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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 9, 2017

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OF
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COURT OF APPEALS

CASES REPORTED

FILED 7 JULY 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2017:

January 9 and 23

February 6 and 20

March 6 and 20

April 3 and 17

May 1 and 15

June 5

July None

August 7 and 21

September 4 and 18

October 2, 16 and 30

November 13 and 27

December 11

Opinions will be filed on the first and third Tuesdays of each month.

BUILDERS MUTUAL INSURANCE COMPANY, PLAINTIFF
v.
DOUG BESAW ENTERPRISES, INC., DEFENDANT

No. COA14-1343

Filed 21 July 2015

1. Civil Procedure—service—alias and pluries summons—exercise of due diligence

In an action for breach of contract and unjust enrichment, the trial court did not err by denying defendant's motion to set aside the default judgment. Pursuant to Rule of Civil Procedure 4(e), after plaintiff's summons sent to defendant's registered office was returned undeliverable, plaintiff served an alias and pluries summons on the Secretary of State. The Court of Appeals disagreed with defendant's argument that plaintiff failed to exercise due diligence in violation of Rule 4.

2. Civil Procedure—service—alias and pluries summons—Secretary of State

In an action for breach of contract and unjust enrichment, the trial court did not err by denying defendant's motion to set aside the default judgment due to the Secretary of State mailing the alias and pluries summons to defendant's registered address rather than defendant's principal address. Service was effective when the alias and pluries summons was served on the Secretary of State.

3. Appeal and Error—argument without merit—conceded by appellant

Where defendant conceded that an argument brought forth on appeal was without merit, the Court of Appeals dismissed the argument.

Appeal by defendant from orders entered 8 July 2014 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 21 April 2015.

The Stuart Law Firm, PLLC, by Catherine R. Stuart and Theresa S. Dew, for plaintiff-appellee.

Law Offices of T. Greg Doucette PLLC, by T. Greg Doucette, for defendant-appellant.

BRYANT, Judge.

Where an alias and pluries summons was properly served upon the Secretary of State, service as to defendant was effective. Where defendant concedes that an argument brought forth on appeal is without merit, we dismiss that argument.

Defendant Doug Besaw Enterprises, Inc., is a residential electrical contractor who contracted with plaintiff Builders Mutual Insurance Company for worker's compensation insurance. After defendant failed to pay plaintiff for insurance premiums incurred, plaintiff filed suit against defendant on 16 September 2013 for breach of contract and unjust enrichment. Plaintiff sent a summons to defendant's registered office via certified mail, but the summons was returned as undeliverable.

On 17 January 2014, plaintiff sent an alias and pluries summons to the North Carolina Secretary of State. The Secretary of State's Office forwarded the summons to defendant's registered office, but the summons was again returned as undeliverable.

On 10 March 2014, plaintiff moved for and received an entry of default and default judgment against defendant. A writ of execution freezing the funds in defendant's bank accounts was issued and, shortly thereafter, plaintiff filed a motion to release defendant's bank account funds.

In June 2014, defendant filed a notice of appearance, followed by a motion to set aside the entry of default and default judgment. After a hearing, the trial court entered an order on 8 July denying defendant's motion to set aside the entry of default and default judgment. That same day, the trial court entered a second order granting plaintiff's motion to release defendant's bank account funds. Defendant appeals.

On appeal, defendant raises four issues as to whether the trial court erred in (I) denying defendant's motion to set aside the default judgment; (II) finding personal jurisdiction over defendant; (III) granting plaintiff's motion to release funds; and (IV) admitting evidence offered by plaintiff.

Motion to Set Aside the Default Judgment Based on Invalid Service

Defendant argues that the trial court erred in denying his motion to set aside the default judgment pursuant to Rule 60(b) of our North Carolina Rules of Civil Procedure and granting plaintiff's motion to release funds. We disagree.

"A default judgment may be set aside under Rule 60(b)[ ] only upon a showing that: (1) extraordinary circumstances were responsible for the failure to appear, and (2) justice demands that relief." *Advanced Wall Sys., Inc. v. Highlande Builders, LLC*, 167 N.C. App. 630, 634, 605 S.E.2d 728, 731 (2004) (citing *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987)). "The decision to grant this rule's exceptional relief is within the trial court's discretion." *Id.* "Because this [C]ourt cannot substitute what it consider[s] to be its own better judgment for a discretionary ruling of a trial court, we may not overturn the judge's ruling unless it was manifestly unsupported by reason." *Id.* (citations and quotations omitted).

[1] Defendant first contends the trial court erred in denying his motion to set aside the default judgment because plaintiff failed to exercise due diligence pursuant to Rule 4 in serving defendant with the summons. Specifically, defendant argues that because plaintiff's summons "lay dormant from 16 December 2013 until the alias and pluries summons was issued on 17 January 2014[,]" plaintiff had to re-serve the summons on defendant before serving it on the Secretary of State.

Pursuant to Rule 4 of our Rules of Civil Procedure,

> (d) When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension: . . .
>
> > (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.
>
> . . .
>
> (e) When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. *Thereafter, alias or pluries summons may issue . . . but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.*

N.C. Gen. Stat. § 1A-1, Rule 4(d)-(e) (2014) (emphasis added).

Here, plaintiff filed its complaint and summons against defendant on 16 September 2013. After the summons was returned to plaintiff as undeliverable, plaintiff waited until 17 January 2014 to serve an alias and pluries summons on the Secretary of State. As such, pursuant to Rule 4(e), the alias and pluries summons commenced a new action when it was issued on 17 January 2014. *See id.* § 1A-1, Rule 4(e) (where an alias and pluries summons is commenced after the conclusion of the 90 day period specified in Rule 4(d), "the action shall be deemed to have commenced on the date of such issuance or endorsement."). Defendant's contention that plaintiff's summons violated Rule 4 is, therefore, overruled.

[2] Defendant next argues that even if "Plaintiff had exercised due diligence prior to serving the Secretary of State, the Secretary of State's independent error in mailing the lawsuit documents to the wrong address invalidated the attempted service of process."

Pursuant to North Carolina General Statutes, section 55D-33,

> [w]hen an entity required to maintain a registered office and registered agent under G.S. 55D-30 fails to appoint or maintain a registered agent in this State, or when its registered agent cannot with due diligence be found at the registered office, . . . the Secretary of State becomes an agent of the entity upon whom any such process, notice or demand may be served. Service on the Secretary of State of any such process, notice or demand is made by delivering to and leaving with the Secretary of State . . . copies of the process, notice or demand and the applicable fee. In the event any such process, notice or demand is served on the Secretary of State in the manner provided by this subsection, the Secretary of State shall immediately mail one of the copies thereof, by registered or certified mail, return receipt requested, to the entity at its principal office or, if there is no mailing address for the principal office on file, to the entity at its registered office. Service on an entity under this subsection is effective for all purposes from and after the date of the service on the Secretary of State.

N.C. Gen. Stat. § 55D-33(b) (2014).

The evidence in the record shows that the Secretary of State immediately mailed the alias and pluries summons to defendant's registered address rather than defendant's principal address as set forth in N.C.G.S. § 55D-33(b). During the hearing, the trial court noted that "the Secretary of State didn't follow the right procedure and sent [the summons] to

the wrong address." However, the trial court also noted that defendant's registered address was not valid, and that defendant's failure to provide the Secretary of State with a valid registered address was not excusable neglect. In its order denying defendant's motion to set aside the default judgment the trial court made the following findings of fact:

> 1. At all times during this litigation, Defendant maintained a registered mailing address with the North Carolina Secretary of State at 416 Oak Grove Road, Flat Rock, NC 28731. That remained the registered address through the date of this hearing.
>
> 2. At all times during the litigation, the registered agent for Defendant was Doug Besaw.
>
> 3. Defendant's registered address was and is unable to receive mail, dating back at least prior to the initiation of this litigation.
>
> 4. Plaintiff attempted service on Defendant by mailing a copy of the complaint and summons by certified mail, return receipt requested, to Defendant's registered agent at the registered address. The envelope was returned to Plaintiff as undelivered.
>
> 5. After Plaintiff's attempted service at Defendant's registered address failed, Plaintiff mailed an alias and pluries summons and copy of the complaint to the Secretary of State.
>
> 6. The Secretary of State received the alias and pluries summons and complaint, and forwarded them to Defendant's registered address.
>
> 7. Defendant's affidavit indicates that Defendant did not receive a copy of the complaint sent via certified mail from Plaintiff, nor from the Secretary of State.
>
> 8. Defendant failed to pay due attention to the possibility that it could be involved in litigation and failed to take steps to ensure that it was notified of claims pending against it.
>
> 9. Defendant failed to properly monitor its corporate affairs.

The trial court then entered the following conclusions of law:

> 1. Plaintiff attempted service of process on Defendant at its registered mailing address by certified mail, return receipt requested in accordance with North Carolina Rules of Civil Procedure, Rule 4(j)(6). The summons and complaint were returned unserved.
>
> 2. Thereafter, and having exercised the due diligence required by statute, Plaintiff effected substitute service on Defendant via the North Carolina Secretary of State pursuant to N.C. Gen. Stat. § 55D-33.
>
> 3. As Plaintiff properly achieved service, the judgment against Defendant is not void pursuant to North Carolina Rule of Civil Procedure 60(b)(4).

Defendant cites *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 351 S.E.2d 779 (1987), in support of his contention that the Secretary of State's failure to mail plaintiff's summons to defendant's principal office, rather than defendant's registered office, resulted in improper service and, therefore, no jurisdiction was obtained by the trial court. However, in *Huggins*, this Court held that service over the defendant was not proper where the Secretary of State did not follow the statutory requirements of N.C. Gen. Stat. § 55-15 because it mailed the plaintiff's alias and pluries summons to an address *other than* the defendant's registered office. *Id.* at 20, 351 S.E.2d at 782 (citing N.C.G.S. § 55-15(b) ("Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.")).

Defendant challenges what he asserts is a broad reading of N.C.G.S. § 55D-33 by the trial court; however, the trial court's determination that

plaintiff had achieved proper substitute service by serving the Secretary of State's office is based on a common sense reading of the statute.[1] Indeed, N.C.G.S. § 55D-33 makes clear that service on a corporation is, for all intents and purposes, effective "from and after the date of the service on the Secretary of State." N.C.G.S. § 55D-33(b); *Advanced Wall Sys., Inc.*, 167 N.C. App. at 632-33, 605 S.E.2d at 730-31 (citation omitted) (holding that the language of N.C. Gen. Stat. § 57C-2-43(b) (2003) ("Service on [an entity] under this subsection shall be effective for all purposes from and after the date of the service on the Secretary of State.)" means that "[w]here the Secretary of State mailed the summons is immaterial because service was effective when Plaintiff served the Secretary of State."). Defendant's argument that the trial court erred in failing to grant defendant's motion to set aside the default judgment due to the Secretary of State mailing the alias and pluries summons to the "wrong" address is, accordingly, overruled.

Defendant raises the additional argument that "[t]he interests of justice demand the default judgment be set aside to avoid unjust enrichment of the Plaintiff." Defendant contends that because plaintiff calculated defendant's insurance premiums by estimating defendant's payroll numbers, plaintiff has been unjustly enriched. However, as defendant does not cite any relevant case law in support of his argument, we decline to address it further.

Defendant also argues that the trial court erred in granting plaintiff's motion to release funds because the judgment upon which plaintiff's writ of execution was based was "void due to defects in service." As it has already been determined that service upon the Secretary of State was sufficient for service of process, we need not address defendant's third issue on appeal. Accordingly, defendant's first and third arguments on appeal are overruled.

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1. The language of N.C.G.S. § 55D-33, which directs the Secretary of State's office to forward an alias and pluries summons "to the entity at its principal office or, if there is no mailing address for the principal office on file, to the entity at its registered office[,]" comes from the Business Corporation Act ("the Model Act"). The Model Act sought to resolve the "circularity problem" of having a summons repeatedly sent to an entity's registered address only to be returned as undeliverable by instead instructing the Secretary of State to send the summons to an entity's principal office first in the hope that service would be effectuated. *See* N.C.G.S. §§ 55D-32-33, Official Comments. Despite this language, N.C.G.S. § 55D-30 *et al.* makes clear that a corporation *must* maintain a registered office and agent in North Carolina, and that "[i]f service is not perfected on the corporation at its *registered* office," service may be accomplished through other means. *See id.* §§ 55D-30, 33, Official Comments (emphasis added).

