dictionary defines a covenant running with the land as "[a] covenant ultimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely." Black's Law Dictionary 421 (9th ed. 2009). It further notes that "[t]he most important consequence of a covenant running with the land is that its burden or benefit will thereby be imposed or conferred upon a subsequent owner of the property who never actually agreed to it. Running covenants thereby achieve the transfer of duties and rights in a way not permitted by traditional contract law." *Id.* (quoting Roger Bernhardt, *Real Property in a Nutshell* 212 (3rd ed. 1993)). It is this feature, the fact that a covenant running with the land can bind subsequent owners who did not agree to it, that distinguishes this type of covenant from a traditional contract.

Despite plaintiffs' contentions, the issue in this case is not one of a covenant running with the land. In the instant case, any potential buyer is required to sign a contract obligating himself to the payment of membership fees. As a result, this matter falls within the realm of traditional contract law, not the law of covenants running with the land. Under traditional contract law, parties that agree to contracts are bound by them. Plaintiffs, or their buyers, would be obligated to pay the membership fees, not because of some covenant running with the land, but because they signed a document agreeing to pay the membership fees. Plaintiffs' contentions that the fees, once collected, need not be spent on improving or maintaining the physical facilities is irrelevant. Plaintiffs' contentions that these fees do not touch and concern the land, and that the fees are therefore an unenforceable covenant running with the land, are without merit.

V. Entry of Injunction

[3] In their third argument, defendants contend that the trial court's summary judgment order, which grants an injunction, violated Rule 65(d) of the North Carolina Rules of Civil Procedure. We agree.

Rule 65 of the North Carolina Rules of Civil Procedure provides, in relevant part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall

> be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

N.C. R. Civ. P. 65(d). This requirement is explicit and unambiguous; a trial court may not issue an injunction or restraining order without providing specific terms, "in reasonable detail, . . . the act or acts enjoined or restrained[.]" In the instant case, the trial court entered a summary judgment order, granting summary judgment on four of plaintiff's claims, including its motion for an injunction, with no further explanation given. Specifically, the trial court's order as to plaintiffs' claims stated:

> Plaintiffs' motion for partial summary judgment is, allowed as to Plaintiffs' First, Third, Eighth and Tenth Claims for Relief as set forth in paragraphs numbered one through five in Plaintiff's motion.

In their motion for summary judgment, plaintiffs alleged with respect to their tenth claim for relief:

> Plaintiffs' Tenth Claim for Relief for Permanent Injunction enjoining and stopping, forever, the Defendants' past, present, and future efforts to implement and enforce certain affirmative covenants in the Declaration of Condominium of The Cedars of Chapel Hill requiring that Plaintiffs pay Defendants certain Challenged Fees, including but not limited to a Transfer Fee (aka the "Membership Fee"), the Corporate Overhead Payment Fee, and the Litigation Fee, in order that this Court may prevent the irreparable harm that the Plaintiffs have suffered, are suffering, and will continue in the future to suffer if a Permanent Injunction is not entered stopping the Defendants from collecting and enforcing their claimed right to such fees[.]

Plaintiffs' motion for summary judgment sought an expansive injunction, and the trial court's cursory handling of that issue did not meet the standard of "reasonable detail" concerning "the act or acts enjoined or restrained[.]" We hold that the trial court erred in granting an injunction in such a cursory manner.

VI. Failure to Make Allegations Against Defendants

In their fourth argument, defendants contend that the trial court erred in entering its summary judgment order where plaintiffs had failed to make allegations against multiple defendants. Because we have held above that the trial court erred in entering summary judgment, we need not address this contention.

VII. Conclusion

We hold that the trial court erred in determining, as a matter of law, that the contracts at issue were unconscionable, and that they violated the provisions of Chapter 39A and the Marketable Title Act. We further hold that the trial court erred in finding the covenants unenforceable. The trial court also erred in entering its injunction in a cursory manner, in violation of Rule 65 of the North Carolina Rules of Civil Procedure. We vacate the order granting summary judgment and the injunction, and remand this matter to the trial court for a trial by jury.

VACATED AND REMANDED.

Judges GEER and STEPHENS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JUNE 2015)

DEP'T OF TRANSP. v. RIDDLE No. 14-980	Cumberland (12CVS3993) (12CVS4714)	Remanded
FRISCIA v. BANK OF AM., N.A. No. 14-1125	Mecklenburg (13CVS10670)	Affirmed
IN RE OSTEYEE-HOFFMAN No. 14-1287	Iredell (14SPC483)	Reversed
IN RE RIVERA No. 14-944	Mecklenburg (11SP8221)	Affirmed in Part, Reversed in Part and Remanded
LAWSON v. LAWSON No. 14-1224	Forsyth (12CVS8369)	AFFIRMED in part; VACATED AND REMANDED in part.
N.C. DEP'T. OF PUB. SAFETY v. TUCKER No. 14-1308	Beaufort (14CVS99)	Affirmed
POPE v. CITY OF ALBEMARLE No. 14-1140	Stanly (12CVS619)	Affirmed
ROSEBORO v. ROSEBORO No. 14-1084	Forsyth (12CVS7004)	Affirmed
SCHEERER v. FISHER No. 14-478	Haywood (08CVS11)	Reversed
STATE v. ANDREWS No. 14-1050	Edgecombe (12CRS50987)	No Error
STATE v. COLEMAN No. 14-1148	Alexander (13CRS243) (13CRS244)	Affirmed
STATE v. KING No. 14-923	Davidson (10CRS58426)	No Error
STATE v. LOWERY No. 14-1306	Gaston (13CRS62066)	Affirmed
STATE v. QUINONEZ No. 14-680	Mecklenburg (12CRS227341)	No Error

STATE v. ROBINSON No. 14-1311	Union (10CRS56379)	No Error
STATE v. SUTPHIN No. 15-106	Lincoln (12CRS51879-80)	NO ERROR; NO PREJUDICIAL ERROR

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