Personal Jurisdiction

Defendant next argues that the trial court erred in finding personal jurisdiction over defendant. Specifically, defendant contends "[t]he trial court's flexible interpretation of N.C. Gen. Stat. § 55D-33 . . . violated [his] procedural due process rights." Defendant concedes that he did not raise a due process argument before the trial court, but argues that his due process argument should be reviewed on appeal because "there was no way for Defendant to preemptively address the trial court's interpretation of [the statute]." We disagree for, as already discussed, the trial court did not err in its interpretation of N.C.G.S. § 55D-33. Moreover, it is well-established by our Courts that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). Defendant's argument is, therefore, dismissed.

Admission of Evidence

[3] Finally, defendant argues that the trial court erred in admitting evidence offered by plaintiff. The evidence in question consisted of assertions in plaintiff's brief filed in opposition to defendant's motion to set aside the default judgment, and an oral statement by plaintiff's attorney. However, defendant concedes that the evidence of which he complains is not, "standing alone, . . . so substantial as to have altered the trial court's ruling had it been excluded." We agree, as there is nothing in the transcript of the hearing before the trial court to indicate that the trial court did in fact rely on this evidence in making its decision. Rather, after raising his objection to the trial court, defendant admitted that at least part of his objection was based on a "misunderstanding" of plaintiff's trial brief. Therefore, we decline to address defendant's argument.

Accordingly, the orders of the trial court are affirmed.

AFFIRMED.

Judges DAVIS and INMAN concur.

SARAH B. DAVIS, NORMAN GOODE, JR., GLORIA H. COLE, MATTIE MILLER, OSCAR BUCHANAN, AND BEVERLY BUCHANAN, PLAINTIFFS

v.

HENRY WILLIAMS, JR., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND NEW ZION BAPTIST CHURCH, DEFENDANTS

No. COA14-1143

Filed 21 July 2015

1. Appeal and Error—interlocutory orders and appeals—ecclesiastical matters immediately appealable

Where the trial court's denial of a Rule 12(b)(1) motion to dismiss could result in the trial court becoming entangled in ecclesiastical matters, such an interlocutory order is immediately appealable.

2. Churches and Religion—church management and use of funds—conversion—embezzlement—obtaining property by false pretenses

The trial court did not err by denying defendants' motion to dismiss plaintiffs' claim regarding defendants' violation of New Zion Baptist Church bylaws. However, the trial court erred by denying defendants' motion to dismiss plaintiffs' claims against the church pastor for conversion and embezzlement/obtaining property by false pretenses. Although our courts may use neutral principles of law to resolve disputes concerning whether a church followed its bylaws, the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds.

Appeal by defendants from order entered 24 June 2014 by Judge Nathaniel J. Poovey in Mecklenburg County District Court. Heard in the Court of Appeals 21 April 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, Edward T. Hinson, Jr., and J. Alexander Heroy, for plaintiff-appellees.

Jesse C. Jones, PLLC, by Jesse C. Jones, for defendant-appellants.

BRYANT, Judge.

Our Courts may use neutral principles of law to resolve disputes concerning whether a church followed its bylaws. Our Courts must

defer to the internal governing body of a church with regard to disputes over the use of church funds.

Plaintiffs Sarah B. Davis, Norman Goode, Jr., Gloria H. Cole, Mattie Miller, Oscar Buchanan, and Beverly Buchanan (hereafter "plaintiffs") are members of New Zion Baptist Church. Defendant Henry Williams, Jr., was elected pastor of New Zion Baptist Church in 2004.

On 20 December 2013, plaintiffs filed a verified complaint against Williams and New Zion Baptist Church (hereafter "defendants") alleging that Williams had violated the church's bylaws regarding voting, refused plaintiffs' requests to review church accounting records, wrongfully converted church funds for personal use, and embezzled from the church. Plaintiffs sought a declaratory judgment finding that defendants' voting process to amend New Zion Baptist Church's bylaws was improper. Plaintiffs also sought an accounting of church records and attorney's fees. Plaintiffs further brought claims against Williams for conversion and embezzlement/obtaining property by false pretenses.

Defendants filed a Rule 12(b)(1) motion to dismiss plaintiffs' complaint for lack of subject matter jurisdiction on 24 February 2014. A hearing on defendants' motion was held on 27 May 2014, the Honorable Nathaniel J. Poovey, Judge presiding. By order entered 24 June 2014, the trial court denied defendants' motion to dismiss. Defendants appeal.

In their sole issue on appeal, defendants contend the trial court erred in denying defendants' motion to dismiss. We disagree in part.

[1] We note at the outset that defendants' appeal is interlocutory in nature. *See In re Will of McFayden*, 179 N.C. App. 595, 599-600, 635 S.E.2d 65, 68 (2006) ("[T]he denial of a motion to dismiss pursuant to Rule 12(b)(1) is interlocutory[.]" (citations omitted)). "[A]ppellate review of an interlocutory order is permissible if . . . the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment." *John Doe 200 v. Diocese of Raleigh*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2015) (citing *Keesee v. Hamilton*, ___ N.C. App. ___, ___, 762 S.E.2d 246, 249 (2014)). Where, as here, the trial court's denial of a Rule 12(b)(1) motion to dismiss could result in the trial court becoming entangled in ecclesiastical matters, such an interlocutory order is immediately appealable. *See Harris v. Matthews*, 361 N.C. 265, 270-71, 643 S.E.2d 566, 569-70 (2007) (holding that where "a civil court action cannot proceed [against a church defendant] without impermissibly entangling the

court in ecclesiastical matters[,]" such entanglement makes the underlying interlocutory order immediately appealable because such entanglement would affect the church defendant's First Amendment rights, and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citations and quotation omitted)). Accordingly, we proceed to address the merits of defendants' appeal.

This Court reviews "Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Id.* at 271, 643 S.E.2d at 570 (citations omitted).

[2] Defendants argue that the trial court erred in denying their motion to dismiss. Specifically, defendants contend the trial court lacked jurisdiction to review New Zion Baptist Church's bylaws, management, or use of funds.

> The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters. However, not every dispute involving church property implicates ecclesiastical matters. Thus, while circumscribing a court's authority to resolve internal church disputes, the First Amendment does not provide religious organizations absolute immunity from civil liability.

Johnson v. Antioch United Holy Church, Inc., 214 N.C. App. 507, 510-11, 714 S.E.2d 806, 810 (2011) (citations and parentheticals omitted). As such, our Courts may resolve disputes through "neutral principles of law, developed for use in all property disputes." *Id.* at 511, 714 S.E.2d at 810; *see also Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 329, 605 S.E.2d 161, 164 (2004) (citation omitted) (holding that courts can adjudicate property disputes as well as exercise jurisdiction over the narrow issue of whether bylaws of a church were properly adopted). "The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998) (citation omitted).

Plaintiffs, in their complaint, allege that defendants violated New Zion Baptist Church bylaws in conducting a vote regarding proposed amendments to the bylaws. This Court has held that such an allegation may be resolved by our courts through neutral principles of law. *See Johnson*, 214 N.C. App. at 511, 714 S.E.2d at 810 ("Whether Defendants' actions were authorized by the bylaws of the church in no way implicates an impermissible analysis by the court based on religious doctrine

or practice."). Indeed, it is well-established that "[w]hen a party brings a proper complaint, [w]here civil, contract[,] or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Harris*, 361 N.C. at 274-75, 643 S.E.2d at 572 (citations and quotation omitted). As plaintiffs' complaint challenges whether defendants "acted within the scope of [their] authority and observed [New Zion Baptist Church's] own organic forms and rules[,]" defendants' motion to dismiss as to plaintiffs' claim regarding defendants' violation of New Zion Baptist Church bylaws was properly denied. *Id.*

Plaintiffs also brought claims against Williams for conversion and embezzlement/obtaining property by false pretenses. In their complaint, plaintiffs alleged that "Pastor Williams wrongfully and impermissibly converted to his own use, enjoyment and control substantial funds belonging to Plaintiffs and New Zion [Baptist Church]." Plaintiffs contend that as a result of Williams' acts of conversion and embezzlement, plaintiffs are entitled to actual, consequential, and punitive damages, as well as attorneys' fees. However, our Supreme Court has held in *Harris* that such claims are not reviewable under neutral principles of law:

> Plaintiffs do not ask the court to determine who constitutes the governing body of Saint Luke or whom that body has authorized to expend church resources. Rather, plaintiffs argue Saint Luke is entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church's pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church's religious doctrine and practice affect its understanding of each of these concepts, seeking a court's review of the matters presented here is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs. None of these issues can be addressed using neutral principles of law.
>
> Here, for example, in order to address plaintiffs' claims, the trial court would be required to interpose its

> judgment as to both the proper role of these church officials and whether each expenditure was proper in light of Saint Luke's religious doctrine and practice, to the exclusion of the judgment of the church's duly constituted leadership. This is precisely the type of ecclesiastical inquiry courts are forbidden to make.

See id. at 273, 643 S.E.2d at 571 (citations omitted). Although plaintiffs' allegations in the instant case that Williams has wrongfully converted and embezzled funds from New Zion Baptist Church are indeed troubling, in light of *Harris*, such claims are not properly reviewable before our Courts; rather, "the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds." *Id.* at 274, 643 S.E.2d at 572. We, therefore, reverse and remand the order of the trial court for entry of dismissal as to plaintiffs' claims against Williams for conversion and embezzlement/obtaining property by false pretenses.

Accordingly, we affirm the ruling of the trial court as to the denial of defendants' motion to dismiss plaintiffs' claim regarding defendants' violation of New Zion Baptist Church bylaws. We reverse and remand the ruling of the trial court as to the denial of defendants' motion to dismiss plaintiffs' claims against Williams for conversion and embezzlement/obtaining property by false pretenses.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges INMAN and DAVIS concur.

FAUCETTE v. 6303 CARMEL RD., LLC

[242 N.C. App. 267 (2015)]

CHRISTOPHER A. FAUCETTE, APRIL FAUCETTE, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MINORS CHRISTOPHER LUKE FAUCETTE AND SARAH EDEN FAUCETTE, AND CHRISTOPHER ASHLEY FAUCETTE, D.D.S., P.A., PLAINTIFFS
v.
6303 CARMEL ROAD, LLC, AND BRADLEY WINER, DEFENDANTS

No. COA14-1248

Filed 21 July 2015

1. Judges—one judge ruling after another—partial summary judgment—interpretation

A trial court judge had jurisdiction to enter final judgment against defendant LLC despite an earlier partial summary judgment by another judge as to all plaintiffs except two individuals. Considering the pleadings, issue, facts, and circumstances, the order was ambiguous and properly subject to interpretation by another superior court judge. In light of this ambiguity and the potential injustice of finding meritorious claims inexplicably dismissed before trial, and with deference to the trial court's interpretation of its own orders, the conclusion that the summary judgment order did not dismiss the claims against the LLC was affirmed.

2. Settlement and Compromise—settlement letter

Any error in the exclusion of a settlement letter in a conversion action was harmless in a bench trial where the trial court was aware that defendants made numerous conditional offers to settle but did not make those offers until the litigation had continued for years. The trial court's actual finding was that defendants did not unconditionally offer to pay the disputed amount, and the letter did not refute that finding.

3. Unfair Trade Practices—conversion of money—sufficient for claim

The trial court did not abuse its discretion in a conversion action by concluding that defendants had committed an unfair or deceptive trade practice where the findings were supported by defendants' failure to unconditionally return the money. The mere act of tortious conversion can satisfy the elements of a Chapter 75 claim. Here, defendants abused their positions of power to withhold payment of the money plaintiff was owed, solely to pressure to plaintiff to resolve unrelated disputes, and their actions were in or effecting commerce.

4. Pleadings—motion to amend—denied

The trial court did not abuse its discretion by denying defendants' motion to amend their pleading to conform to the evidence by adding counterclaims. Defendants did not seek to add the claims earlier in the proceedings, and plaintiff did not expressly or impliedly consent to try these claims as part of the case.

5. Unfair Trade Practices—attorney fees awarded—no abuse of discretion

The trial court did not abuse its discretion in an unfair trade practices claim arising from a conversion where the trial court awarded attorney fees to plaintiff's counsel. The trial court did not err by concluding that defendants' conduct was willful or in the amount of fees awarded.

6. Attorneys—fees—unfair and deceptive trade practices

Plaintiffs who were entitled to attorney fees for the hours expended at the trial level in an unfair and deceptive trade practices claim were entitled to attorney fees on appeal.

Appeal by Defendants from final judgment entered 9 May 2014 by Judge Eric Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 April 2015.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for Plaintiff-Appellee.

McNair Law Firm, P.A., by Samuel I. Moss and Jeremy A. Stephenson, for Defendants-Appellants.

DIETZ, Judge.

This appeal is the culmination of a long-running dispute over $5,000. Plaintiff Christopher A. Faucette is a dentist who owns a commercial condominium. Defendant 6303 Carmel Road, LLC owns several adjacent condominium units. Defendant Bradley Winer is the member-manager of the Defendant LLC and also the president of the 6303 Carmel Road Condominium Association.

In December of 2010, a pipe burst above one of Defendants' units that shares a common interior wall with Faucette's unit. The resulting flood caused extensive damage to both units. Faucette recovered from his own insurance policy, but had to pay a $5,000 deductible. Defendants

made a claim on the condominium association's insurance policy and received a large settlement that included $5,000 to reimburse Faucette for his deductible.

Instead of releasing those funds to Faucette, Defendants kept the money for leverage in an ongoing dispute with Faucette over payment of condominium association dues. What followed was a series of demand letters, threats of lawsuits, and ultimately a bench trial for conversion and unfair and deceptive trade practices. The trial court entered judgment in favor of Faucette for $5,000, trebled the award to $15,000, and awarded $27,000 in attorneys' fees.

On appeal, Defendants argue that one superior court judge improperly overruled another in the interpretation of a summary judgment order, that the trial court improperly excluded evidence at the bench trial, and that Faucette failed to prove his unfair and deceptive trade practices claim or show his entitlement to attorneys' fees.

For the reasons discussed below, we reject Defendants' arguments. The trial court's interpretation of the summary judgment order was permissible, any error in the exclusion of the challenged evidence was harmless, and the trial court's findings and conclusions on the Chapter 75 claim and corresponding attorneys' fees award are supported by competent evidence. Accordingly, we affirm the judgment of the trial court.

Facts and Procedural Background

Plaintiff Christopher A. Faucette owns Unit 102 in a commercial condominium building located at 6303 Carmel Road in Charlotte, North Carolina, where he has operated a dental practice for nearly twenty years. Defendant 6303 Carmel Road, LLC, owns four condominium units in the same building, including Unit 103, which is adjacent to and shares an interior wall with Faucette's unit. Defendant Bradley Winer is a member-manager of Defendant LLC.

Defendant Winer is also the president of 6303 Carmel Road Condominium Association, Inc., the entity that manages the condominium complex. The North Carolina Secretary of State administratively dissolved the condominium association on 30 October 2006 for failure to pay taxes, and it remained dissolved at the time of trial. Defendant Winer is the sole signatory on the condominium association's bank account, and the statements for that account are mailed to Winer's personal residence. The condominium association was never a party to this litigation.

On 15 December 2010, a pipe burst above Defendants' Unit 103, causing a flood that damaged both Unit 103 and Faucette's Unit 102. Faucette

maintains an insurance policy on his unit through State Farm, and he submitted a claim on this policy for extensive damage resulting from the flood. State Farm reimbursed Faucette for the cost of repairs, issuing a check for the amount owed reduced by Faucette's $5,000 deductible.

After the flood, Defendants similarly submitted a claim to the condominium association's insurance company, which issued a $21,000 settlement check to Defendants in late January 2011. The check included $5,000 to reimburse Faucette for his deductible. Defendants refused to turn this money over to Faucette, however, despite Faucette's written demand that Defendants do so. Instead, citing an ongoing dispute with Faucette over payment of condominium association dues, Defendants held the funds, placed them in the condominium association's bank account, and later gave them to Defendants' attorney to deposit in the law firm's trust account.

On 31 January 2011, Faucette, through counsel, wrote Defendant Winer a letter demanding payment of $10,626. State Farm also sent Winer a letter notifying Defendants of its subrogation rights and demanding payment of the $5,000 owed to its insured. Defendant Winer issued a written response to these letters, through his attorney, on 15 March 2011, offering to settle the dispute. In the settlement offer, Winer proposed to direct the condominium association to pay Faucette $5,165 in exchange for a release of all potential claims against Defendant Winer and the condominium association. Faucette did not accept the terms of this offer.

Defendant Winer testified at deposition that Defendants refused to return Faucette's $5,000 deductible in part because of an ongoing disagreement with Faucette over unpaid condominium association dues. Defendant Winter testified that he understood the money belonged to Faucette but refused to return it:

> Q. All right. And you did that intentionally because you were basically pissed off at Dr. Faucette?
>
> A. Yes.
>
> Q. But you understand that's his money?
>
> A. Uh-huh. Yes.
>
> Q. And he has asked for it back?
>
> A. Yes.
>
> Q. And you haven't given it to him?
>
> A. No. That means no. Sorry.

Faucette and his wife filed a complaint against Defendants on 16 December 2011, and the parties attended a mediated settlement conference as required by court order. Mediation failed, and Plaintiffs later voluntarily dismissed the action, without prejudice, on 25 September 2012. Faucette, his wife, their minor children, and Faucette's dental practice subsequently commenced this lawsuit against Defendants on 7 December 2012, asserting claims for negligence, trespass, conversion, unfair and deceptive trade practices, piercing the corporate veil/alter ego, and punitive damages. All of the claims stemmed from the flood and Defendants' refusal to pay the $5,000 for Faucette's deductible.

In response to the September 2012 lawsuit, Defendants immediately contacted Faucette's attorney regarding a possible settlement, but no negotiations followed. On 15 January 2013, Defendants moved to dismiss the negligence and trespass claims asserted by all of the plaintiffs other than Faucette. Defendants also moved to dismiss the unfair and deceptive trade practices claim in its entirety. The trial court decided Defendants' motion by order entered 3 March 2013, accepting a stipulation that only Faucette and the dental practice were asserting the trespass claim and denying the remainder of Defendants' motion.

Defendants moved for partial summary judgment on 12 March 2013. The summary judgment motion asserted that Defendants were entitled to judgment on Plaintiffs' claims for unfair and deceptive trade practices, mold-related bodily injury, negligence, trespass, and punitive damages. The motion did not challenge, or even mention, Faucette's conversion claim.

Before the trial court ruled on Defendants' summary judgment motion, the parties again attempted mediation on 28 June 2013 but were unsuccessful. However, on 19 August 2013, Defendants directed their attorney to disburse $5,000 from the law firm's client trust account made payable to Faucette.

On 18 September 2013, Judge Richard Boner entered an order on Defendants' motion for partial summary judgment, stating in relevant part:

> Defendants' Motion for Summary Judgment is GRANTED in its entirety as to all of Plaintiffs' Claims, which claims are hereby dismissed with prejudice, EXCEPT for the claims of Christopher A. Faucette against Bradley Winer for "conversion" and "unfair and deceptive trade practices" and any damages therefrom, which are not dismissed and as to such claims the Motion is DENIED.

The case came on for a bench trial before Judge Eric Levinson on 27 September 2013. At the trial, Defendants offered into evidence the settlement letter, dated 15 March 2011, to challenge Faucette's assertion that Defendants unreasonably refused to fully resolve the matter. Faucette's counsel objected to admission of the settlement letter into evidence, and Judge Levinson sustained the objection under Rule 408 of the North Carolina Rules of Evidence.

The trial resumed for a second day on 18 October 2013. Defendants moved the court for leave to amend their answer to add counterclaims for unjust enrichment and violation of Chapter 75 based on Faucette's admissions at trial that he had refused to pay condominium association dues. The court orally denied this motion.

At the urging of the trial court, Defendants again attempted to settle the matter with Faucette on 20 October 2013. No negotiations followed, however, and the trial court concluded that Defendants had illegally converted Faucette's $5,000. The court further determined that Faucette's conversion claim fell within Chapter 75 and thus trebled Faucette's damages of $5,000 to $15,000, reduced by the $5,000 already paid by Defendants.

On 7 November 2013, at the invitation of the trial court, Faucette filed a motion for attorneys' fees, requesting $49,538.16. Counsel for Defendants filed an affidavit in opposition to this motion, arguing that Defendants had made several "good faith efforts" to resolve the claims over the course of the litigation. Faucette did not dispute the parties' history of settlement discussions, offers, demands, or mediations. Nevertheless, on 9 May 2014, the trial court entered a final judgment concluding that Defendants converted Faucette's funds, the conversion violated Chapter 75's prohibition against unfair and deceptive trade practices, and Defendants unwarrantedly refused to fully resolve the matters raised in the lawsuit. In light of these conclusions, the court awarded $27,000 in attorneys' fees to Faucette's counsel pursuant to N.C. Gen. Stat. § 75-16.1 (2013).

Defendants timely appealed.

Analysis

I. Jurisdiction to Enter Final Judgment Against Defendant LLC

[1] Defendants first argue that the trial court lacked jurisdiction to enter final judgment against Defendant LLC because, at summary judgment, the court granted partial summary judgment as to "all of Plaintiffs' claims . . . EXCEPT for the claims of Christopher A. Faucette

against Bradley Winer for 'conversion' and 'unfair and deceptive trade practices.' " Defendants contend that, by the plain terms of the summary judgment order, all claims against Defendant LLC were dismissed. For the reasons set forth below, we disagree.

"Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole. The interpreting court must take into account the pleadings, issues, the facts of the case, and other relevant circumstances." *Reavis v. Reavis*, 82 N.C. App. 77, 80, 345 S.E.2d 460, 462 (1986) (citations omitted). If a judgment is susceptive to multiple interpretations when considered in light of all relevant circumstances, the court should adopt the interpretation that is in line with the law applicable to the case. *See*, *e.g.*, *Blevins v. Welch*, 137 N.C. App. 98, 102, 527 S.E.2d 667, 670 (2000). "Generally, the interpretation of judgments presents a question of law that is fully reviewable on appeal." *Id.* at 101, 527 S.E.2d at 670. However, this Court will afford some degree of deference to the trial court's interpretation of an ambiguous judgment. *See id.* at 102, 527 S.E.2d at 671.

We hold that in entering final judgment against Defendants, the trial court properly interpreted the order as denying summary judgment on the conversion and Chapter 75 claims against *both* Defendant Winer and Defendant LLC. First, Defendant Winer and Defendant LLC presented the *identical* argument in support of summary judgment on the Chapter 75 claim—maintaining that their conduct did not affect commerce and was neither unfair nor deceptive. Defendants did not assert that there were grounds for dismissing the claim against the LLC but not against Winer, and no party discussed that possibility at the hearing. Thus, there was no basis for the trial court to dismiss the Chapter 75 claim against one but not both Defendants.

More importantly, Defendants did not even request summary judgment on Faucette's conversion claim. But the summary judgment order, as written, purports to dismiss that claim with respect to Defendant LLC. That the order appears to dismiss a claim that Defendants did not even ask to be dismissed is strong evidence that the order is ambiguous.

In sum, upon reviewing "the pleadings, issues, the facts of the case, and other relevant circumstances" surrounding the order, we conclude that the order is ambiguous and thus properly subject to interpretation by another superior court judge later in the proceeding. In light of this ambiguity and the potential injustice of finding meritorious claims inexplicably dismissed before trial, and according due deference to the trial court in the interpretation of its own orders, we affirm the trial

court's conclusion that its summary judgment order did not dismiss the conversion and Chapter 75 claims against Defendant LLC.[1]

II. Exclusion of Settlement Letter

[2] Defendants next argue that the trial court erred in sustaining Faucette's objection to admission of the March 2011 settlement letter into evidence. At the bench trial, Defendants sought to introduce the letter (which their counsel sent to Faucette's counsel) offering to pay $5,165 in exchange for Faucette signing a settlement agreement releasing Defendants from any future claims. Defendants argued at trial that the settlement letter was admissible under Rule 408 because Faucette claimed Defendants unreasonably refused to pay him the $5,000 from the condominium association's insurance, and "this document squarely shows that as of March, 2011 we're not refusing to make a payment."

We need not determine whether the trial court correctly applied Rule 408 because any error in the admission of this settlement letter was harmless as a matter of law.

"Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right." *Walker v. Walker*, 201 N.C. 183, 184, 159 S.E. 363, 364 (1931). The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different. *Medford v. Davis*, 62 N.C. App. 308, 311, 302 S.E.2d 838, 840 (1983); *see also Burgess v. C.G. Tate Const. Co.*, 264 N.C. 82, 83, 140 S.E.2d 766, 767 (1965) ("The burden is on appellant to show not only that there was error in the trial but also that there is a reasonable probability that 'the result was materially affected thereby to his hurt.' ").

Defendants maintain that the trial court's exclusion of the settlement letter was not harmless because "the letter completely contradicted Faucette's contentions that [Defendants] failed to offer to return the funds and that there were unwarranted refusals by [Defendants] to fully resolve the matter." But this ignores the trial court's actual finding—that Defendants did not *unconditionally* offer to pay the disputed $5,000. The settlement letter, which offered to return the $5,000 only if Faucette

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1. Faucette has filed a motion with this Court seeking leave to request the trial court correct the order pursuant to N.C. Gen. Stat. §1A-1, Rule 60(a) (2013). In light of our holding, we deny this motion as moot.

agreed to certain things in return, does not refute the trial court's findings that Defendants refused to unconditionally return the money until years after this dispute began.

Moreover, "[e]rror in the exclusion of evidence is harmless when other evidence of the same import is admitted." *Medford*, 62 N.C. App. at 311, 302 S.E.2d at 840. Here, Defendants submitted—and the trial court considered—numerous examples of Defendants' offers to settle. Faucette did not dispute the facts regarding the parties' history of settlement discussions, offers, demands, or mediations. Defendants even admit in their brief to this Court that "[e]ven assuming, *arguendo*, the [settlement] letter was properly excluded, the record is full of undisputed evidence of ongoing efforts of Winer to fully resolve Faucette's conversion claim."

Simply put, the trial court was aware that Defendants made numerous offers to settle in which they conditioned payment of the $5,000 on concessions, releases, or other commitments from Faucette. But there was no evidence that Defendants made an *unconditional* offer to return the $5,000 until this costly litigation had gone on for years. It was this failure to promptly offer the unconditional return of the money that supported the trial court's findings. Accordingly, any error in excluding the settlement letter was harmless. *See Shepard v. Drucker & Falk*, 63 N.C. App. 667, 672, 306 S.E.2d 199, 203 (1983).

III. Unfair and Deceptive Trade Practices

[3] Defendants next argue that the trial court erred by concluding that Defendants committed unfair or deceptive trade practices in violation of Chapter 75 of our General Statutes. We review the trial court's findings of fact for competent evidence and the court's conclusions of law *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

"To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991); *see also* N.C. Gen. Stat. § 75-1.1 (2013). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); *see also D.G. II, LLC v. Nix*, 213 N.C. App. 220, 230, 713 S.E.2d 140, 148 (2011) ("[A]n act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." (internal

quotation marks omitted)). The statute does not apply to every transaction that might be viewed as unfair or deceptive, but applies only if the alleged violator is engaged in "commerce." *See* N.C. Gen. Stat. § 75-1.1. Our legislature has defined "commerce" very broadly, however, to include "all business activities, however denominated," with the exception of "professional services rendered by a member of a learned profession." *Id.* § 75-1.1(b); *see also Prince v. Wright*, 141 N.C. App. 262, 268, 541 S.E.2d 191, 197 (2000) ("Commerce in its broadest sense comprehends intercourse for the purpose of trade in any form.").

Defendants argue that their improper conversion of the $5,000 was not "unfair and deceptive" and not "in or affecting commerce" within the meaning of the statute because it was simply a "private and personal dispute between Faucette and Winer, or intra-corporate dispute among and between members of the Condominium Association."

This Court previously has held that a defendant's mere act of tortious conversion can satisfy the elements of a Chapter 75 claim. *See*, *e.g.*, *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 83, 665 S.E.2d 478, 487 (2008); *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 374-75, 614 S.E.2d 555, 560-61 (2005); *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 533-34, 551 S.E.2d 546, 552-53 (2001). Here, Defendants converted funds belonging to Faucette by refusing to turn over the $5,000 that Defendants owed Faucette from the insurance settlement. Defendants obtained those funds because of Defendant Winer's position as acting president and sole custodian of the condominium association's finances and Defendant LLC's ownership of the adjacent units damaged by the burst pipe. Defendants abused their positions of power to withhold payment of the money Faucette legally was owed, solely to pressure Faucette to resolve several unrelated disputes between the parties, including an ongoing dispute involving payment of condominium association dues. This wrongful conduct is unfair or deceptive within the meaning of the statute. *See Lake Mary Ltd.*, 145 N.C. App. at 533-34, 551 S.E.2d at 552-53 (concluding that defendant's conversion constituted an unfair or deceptive act or practice when it was accomplished through "an inequitable assertion of [defendant's] power and position"); *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2002) (noting that "where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice").

Defendants' acts also were in or affecting commerce. Defendant Winer testified that he knew that $5,000 from the condominium association's insurance settlement belonged to Faucette and that

Faucette had demanded return of the money. Faucette's insurer also notified Defendants of its subrogation rights, demanding that Defendants release the funds belonging to Faucette. Defendants nevertheless refused to surrender these funds unless Faucette agreed to certain conditions unrelated to that insurance payment, including the payment of outstanding condominium association dues. Withholding money owed from an insurance carrier's settlement payment in order to force the rightful recipient of those funds to resolve other, unrelated business disputes is conduct "in or affecting commerce" under Chapter 75. *See Adams v. Jones*, 114 N.C. App. 256, 259, 441 S.E.2d 699, 700 (1994). Accordingly, we affirm the trial court's final judgment holding Defendants liable for unfair and deceptive trade practices.

IV. Motion for Leave to Amend

[4] In the middle of trial, Defendants filed a motion to amend their responsive pleading to "conform to the evidence" by adding counterclaims for unjust enrichment, violation of Chapter 75, and punitive damages arising out of Faucette's refusal to pay dues to the condominium association. The trial court orally denied this motion. We hold that the trial court's denial was well within its sound discretion.

Rule 15(b) of the North Carolina Rules of Civil Procedure states that "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. R. Civ. P. 15(b) (2013). We review the denial of a Rule 15(b) motion for abuse of discretion. *Marina Food Assocs., Inc. v Marina Restaurant, Inc.*, 100 N.C. App. 82, 89, 394 S.E.2d 824, 828 (1990).

In denying Defendants' motion, the trial court noted that Defendants sought to add "fairly substantial claims: Unjust enrichment, Chapter 75, et cetera" for the first time in the middle of trial. The court also stated that any evidence relating to those claims was not "tried by the express or implied agreement of the parties. In fact, there's been vociferous . . . there's been, you know, strong argument against" admission of that evidence. Finally, the court stated that "I don't agree that it advances the interest of justice to [grant leave to amend]."

Given Defendants' failure to seek leave to add these claims earlier in the proceedings, and the trial court's finding—a correct one, in our review of the record—that Faucette did not expressly or impliedly consent to try these claims as part of the case, we hold that the trial court's denial of leave to amend was within its sound discretion to manage the course of the trial proceedings.

V. Award of Attorneys' Fees

a. Trial Court's Award

[5] Defendants next argue that the trial court abused its discretion in awarding attorneys' fees to Faucette's counsel. Defendants claim that the trial court's findings of fact and supporting record evidence do not support the court's conclusions of law that Defendants refused to fully resolve the dispute, that Defendants acted willfully, or that Faucette met his burden to recover attorneys' fees under N.C. Gen. Stat. § 75-16.1 (2013). We disagree.

A trial court may award reasonable attorneys' fees to a prevailing party under Chapter 75 upon finding, in relevant part, that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." *Id.* § 75-16.1(1). "The decision whether or not to award attorney fees under section 75-16.1 rests within the sole discretion of the trial judge. And if fees are awarded, the amount also rests within the discretion of the trial court." *Printing Servs. of Greensboro, Inc. v. Am. Capital Grp., Inc.*, 180 N.C. App. 70, 81, 637 S.E.2d 230, 236 (2006), *aff'd*, 361 N.C. 347, 643 S.E.2d 586 (2007) (internal quotation marks omitted).

This Court employs a two-pronged standard of review in considering a trial court's award of fees pursuant to N.C. Gen. Stat. § 75-16.1(1). *See, e.g., Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 150 N.C. App. 231, 248-49, 563 S.E.2d 269, 280-81 (2002). First, we determine whether any competent evidence supports the trial court's findings of fact and whether these findings support the court's conclusions of law. *See id.* Second, we review the trial court's fee award for abuse of discretion. *See id.* at 249, 563 S.E.2d at 281. A trial court abuses its discretion only when its award of fees is "manifestly unsupported by reason or wholly arbitrary." *Id.*

We hold that the trial court did not err in concluding that Defendants' refusal to return the $5,000 was unwarranted. Defendants again attempt to focus this Court's attention on the March 2011 settlement letter and other settlement negotiations, arguing that "the record is full of undisputed evidence of ongoing efforts of Winer to fully resolve Faucette's conversion claim." But as the trial court properly found, all of those purported efforts to resolve the claim imposed conditions—that is, they demanded that Faucette also make some concessions or agree to release or waive potential liability. The record discloses no effort by Defendants to *unconditionally* pay the $5,000 until years after this

litigation began. Thus, the trial court's findings support its conclusion that Defendants' refusal to resolve this dispute was unwarranted.

The trial court likewise did not err in concluding that Defendants' conduct was willful. An act is "willful" within the meaning of N.C. Gen. Stat. § 75-16.1(1) if it is "done voluntarily and intentionally with the view to doing injury to another." *Standing v. Midgett*, 850 F. Supp. 396, 404 (E.D.N.C. 1993). Here, the trial court made numerous unchallenged findings regarding Defendants' willful conduct, and Defendant Winer admitted in his sworn deposition testimony that he intentionally withheld the $5,000 despite knowing that these funds belonged to Faucette. Accordingly, the trial court's conclusion of willfulness is supported by its findings.

Finally, we hold that the trial court did not abuse its discretion in selecting the amount of attorneys' fees to award Faucette's counsel. The trial court made detailed findings regarding "the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney." *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 626, 664 S.E.2d 388, 396 (2008). Accordingly, we affirm the trial court's award of attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1(1).

b. Fees on Appeal

[6] Faucette also requests an award of attorneys' fees incurred during this appeal. In previous Chapter 75 cases, we have held that "[u]pon a finding that [appellees] were entitled to attorney's fees in obtaining their judgment [under N.C. Gen. Stat. § 75-16.1], any effort by [appellees] to protect that judgment should likewise entitle them to attorney's fees." *Willen v. Hewson*, 174 N.C. App. 714, 722, 622 S.E.2d 187, 193 (2005) (internal quotation marks omitted). "[B]ecause plaintiffs were entitled to attorneys' fees for hours expended at the trial level, plaintiffs are entitled to attorneys' fees on appeal." *Id.* at 723, 622 S.E.2d at 193. Accordingly, we remand to the trial court for a determination of the hours spent on appeal and a reasonable hourly rate, and for the entry of an appropriate attorneys' fee award.

Conclusion

We affirm the trial court's judgment.

AFFIRMED AND REMANDED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

GOOD NEIGHBORS OF OR. HILL PROTECTING PROP. RIGHTS v. CNTY. OF ROCKINGHAM

[242 N.C. App. 280 (2015)]

GOOD NEIGHBORS OF OREGON HILL PROTECTING PROPERTY RIGHTS AND ASHLEY M. WYATT, PLAINTIFFS
v.
COUNTY OF ROCKINGHAM, DEFENDANT

No. COA15-121

Filed 21 July 2015

1. Zoning—spot zoning—"single person" ownership requirement

On appeal from the denial of Rockingham County's summary judgment motion in an action concerning a rezoning ordinance, the Court of Appeals held that the rezoning was not spot zoning because the tract of land in question was owned by a father and son rather than a "single person." The Court of Appeals further concluded that the trial court improperly weighed the evidence and substituted its judgment for that of the Board of Commissioners. The case was reversed and remanded for a new summary judgment hearing.

2. Zoning—notice to abutting property owners—certification—conclusive in absence of fraud

On a summary judgment motion in an action concerning a rezoning ordinance, the trial court erred by concluding there was no genuine issue of material fact that certain abutting property owners did not receive notice of the Board of Commissioner's hearing as required by statute. Pursuant to the statute, the certification that notices were sent is deemed conclusive in the absence of fraud.

3. Zoning—summary judgment motion—improper weighing of evidence

On a summary judgment motion in an action concerning a rezoning ordinance, the trial court erred by concluding that there was no genuine issue of material fact that the rezoning applicant had violated the zoning ordinance by pouring a concrete pad on the tract of land before submitting his rezoning application. The trial court improperly weighed the evidence to reach this conclusion.

Appeal by defendant from order entered 14 November 2014 by Judge Patrice A. Hinnant in Rockingham County Superior Court. Heard in the Court of Appeals 3 June 2015.

Wayne E. Crumwell for plaintiffs.

G. Nicholas Herman and Robert V. Shaver, Jr. for defendant.

ELMORE, Judge.

The County of Rockingham (defendant) appeals the denial of its summary judgment motion and the entry of summary judgment in favor of Good Neighbors of Oregon Hill Protecting Property Rights and Ashley M. Wyatt (plaintiffs). After careful consideration, we reverse and remand for further proceedings.

I. Background

The facts relevant to this appeal are as follows: On 10 August 2012, Philip M. Behe (aka "Matt Behe") and his father, Philip L. Behe[1], purchased through North Carolina Special Warranty Deed the property located at 403 Live Oak Road in Reidsville. The property consisted of a 101.76 acre tract, and Matt Behe wished to subdivide approximately two acres out of the parent tract for a kennel to be used as a bird-dog training facility. Matt Behe owns Rocky River Gun Dogs, LLC, which has trained world and national championship bird dogs. On 5 September 2012, Matt Behe and his wife, Megan Behe, filed an application with Rockingham County to rezone the two-acre tract from Residential Agricultural to Highway Commercial – Conditional District.

The Rockingham County Planning Staff issued a report, Case #2012-016, recommending a request for rezoning from Residential Agricultural to Highway Commercial – Conditional District, with the following nine conditions:

> 1. All development shall proceed in accordance with the site plan, including applicant submitted materials, and any changes may require a Site Plan Amendment.
>
> 2. The applicant is responsible for obtaining and complying with all required permits and approvals.
>
> 3. The Applicant shall use Best Management Practices for any additional grading and erosion control as shown in either the (*USDA-Natural Resources Conservation Service Field Office Technical Guide*) or the (*NC Erosion and Sediment Control Planning and Design Manual*).
>
> 4. A Type I landscape buffer, either planted or existing, must be maintained in a healthy manner along all property

1. In the record, Philip is interchangeably spelled both Philip and Phillip, including in the deed to the property at issue. We spell it "Philip" in this opinion.

lines adjoining residentially zoned properties. A chain link fence with slats providing 90% coverage is acceptable as a type I visual buffer. The landscaping or buffer must be installed within one year of the date of the Certificate of Occupancy for the building.

5. Lighting fixtures shall be full cut-off or shoebox type fixtures and shall be aimed and shielded in a manner that would not direct illumination on adjacent properties.

6. The required Parking shall be calculated at one (1) space per 400 sq. ft. of gross floor area.

7. Prior to operation of the business, the applicant shall contact the North Carolina Department of Transportation to determine if a commercial driveway permit is needed. The applicant shall provide the Planning Department with a copy of the commercial driveway permit or a letter from the North Carolina Department of Transportation stating a permit is not needed.

8. Applicant must dispose of all wastes in accordance with the applicable federal, state, and local regulations.

9. Within 60 days of approval of the rezoning request, a minimum 30,000 square feet lot shall be subdivided from the parent tracts according to the site plan provided by the applicant.

On 8 July 2013, the Rockingham County Planning Board (Planning Board) voted 6-4 in favor to rezone approximately 1.9 acres of the 101.76 tract from Residential Agricultural to Highway Commercial – Conditional District for a kennel dog training facility. On 5 August 2013, the Rockingham County Board of Commissioners (BOC) approved the zoning amendment, with a 4-1 vote. In the BOC's rezoning order, it included the nine conditions listed above that were recommended by the Planning Staff.

On 24 October 2013, plaintiffs sought a preliminary injunction and a declaratory judgment in superior court that the rezoning ordinance adopted by the BOC was void and of no legal effect. Plaintiffs alleged four claims: (1) the rezoning constituted illegal spot zoning; (2) defendant failed to comply with statutory requirements; (3) defendant failed to comply with requirements of the zoning ordinance; and (4) defendant's decision to rezone the property was arbitrary and capricious and is therefore void and of no effect.

On 26 November 2013, defendant denied each allegation outlined in plaintiffs' four claims. The parties filed cross-motions for summary judgment. While the case was pending, Matt Behe, Megan Behe, Philip L. Behe, and his wife, Cheryl Behe, transferred ownership of the 403 Live Oak Road property to Rocky River Gun Dogs, LLC through a North Carolina General Warranty Deed in April 2014.

On 14 November 2014, the trial court granted plaintiffs' motion for summary judgment. In its order, the trial court listed thirteen points to justify its holding, none of which were identified as findings of fact or conclusions of law. The final point in the order stated:

> 13. The re-zoning decision was not shown to be in compliance with the local zoning ordinance and the state enabling statutes in the following respects:
>
> a) Among the Commercial Rezoning Site Plan Requirements is III, which requires the Applicant to make a good faith effort to meet with the owners of neighboring properties to discuss the application by requiring him to arrange a date for the meeting and mailing written notice to all properties within 250 feet of the property proposed to be rezoned. The record does not reveal where the Applicant complied with this requirement.
>
> b) The Report, pages 8 and 9, summarizes the testimony of several so described owners of parcels of land abutting that parcel of land for which re-zoning was being sought did not receive notification as provided by Chapter 153A-343.
>
> c) The record reveals that the Applicant began excavation and installation of the structure intended for use under the rezoning before securing the zoning permit from the defendant as specifically prohibited under the Zoning Ordinance at Section 15-2 (a).

Defendant timely appealed to this Court on 25 November 2014.

II. Analysis

a.) Illegal Spot Zoning

[1] We must determine whether the trial court erred in granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment. As a threshold matter, defendant argues

for the first time on appeal that, as a matter of law, the rezoning of the two-acre tract does not involve spot zoning. We agree.

"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, 523-24, 649 S.E.2d 382, 385 (2007)). This is a proper case for summary judgment as "there is no substantial controversy as to the facts disclosed by the evidence. The controversy is as to the legal significance of those facts." *Blades v. City of Raleigh*, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972).

Our Supreme Court has defined spot zoning as:

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract *owned by a single person* and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected[.]

Id. at 549, 187 S.E.2d at 45 (emphasis added). In North Carolina, " 'spot zoning' is a descriptive term merely, rather than a legal term of art, and [ ] spot zoning practices may be valid or invalid depending upon the facts of the specific case." *Chrismon v. Guilford Cnty.*, 322 N.C. 611, 626, 370 S.E.2d 579, 588 (1988). As such, "the practice is not invalid per se but, rather, [ ] it is beyond the authority of the municipality or county and therefore void *only* in the absence of a clear showing of a reasonable basis therefor." *Id.* at 627, 370 S.E.2d at 589 (internal quotation and citation omitted) (emphasis in original).

In every alleged spot zoning case, our courts apply a two-part test in order to determine if the spot zoning is lawful. Specifically, the trial court must consider "(1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning." *Id.* In analyzing the second prong of the test, a number of factors are considered, including:

> [T]he size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property,

> his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Id. at 628, 370 S.E.2d at 589.

This Court has previously stated: "An essential element of spot zoning is a small tract of land owned by a single person and surrounded by a much larger area uniformly zoned." *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 895 (2009). When applying the above test in a spot zoning case, the burden is on the zoning authority to show that the spot zoning is lawful, *see Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589, whereas in an ordinary zoning case, "[t]he burden is on the complaining party to show [the zoning change] to be invalid" and "[a] duly adopted zoning ordinance is presumed to be valid." *Graham v. City of Raleig*h, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981). Accordingly, the question of whether a zoning change constitutes spot zoning is relevant because the burden of proof shifts depending on the determination.

In the parties' cross-motions for summary judgment, each party stipulated that this was a spot zoning case. The trial court found: "The parties spoke without objection as to whether the zoning was spot zoning." However, defendant now argues that the rezoning of the two-acre tract does not involve spot zoning because the parcel was owned by Matt and Philip Behe, as father and son, when the application for the rezoning was filed. Defendant's argument has merit.

In *Musi*, the plaintiffs tried to bring a spot zoning claim to challenge the rezoning of 15 separate parcels owned by six different owners from the same extended family despite the "common owner" requirement for spot zoning. *Musi*, 200 N.C. App. 379, 383, 684 S.E.2d at 895. The plaintiffs cited three cases in support of their proposition, none of which this Court found to be persuasive. "Two of these, *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885 (1988); and *Lathan v. Bd. of Commissioners*, 47 N.C. App. 357, 267 S.E.2d 30 (1980), involved the rezoning of property with a common owner, and thus shed no light on this issue." *Id.* at 383, 684 S.E.2d at 895.

Specifically, *Alderman* involved a parcel owned by a husband and wife, which this Court concluded met the common owner requirement for spot zoning. *Alderman*, 89 N.C. App. at 617, 366 S.E.2d at 889-90. The second case, *Lathan*, concerned a parcel owned by the "Keith Nesbitt family," which this Court impliedly determined, without discussion,

also met the common owner requirement for spot zoning. *Lanthan*, 47 N.C. App. at 357, 267 S.E.2d at 30. The third case, *Budd v. Davie Cnty.*, involved the rezoning of a tract of land owned by a mother and a strip of land running from the tract owned by her son. *Budd*, 116 N.C. App. 168, 170, 447 S.E.2d 449, 450-51 (1994). Despite the fact that the tract of land and the strip of land were separately owned by a mother and her son, the *Budd* Court held that the rezoning met the common owner requirement for spot zoning. *Id.* at 174, 447 S.E.2d at 452. Accordingly, the plaintiffs in *Musi* argued that *Budd* was analogous to their case and was controlling.

However, the *Musi* Court was not persuaded, and it declined to extend *Budd* to permit a spot zoning claim, reasoning:

> Firstly, *Budd's* holding is internally inconsistent. After quoting the same definition of spot zoning given [in *Blades*, 280 N.C. at 549, 187 S.E.2d at 45], and even noting that an "essential element of spot zoning is a small tract of land owned by a single person", the Court then holds that the rezoning in question, involving property with two different owners, was spot zoning.

Musi, 200 N.C. App. at 383, 684 S.E.2d at 895-96. Additionally, the *Musi* Court noted that in *Good Neighbors of South Davidson v. Town of Denton*, 355 N.C. 254, 259, 559 S.E.2d 768, 772 (2002), a Supreme Court of North Carolina case decided after *Budd*, our Supreme Court reiterated the requirement that spot zoning must involve a parcel with one owner. *Musi*, 200 N.C. App. at 383, 684 S.E.2d at 896. Therefore, "[t]o the extent that *Good Neighbors* conflicts with *Budd*, we are bound to follow *Good Neighbors*." *Id.* Accordingly, the *Musi* Court upheld the trial court's grant of summary judgment in favor of the defendant on the basis that the plaintiffs failed to satisfy the "single ownership" requirement for spot zoning.

Recently, in *Wally v. City of Kannapolis*, the plaintiffs, while admitting that the rezoned property was owned by two entities, nevertheless argued that the rezoning of the subject parcels was spot zoning. *Wally*, No. 13-1425, 2014 WL 7472941, at *2-3, (N.C. Ct. App. Dec. 31, 2014). The plaintiffs challenged the *Musi* holding as being "too vague to be practically applied, [ ] inconsistent with the purpose of the spot zoning doctrine, and produc[ing] inequitable and absurd results[.]" *Id.* at *3. This Court responded that "those arguments must be presented to the Supreme Court." *Id.* "Just as *Musi* was bound to follow *Good Neighbors*, we are bound to follow *Musi*." *Id.*

In the case before us, the trial court stated:

> In the matter *sub judice*, there is only one particular property owner, Applicant Matt Behe, who is receiving the special benefit of being allowed to narrowly carve out a small portion of the acreage owned by him, namely 2 out of 100 acres, in order to construct and operate a kennel/dog training facility.

The trial court appears to have determined that because Matt Behe is the sole owner receiving a special benefit, this is a spot zoning case. However, the definition of spot zoning requires a single owner of property, not a single person benefitting from the rezoning. Regardless, the tract of land in question was not owned by a single person when the application for rezoning was filed and when the BOC made its determination, rather it was jointly owned by Philip Behe and Matt Behe. Accordingly, as we too are bound to follow *Musi* and *Good Neighbors*, we hold that the rezoning did not constitute spot zoning as our courts have defined it.

The record shows that the BOC rezoned the two-acre tract from Residential Agricultural to Highway Commercial—Conditional District specifically to allow a kennel/dog training facility to operate as a permitted use on the land. This rezoning is classified as conditional use zoning. *Chrismon*, 322 N.C. at 618, 370 S.E.2d at 583 (citation omitted). " 'In order to be legal and proper, conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.' " *Covington v. Town of Apex*, 108 N.C. App. 231, 235, 423 S.E.2d 537, 539 (1992) (quoting *Chrismon*, 322 N.C. at 622, 370 S.E.2d at 586). Again, the burden would be on the complaining party to show the zoning change to be invalid.

In their motion for summary judgment, plaintiffs argued that the rezoning was, among other things, unlawful, invalid, and void in that it was arbitrary and capricious, vague, and discriminatory. As such, the trial court was charged with reviewing the whole record to discern whether the BOC's determination was supported by evidence showing a reasonable basis for the zoning change.

In reviewing the whole record, the trial court "is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993) (citations omitted). "It is not the function of the reviewing court, in such

a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board." *Application of Campsites Unlimited, Inc.*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975); *see Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 353, 578 S.E.2d 688, 691 (2003). Notably, "[t]he trial court, when sitting as an appellate court, to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (holding "[w]hen the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test"). The trial court examines the whole record to determine whether the Board's decision is supported by competent, material, and substantial evidence. *Id.* at 14, 565 S.E.2d at 17. In doing so, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency." *Cumulus Broadcasting., LLC v. Hoke Cnty. Bd. of Comm'rs*, 180 N.C. App. 424, 426, 638 S.E.2d 12, 15 (2006) (citation and quotation omitted). Questions of law are reviewable *de novo*. *Id.*

Further, it is inappropriate for the trial court's order to contain detailed findings of fact and conclusions of law in a case decided upon a summary judgment motion. *War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 551-52, 694 S.E.2d 497, 500 (2010); *see* N.C. Gen. Stat. § 1A–1, Rule 56 (2013). "The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is not appropriate when granting a motion for summary judgment" because "the basis of the judgment is 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.* (quotation and citation omitted). "By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings." *Id.* at 552, 694 S.E.2d at 500. It is only appropriate for the trial court to recite those "uncontested facts" that form the basis of its decision. *Id.* "[A]ny findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts." *Id.*

Although not specifically designated as findings of fact, it is clear that the thirteen numbered paragraphs in the trial court's order operate as such (#13 also operates as a conclusion of law). However, the order lacks any statement that findings were of "uncontested facts." This is likely because at least two of the trial court's findings were clearly

not restatements of uncontested facts, but were statements weighing the evidence.

In its order, the trial court found:

> 11. There is a strong potential for noxious odors fouling the air, as well as sanitation issues; noise; increased traffic; the loss of the use and enjoyment of their property; the loss of property values; and, interference with their health, safety and general welfare. Some of these issues were not even addressed by the County or by the Applicant, e.g., the noise and health hazards associated with discharge of weapons involved in dog training activities, and the use of and disposal of birds involved in dog training activities.
>
> 12. The property was rezoned without any consideration of: (a) the impact upon the health, safety, and welfare on surrounding property owners of utilizing live birds in the training of the bird dogs; (b) the impact upon the health, safety, and welfare on surrounding property owners of utilizing and discharging firearms in the training of the bird dogs, including, the environmental impact of lead residue; (c) whether the use being contemplated by the Applicant for re-zoning was actually similar to the permitted use of a kennel, given the use as described was much different than the generally accepted definition of a kennel, being simply a location where dogs are housed on a temporary basis (the Court, noting that such a finding that the intended use was not sufficiently similar to any permitted use to treat it like the permitted use, would have required a determination that such use was prohibited, pursuant Section 8-4 of the Rockingham County Zoning Ordinance, [ ] (d) the need for protection to adjoining property; (e) the effects of the kennel/dog training use on property values; (f) general health, safety and general welfare and (g) benefits to the neighbors and the surrounding community.

In making these findings, the trial court has substituted its own judgment for that of the BOC. This is quite evident in finding 11, where the trial court states: "Some of these issues were not even addressed by the County[.]" The trial court's sole charge was to review the BOC's decision to see if it was supported by the evidence—it was not to weigh the evidence presented by one party (but not addressed by the other party) and then make a finding that there is "a strong potential" for certain

negative outcomes if the zoning change is upheld. Further, several of the statements contained in finding 12 are unsupported by the record evidence. For example, there is evidence that the BOC considered the effect of the zoning change on surrounding property values by hearing evidence pertaining to environmental concerns—including lead—and noise concerns from gunfire and barking. It was blatantly incorrect for the trial court to assert that the property was rezoned "without any consideration of the above factors."

In its summary judgment order, the trial court did not set forth its standard of review; it weighed the evidence; and it substituted its judgment for that of the BOC (and this is not a spot zoning case). As such, we believe the trial court lacked a fundamental understanding of the nature of a summary judgment proceeding, and we are confident that the summary judgment order should not be upheld. However, we do not have sufficient evidence before us to determine if summary judgment should have been granted in defendant's favor. There is no transcript of the summary judgment proceeding in the record, and, thus, we have only an invalid summary judgment order before us for our review. We must reverse the trial court's order and remand for a new summary judgment hearing.

b.) Lack of Proper Notice of Public Hearing on the Rezoning Amendment

[2] Defendant argues that the trial court erred in concluding that there was no genuine issue of material fact that certain abutting property owners did not receive notice of the BOC's hearing as required by statute. We agree. Because this issue is likely arise on remand, we believe judicial economy is best served by addressing it on appeal.

Plaintiffs alleged in their complaint that defendant failed to notify all of the abutting landowners of the public hearing and failed to certify to the BOC that notice had been mailed to property owners in violation of N.C. Gen. Stat. § 160A-384(a).

We first note that N.C. Gen. Stat. § 160A-384(a) is applicable only in hearings placed before a city council, which is not what we have before us. N.C. Gen. Stat. § 153A-343 (2013) is the statute that outlines the notice requirement for hearings before the BOC. N.C. Gen. Stat. § 153A-343 requires the person or persons who mailed the notice of public hearing to all eligible property owners to certify to the BOC that the notifications were sent. N.C. Gen. Stat. § 153A-343(a). It further states that "such certificate shall be deemed conclusive in the absence of fraud." *Id.*

Here, Stacy Tolbert, Secretary to the Rockingham County Planning Board, certified to the BOC that she sent a Notice of Public Hearing on 28 June 2013 to thirty-three residences, including Ashley Wyatt's (Wyatt) and Keith Neal's (Neal), who both contend that they did not receive proper notice. The certification stated: "The following parties and abutting property owners to the application for Rezoning Case #2012-016 were forwarded legal notice by first class mail on June 28, 2013." Plaintiffs have not alleged any fraud in the mailing of the notices on the part of the County. In the absence of fraud, Ms. Tolbert's certification is deemed conclusive that defendant complied with the notice requirements. *See Rakestraw v. Town of Knightdale*, 188 N.C. App. 129, 135, 654 S.E.2d 825, 829 (2008). Accordingly, the trial court erred in concluding that there was no genuine issue of material fact that defendant failed to comply with the statutory notice requirement. The opposite is true—the record shows that notice was served to all proper parties in a timely fashion and properly certified to the BOC. Further, we note that Wyatt and Neal attended both the planning board meeting and the hearing before the BOC despite their claims.

c.) Section 15-2 of the Zoning Ordinance

[3] Defendant argues that the trial court erred in concluding that there was no genuine issue of material fact that Matt Behe violated Section 15-2 (a) of the Zoning Ordinance by pouring a concrete pad on the two-acre tract for use by his personal dogs prior to submitting his rezoning application. We agree.

We note that plaintiffs' complaint fails to allege a violation of Section 15-2(a) of the Zoning Ordinance in their motion for declaratory judgment. Nonetheless, the trial court has included Matt Behe's purported violation of this section as part of its basis for the summary judgment award in favor of plaintiffs. The trial court's order provides: "The record reveals that the Applicant began excavation and installation of the structure intended for use under the rezoning before securing the zoning permit from the defendant as specifically prohibited under the Zoning Ordinance at Section 15-2 (a)."

Section 15-2 (a) of the Zoning Ordinance provides, in pertinent part, that "[b]efore commencing the construction . . . of any . . . structure, . . . a zoning permit for the same shall be secured from the Zoning Administrator." At the Planning Board hearing, Matt Behe stated that he had previously poured a concrete pad on the two-acre tract for use by his personal dogs. He recognized that if the rezoning were granted, the reconstruction of the pad as the foundation for the dog-training building

would require a permit. There is no evidence that Matt Behe, as applicant, failed to obtain or comply with all required permits and approvals. It appears, once again, that the trial court weighed the evidence instead of simply reviewing the whole record before it.

III. Conclusion

In sum, we decline to rule on whether the trial court erred in granting summary judgment in favor of plaintiff because the trial court's order and the record before us is insufficient to allow us to make that determination. Instead, we reverse the trial court's order and remand for a new summary judgment hearing. At the subsequent hearing, the trial court is to review the whole record to discern whether the BOC's zoning decision was reasonable and supported by the record. Because this case does not involve spot zoning, the burden is on plaintiff to show that the zoning change was invalid.

REVERSED AND REMANDED.

Judge CALABRIA concurs.

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

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

The majority concludes that the action taken by the County in rezoning the two-acre tract of land owned by Phillip and Matt Behe (the "Property") did not constitute spot zoning. The majority further concludes that the record is insufficient to allow this Court to determine whether summary judgment was appropriate for either party. Accordingly, the majority orders that the trial court's order granting summary judgment be reversed and that the matter be remanded for a new hearing, with the burden on the plaintiffs to show that the rezoning of the Property was invalid.

I believe that the County's action *did* constitute spot zoning, and, therefore, the burden is *not* on the plaintiffs to show that the rezoning was invalid, but rather the burden was on the County to make a "clear showing that there was a reasonable basis for its decision" to rezone the Property. *Good Neighbors v. Town of Denton*, 355 N.C. 254, 259, 559 S.E.2d 768, 772 (2002). However, I further believe that the County met its burden, and, therefore, my vote is to reverse the order of the trial

court granting summary judgment and remand with instructions to enter summary judgment for the County.

The majority holds that we are compelled by our Supreme Court's decision in *Good Neighbors*, *supra*, and our Court's decision in *Musi v. Town of Shallotte*, 200 N.C. App. 379, 684 S.E.2d 892 (2009) to conclude that the County's action did not amount to spot zoning because the Property is owned by two individuals (a father and son) rather than by "a single person." I disagree.

I recognize that our Supreme Court has used the phrase a single "tract owned *by a single person*" as part of a definition of spot zoning, *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1975), a phrase which has been repeated in subsequent cases, *see Chrismon v. Guilford County*, 322 N.C. 611, 627, 370 S.E.2d 579, 588 (1988); *Musi*, 200 N.C. App. at 382-83, 684 S.E.2d at 895, and, therefore, I understand how the majority reached its conclusion in the present case. I do not believe, however, that the Supreme Court intended by the use of this phrase to fashion a definitive rule whereby the question of whether the rezoning of a single tract of land constitutes "spot zoning" turns on whether that tract is owned by a single person rather than by two people. Such a rule would allow a landowner to avoid the spot zoning analysis simply by conveying a partial interest in his land to a "straw" entity. Rather, by its use of the phrase "by a single person" in certain opinions, I believe the Supreme Court was merely describing *an example* of spot zoning, as was the case in *Chrismon*. Indeed, in both *Good Neighbors* and *Blades*, the tract involved was *not* owned by a "single person" but rather by a corporation, made up of multiple individuals[1]. *See Good Neighbors*, *supra*; *Blades*, *supra*.

I note that the Supreme Court has never expressly held – in *Good Neighbors* or otherwise – that a rezoning of a single tract did not constitute spot zoning simply because the tract was owned by multiple individuals. Rather, the Supreme Court recently avoided reaching this question. *Wally v. City of Kannapolis*, 365 N.C. 449, 722 S.E.2d 481 (2012). Further, the

1. By way of example, if the City of Raleigh granted my request to rezone my single-family residential lot to commercial, it makes no sense that the rezoning of my lot would not be subject to the spot zoning analysis by a reviewing court simply because I happen to own my house with my wife. Alternatively, however, if the City granted the rezoning request of my unmarried neighbor, the City's decision *would be* subject to the spot zoning analysis. Of course, under the majority's analysis, my neighbor could avoid the spot zoning analysis by setting up a "straw" entity and conveying a small interest in his house to that entity before making his rezoning request.

Musi decision from our Court is clearly distinguishable from the present case in that *Musi* involved the rezoning of *fifteen* separate tracts of land which were not all owned by the same group of individuals. 200 N.C. App. at 383, 684 S.E.2d at 895.

Notwithstanding that I conclude that the rezoning in the present case does constitute spot zoning, I also conclude that the spot zoning was legal. *Chrismon*, 322 N.C. at 627-28, 370 S.E.2d at 588-89 (stating that not all spot zoning is illegal). That is, I believe that the County met its burden of clearly showing a reasonable basis for its decision by demonstrating that the rezoning was compatible with the existing zoning, that the benefits outweighed any detriments for the neighbors and the community, and that the new zoning was consistent with the County's long range plans.

On the other issues raised in this appeal, I agree with the majority that there is no issue of fact that all proper parties *did* receive adequate notice of the proceeding and that Matt Behe did not violate any zoning ordinance when he poured a concrete pad on the Property.

Accordingly, my vote is to reverse and remand with instructions to enter summary judgment in favor of the County.

HOUSE OF RAEFORD FARMS, INC., PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT

No. COA15-47

Filed 21 July 2015

1. Environmental Law—burden of proof—discharge of material—bound by prior decisions

The trial court did not err by placing the burden of proof on petitioner House of Raeford to prove it did not discharge material into Cabin Branch Creek, rather than requiring the North Carolina Department of Environment and Natural Resources to prove the allegations. A panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.

2. Penalties, Fines, and Forfeitures—civil penalty—dumping waste material-remand for eight statutory factors

Although petitioner farm contended that it did not violate the provisions of N.C.G.S. § 143-215.1(a)(6) by dumping waste material into Cabin Branch Creek, and upholding the assessment of a civil penalty, this issue was remanded to the superior court with instructions to remand to the finder of fact, to make specific findings with regard to the eight statutory factors set forth in N.C.G.S. § 143B-282.1(b) and to formulate the amount of any civil penalty to be imposed.

3. Penalties, Fines, and Forfeitures—civil penalty—fined twice for same violation

The superior court did not err by determining that petitioner House of Raeford was fined "twice for the same violation," under N.C.G.S. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c), and assessing only one civil penalty. The superior court properly reviewed and ruled the Environmental Management Commission Final Decision and assessment of the two additional maximum civil penalties was error.

Appeals by Petitioner and Respondent from Judgment entered 30 May 2014 by Judge John E. Nobles, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 1 June 2015.

Jordan, Price, Wall, Gray, Jones & Carlton, by Henry W. Jones, Jr. and Lori P. Jones, for Petitioner.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary L. Lucasse, Special Deputy Attorney General Anita LeVeaux, and Special Deputy Attorney General Jennie Wilhelm Hauser, for Respondent.

TYSON, Judge.

Petitioner, House of Raeford Farms, Inc. ("House of Raeford"), and Respondent, North Carolina Department of Environment and Natural Resources ("DENR"), each appeal from the superior court's judgment affirming in part and reversing in part the Final Agency Decision of the Environmental Management Commission ("EMC"). We affirm in part and remand in part.

I. Background

House of Raeford operates a chicken processing facility near Rose Hill in Duplin County, North Carolina. This facility includes an engineered or designed system to treat the wastewater used during processing. Solids are carried by water outside of the plant to a diffused air flotation system. Solid materials are separated from the water, pumped into a tanker trailer, and transported to a plant operated by another company.

The remaining wastewater is pumped to House of Raeford's primary wastewater lagoon ("Lagoon 1"), which is approximately 795 feet long and 329 feet wide. House of Raeford adds approximately one million gallons of wastewater per day into Lagoon 1. The Lagoon has a design capacity of seven to eight million gallons.

At Lagoon 1, the remaining solid material separates from the water. The skimmed wastewater is gravity fed into a second lagoon ("Lagoon 2"), where it settles further. Wastewater from Lagoon 2 is later pumped approximately two miles to yet a third lagoon to further settle ("Lagoon 3"). House of Raeford applies water from Lagoon 3 to its spray fields. Lagoon 1 is located closest to House of Raeford's processing facility. Lagoon 2 is located directly behind Lagoon 1.

Cabin Branch Creek flows behind the House of Raeford facility and is located very close to Lagoon 2. The creek flows through two ponds, which are former limestone quarries, and eventually joins with Beaverdam Branch Creek. The Cabin Branch Creek drainage basin, which contributes to the flow of the creek behind House of Raeford, encompasses approximately 5.6 miles.

Valley Protein (a/k/a Carolina By-Products) is a rendering facility, which accepts offal from House of Raeford and other animal processing facilities and transforms the offal into other useable products. Valley Protein, along with Duplin Winery, are located upstream from the House of Raeford facility in the Cabin Branch Creek drainage area. Parker Bark, a mulch facility, is located adjacent to the House of Raeford property. Hog and cattle farms are also located within the Cabin Branch Creek drainage basin. Cabin Branch Creek is classified by DENR as swamp waters, which are characteristically wide, shallow, and slow flowing, and fed by wetlands and low-lying areas.

On 9 September 2009, DENR's Division of Water Quality ("DWQ"), Wilmington Regional Office, received an anonymous complaint about an odor emanating from Beaverdam Branch Creek. The following morning, two DENR representatives, Linda Willis ("Willis"), an environmental

engineer, and Geoffrey Kegley ("Kegley"), a hydrogeologist, investigated the source of the odor. Willis and Kegley observed a "greasy, brown film" on Beaverdam Branch Creek where the creek crosses Brooks Quinn Road. As a result of this observation, Willis and Kegley began to investigate Beaverdam Branch Creek and its tributaries upstream from Brooks Quinn Road.

Willis and Kegley first investigated two hog farms' lagoons located along one of the tributaries. They determined neither farm was the source of the film on the creek. Willis testified she inspected the hog waste lagoons, observed no "overtopping" and noted the adjacent ditches were dry. Willis also testified she would have seen something in the ditches adjacent to the hog waste lagoons if there had been any problems with the lagoons. She further testified nothing was floating on the surface of the tributary adjacent to the hog farm lagoons.

Just downstream from the House of Raeford facility, Willis and Kegley observed a "floating, brown, sludge-type, greasy biomass" on the surface of Beaverdam Branch Creek. They then visited two sites located upstream from the House of Raeford facility: one on Cabin Branch Creek and the other on an unnamed tributary. Willis and Kegley did not observe any similar material in the water at either of these sites. Dissolved oxygen levels in the Cabin Branch Creek area upstream from the House of Raeford facility were in compliance with the water quality standards for swamp waters.

Willis and Kegley then drove to the House of Raeford facility. Joe Teachey ("Teachey"), the person responsible for the wastewater operations, met with them and escorted them behind the facility to view Cabin Branch Creek. Willis testified, "the creek was just full of sludge from bank to bank and as far as the eye could see. It was an unbelievable site."

She testified the sludge was fresh because it was a light tan color: "It starts out looking like a milkshake and then as it decomposes, it gets [darker] because of the septicity[.]" The sludge adhered to the shorelines and was so thick on the surface of the water that it had formed ridges. The sludge was darker and thinner downstream from the House of Raeford facility.

Willis testified the sludge in the creek appeared similar to the sludge in House of Raeford's Lagoon 1. Willis walked upstream to the adjacent property line. At that location, the water was clear and reflective.

On 17 September 2009, DENR collected fecal samples from Cabin Branch Creek, directly behind the House of Raeford facility. The

analysis of the samples confirmed a fecal coliform density greater than 60,000 colonies per 100 milliliters. As a result of the contamination, the designated uses for the swamp waters below the House of Raeford facility were deemed to be impaired.

No direct or physical evidence was presented which tended to show that House of Raeford had discharged sludge into the creek. DENR did not gather or perform any tests on the sludge or material in the creek to determine whether it was the same material contained in House of Raeford's lagoons.

Evidence was presented that House of Raeford had made repairs to the lagoon system in early September 2009. An elevation change between the topography of the lagoons allows water to flow through a pipe from Lagoon 1 to Lagoon 2. These flows are controlled by a valve, which is opened by physically turning a wheel. In early September 2009, the valve and pipe were replaced. Teachey testified that he began to lower the level of Lagoon 1 approximately a week to ten days before construction began on the repairs. Teachey was able to lower the water level of Lagoon 1 by approximately one foot. The construction and repairs on the pipe and valve occurred between 8 September 2009 and 11 September 2009.

On 15 September 2009, Ms. Willis met with Clay Howard, the operations manager for House of Raeford, and a representative from the Environmental Protection Agency. Mr. Howard retained Register's Septic Tank Pumping, operated by Kenneth Register, to remove the material from Cabin Branch Creek, behind the House of Raeford facility. Mr. Register used a hose to pump material from the creek into his tanker truck, drove to Lagoon 1, and deposited the material therein. Register pumped approximately one million gallons of material, consisting of ninety-percent water, from the creek and deposited it into House of Raeford's Lagoon 1. House of Raeford paid Mr. Register $20,000.00.

Jeffrey O. Poupart, the Point Source Branch Chief for DENR's Division of Water Quality, testified that it is "unheard of" for a company to accept unknown contaminants, such as sludge, into lagoons without first characterizing the contaminant. He stated that unknown contaminants are not accepted due to the risk of causing an imbalance in the lagoon's biological system, as well as the liability risk of accepting potentially hazardous or restricted materials.

Other testimony stated only two facilities in the creek basin area produce a floating sludge, Valley Protein and House of Raeford. DENR ruled out Valley Protein as a source of the creek sludge, because it is

located several miles upstream from the site of contamination. No sign of sludge was observed upstream from the House of Raeford facility. DENR also excluded the other possible sources: Duplin Winery, Parker Bark, cattle farms, and hog farms.

Willis testified that, as a result of her investigation, she concluded House of Raeford had lowered the level of Lagoon 1 by pumping the material directly into the creek to accommodate the repair work to the pipe and valve. No physical evidence, such as tire tracks, pipe lanes, spills, or soil disturbance, was presented to show the material was pumped or that a truck hauled sludge from the lagoon to the creek. A ditch runs parallel to the lagoons. Except at the location where the ditch meets the creek, no evidence was presented to show sludge or waste was present in the ditch. In spite of the lack of any direct or physical evidence, DENR concluded House of Raeford had contaminated the creek.

In January of 2011, House of Raeford retained James K. Holley, PG, a hydrogeologist, to perform an independent review of possible causes of the contamination. Mr. Holley was tendered and testified, without objection, as an expert in the field of hydrogeology. He testified there was evidence of potential upstream contributors to the conditions observed in Cabin Branch Creek in September 2009. That evidence included past reports and notices of violation from DENR regarding illicit discharges at both Valley Protein and Duplin Winery.

Mr. Holley also testified that certain physical characteristics of Cabin Brank Creek could explain the natural accumulation of material behind the facility. The area of the creek behind the House of Raeford facility serves as a natural trapping point for materials flushed downstream. Immediately downstream from the facility, the creek contains numerous fallen trees and sharp turns, which serve as physical impediments to the water flow and debris carried downstream. The narrow stream channel behind House of Raeford enters an abandoned limestone quarry pond. As water exits this narrow stream and enters the large pond feature, the velocity of the flow drops, which causes the flow to slow and back up. In Mr. Holley's expert opinion, it is possible for matter to accumulate over a period of time at this "natural trapping point" from the release of materials further upstream, and naturally occurring debris in the creek.

Mr. Holley also testified that beavers create significant drainage problems for creeks like Cabin Branch. Beavers build dams, which cause water to slow, pond, trap debris, and stagnate. A couple of months earlier, on 16 June 2009, the Natural Resources Conservation Service had sent a letter to DENR that indicated "the volume of standing water

in this drainage system has been improved by removal of beavers and beaver dams obstructing the flow of water. The Beaver Management Assistance Program (BMAP) was employed to trap the creek from the railroad to HWY 117." This area of the BMAP eradication of beaver dams is downstream from Valley Protein, but upstream from House of Raeford.

In addition, Mr. Holley testified low volumes of rainfall occurred from July until early August 2009, and the ground was dry. In August, two significant rainfalls occurred, which raised the water levels, mobilized and trapped upstream material, and flushed it downstream. In Mr. Holley's expert opinion, the material in the creek behind House of Raeford could have accumulated over a period of days, weeks or months.

On or about 10 August 2010, DENR issued a Findings and Decision and Assessment of Civil Penalties against House of Raeford arising out of the alleged discharge into Cabin Branch Creek. DENR assessed total civil penalties against House of Raeford in the amount of $75,000.00, plus enforcement costs of $1,357.95 as follows: (1) a penalty of $25,000.00 was assessed for an alleged violation of N.C. Gen. Stat. § 143-215.1(a)(6). DENR asserted House of Raeford caused or permitted waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications, or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the EMC; (2) a penalty of $25,000.00 was assessed for violation of 15A N.C.A.C. 2B.0211(3)(b) for violating the dissolved oxygen water quality standard for Class C-Sw waters of the State; and, (3) a penalty of $25,000.00 was assessed for violation of 15A N.C.A.C. 2B.0211(3)(c) for allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State.

House of Raeford timely filed a petition for a contested case hearing. These hearings took place on various dates between 25 October 2011 and 20 December 2011. On 30 May 2012, the administrative law judge ("ALJ") issued his recommended decision, which: (1) upheld the imposition of a $25,000.00 fine for violation of N.C. Gen. Stat. §143-215.1(a)(6); (2) found that imposition of both $25,000.00 fines for violations of 15A N.C.A.C. 2B.0211(3)(b) and 15A N.C.A.C. 2B.0211(3)(c) respectively, were improper and in error; and, (3) reduced the enforcement costs charged against House of Raeford from $1,357.95 to $452.65.

House of Raeford and DENR both submitted exceptions and objections to the ALJ's recommended decision and requested oral argument

before the EMC. On 8 October 2012, the EMC, by a divided majority vote, issued its Final Agency Decision. The majority adopted in part and rejected in part the recommended decision of the ALJ. The EMC imposed a total civil penalty of $50,000.00 and enforcement costs of $905.30 against House of Raeford for violation of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c).

On 9 November 2012, House of Raeford timely filed a Petition for Judicial Review of the Decision in the Duplin County Superior Court. A hearing was held on 14 April 2014. On 30 May 2014, the court agreed with the ALJ, imposed a single $25,000.00 fine for violation of N.C. Gen. Stat. § 143-215.1(a)(6) and enforcement costs of $452.65, and issued a Judgment on Judicial Review. DENR appeals, and House of Raeford cross-appeals.

II. Issues

House of Raeford argues the superior court erred by: (1) allocating the burden of proof to House of Raeford, rather than DENR; and, (2) concluding that House of Raeford violated N.C. Gen. Stat. § 143-215.1(a)(6).

DENR argues the superior court erred by: (1) reversing the Commission's decision upholding DENR's assessment of two $25,000.00 civil penalties and costs against House of Raeford for violating its non-discharge permit and violating water quality standards for settleable solids or sludge; and, (2) failing to defer to the Commission's decision upholding DENR's assessment of more than one civil penalty.

III. Standard of Review

The superior court's review of the EMC's Final Agency Decision is governed by N.C. Gen. Stat. § 150B-51, which provides:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c) (2013); *see also N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658-59, 599 S.E.2d 888, 894 (2004) (An agency's Final Decision may be reversed or modified "only if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's findings, inferences, conclusions, or decision [fall into one of the six categories listed in § 150B-51(b)]."). "This Court's scope of review is the same as that employed by the trial court." *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 702, 635 S.E.2d 442, 446 (2006), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 445 (2007). "Under the *de novo* standard of review, the trial court consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895.

Under the whole record test

> the trial court may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion.

Overcash, 179 N.C. App. at 703, 635 S.E.2d at 446-47 (citation and internal quotation marks omitted).

IV. Burden of Proof

[1] House of Raeford argues the trial court improperly placed the burden of proof on House of Raeford to prove it did not discharge the material into Cabin Branch Creek, rather than requiring DENR to prove the allegations. We disagree.

The superior court concluded:

> 7. The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so. *Peace v. Empl. Sec. Com'n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Generally, a Petitioner bears the burden of proof on the issues. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). Petitioner in this case carries the burden of proof.

N.C. Gen. Stat. § 150B-23(a) provides:

> A contested case shall be commenced by . . . filing a petition with the Office of Administrative Hearings . . . . [I]f filed by a party other than an agency, [the petition] shall state facts tending to establish that the agency named as the respondent . . . has ordered the petitioner to pay a fine or civil penalty . . . and that the agency:
>
> (1) Exceeded its authority or jurisdiction;
>
> (2) Acted erroneously;
>
> (3) Failed to use proper procedure;

(4) Acted arbitrarily or capriciously; or

(5) Failed to act as required by law or rule.

N.C. Gen. Stat. § 150B-29(a) (2013); *see also* N.C. Gen. Stat. § 150B-29(a) (2013) ("The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.").

In *Overcash*, this Court explained:

> While neither of these statutes specifically allocates the burden of proof, this Court held in *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (emphasis omitted), *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995), that 'the ALJ is to determine whether the petitioner has met its burden in showing that the agency' acted or failed to act as provided in § 150B-23(a)(1)-(5). Likewise, in *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 608, 627 S.E.2d 326, 337 (2006) [*rev'd on other grounds*, 361 N.C. 531, 648 S.E.2d 830 (2007)], this Court observed that 'caselaw holds that unless a statute provides otherwise, petitioner has the burden of proof in OAH contested cases.' Applying this principle, the Court concluded that the petitioner – and not DENR – bore the burden of proving the violations specified in N.C. Gen. Stat. § 150B-23(a). *Holly Ridge*, 176 N.C. App. at 608, 627 S.E.2d at 337. In short, this Court has already held that the burden of proof rests on the petitioner challenging an agency decision.

Overcash, 179 N.C. App. at 704, 635 S.E.2d at 447.

We are bound by our prior decisions in *Overcash*, *Britthaven*, and *Holly Ridge*, and hold the trial court did not err in its allocation of the burden of proof. "[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This argument is overruled.

V. Violation of N.C. Gen. Stat. § 143-215.1(a)(6)

[2] House of Raeford asserts the superior court erred by concluding it violated the provisions of N.C. Gen. Stat. § 143-215.1(a)(6) by dumping waste material into Cabin Branch Creek, and upholding the assessment of a civil penalty.

House of Raeford argues: (1) no substantial evidence shows a similarity between the sludge in the lagoon and the material in the creek; (2) no substantial evidence supports the finding that there was no sludge upstream from the House of Raeford facility, and ruling out of other possible sources of the sludge; (3) House of Raeford's allowance of the material from the creek into its lagoon should not be considered as an admission of it being the source of the sludge; and, (4) DENR presented no evidence to show how material could have moved from House of Raeford's lagoon into the creek.

DENR's conclusion that House of Raeford dumped sludge into Cabin Branch Creek was based upon wholly circumstantial evidence. "It has long been the law in our state that circumstantial evidence may be used, and is highly satisfactory in matter of gravest moment[.]" *State v. Cummings*, 267 N.C. 300, 301, 148 S.E.2d 97, 98 (1966). Testimony was presented that (1) the creek directly behind the House of Raeford facility contained a large volume of sludge; (2) the material in the creek was visually similar to the material in House of Raeford's Lagoon 1; (3) the sludge in the creek appeared to be fresh; (4) the creek was clear upstream from the House of Raeford facility; (5) House of Raeford paid $20,000.00 to pump the sludge from the creek into its lagoon and it is "unheard of" for a company to accept unknown contaminants into its wastewater system; (6) House of Raeford lowered the level of Lagoon 1 to accommodate repairs within a week of the discovery of the sludge in the creek; and, (7) DENR's investigation ruled out other possible upstream sources for the sludge.

We recognize the ALJ and EMC tribunals have "unchallenged superiority to act as finders of fact." *Carroll*, 358 N.C. at 662, 599 S.E.2d at 896 (citation omitted). Where there are two conflicting views, this Court should not substitute our judgment for that of the agency's, even though this Court "could reasonably have reached a different result had [we] reviewed the matter *de novo*." *Overcash*, 179 N.C. App. at 703, 635 S.E.2d at 447 (citation omitted). Circumstantial evidence was presented by DENR which tended to show House of Raeford caused or permitted waste to be discharged into Cabin Branch Creek without an applicable permit and in violation of N.C. Gen. Stat. § 143-215.1(a)(6) and the water quality standards. *Id.* at 702, 635 S.E.2d at 446.

N.C. Gen. Stat. § 143-215.6A(a) allows a civil penalty up to a maximum of $25,000.00 per violation, to be assessed for violations of the eleven enumerated restrictions set forth in the statute. In assessing the amount of the civil penalty, the factors set forth in N.C. Gen. Stat. § 143B-282.1 *shall* be considered:

> (1) The degree and extent of harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
>
> (2) The duration and gravity of the violation;
>
> (3) The effect on ground or surface water quantity or quality or on air quality;
>
> (4) The cost of rectifying the damage;
>
> (5) The amount of money saved by noncompliance;
>
> (6) Whether the violation was committed willfully or intentionally;
>
> (7) The prior record of the violator in complying or failing to comply with programs over which the Environmental Management Commission has regulatory authority; and
>
> (8) The cost to the State of the enforcement procedures.

N.C. Gen. Stat. § 143B-282.1(b) (2013).

Jeffrey Poupart, the Point Source Branch Chief for DENR's Division of Water Quality, made "findings of fact" and "conclusions of law" and assessed three maximum civil penalties against House of Raeford. Poupart oversees the permitting and compliance for all point source wastewater facilities in the State.

Poupart's decision does not state, with any specificity, facts to support consideration and application of the factors set forth in N.C. Gen. Stat. § 143B-282.1(b). In Poupart's decision, he states he "considered" these factors set forth in the statute, and then lists the statutory factors.

The ALJ's decision contains only one finding of fact pertaining to these statutory factors:

> 64. The test results performed by DWQ in September 2009, throughout the drainage basin for Cabin Branch Creek, from its headwaters to the downstream reaches, showed low [dissolved oxygen] levels *that could not be assigned to the presence of the matter found in the creek behind the [House of Raeford] facility. Low dissolved oxygen was a systematic problem throughout Cabin Branch and its tributaries.* (Emphasis supplied).

In its Final Agency Decision, the EMC incorporated all of the ALJ's findings of fact verbatim, with the addition of the finding that the cost of

DWQ's investigation and monitoring of the water quality totaled $1,357.95. The superior court also adopted the findings of the ALJ verbatim.

Poupart testified before the ALJ regarding his assessment of the eight statutory factors. Poupart testified the sludge behind the facility covered the stream from bank to bank, inhibiting the movement of aquatic life, and causing a "severe[ ] adverse affect on [the] water environment." The dissolved oxygen in the creek was "very depressed for 13 days" and unable to support the ecosystem, and the water in the creek was septic for a significant stretch downstream from the facility. Poupart also testified of at least twenty-five other civil penalty assessments against House of Raeford in the five years preceding the violation, which was a "significant factor" in the penalty assessment. He did not testify regarding the details of the twenty-five past violations. Poupart referenced a spreadsheet which summarized the past violations. None of the finders of fact made any findings regarding House of Raeford's past violations. Poupart further testified that the cost to the State for enforcement procedures was "moderately significant."

House of Raeford was assessed the maximum statutory penalty. The record shows that DENR discovered the material in the creek on 9 September 2009, and met with a representative from House of Raeford. That same day, House of Raeford contracted with a company to pump the material from the creek into House of Raeford's Lagoon 1. The record is unclear whether the pumping of the material began on 9 September or 14 September 2009. Nevertheless, the record clearly shows House of Raeford took timely action, upon the EPA's and DENR's request, to remove the material from the creek and placed it in its lagoon. No evidence shows there was any further remediation required or performed by anyone else, or there was any lasting or long-term impact on the creek. In assessing the civil penalty, DENR did not consider the $20,000.00 House of Raeford had spent in pumping the material from the creek and into its lagoon.

The orders from the lower court and tribunals baldly state that Poupart "considered" the eight statutory factors in assessing the civil penalty, but contain no findings of fact to support these factors. Furthermore, Poupart's testimony before the ALJ contains bald statements regarding the environmental impact from the discharge. No evidence was presented tending to show the State spent significant funds to enforce the water quality regulations, or that any additional funds were expended, or should have been expended, to remediate the damage.

In light of these considerations, we remand to the superior court with instructions to remand to the finder of fact, to make specific findings with regard to the eight statutory factors set forth in N.C. Gen. Stat. § 143B-282.1(b) and to formulate the amount of any civil penalty to be imposed.

VI. Duplicative Assessment of Civil Penalties

[3] DENR assessed civil penalties against House of Raeford as follows:

> $25,000 for violation of N.C. Gen. Stat. § 143-215.1(a)(6); causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of the Article.
>
> $25,000 for violation of 15A N.C.A.C. 2B.0211(3)(b); violating the dissolved oxygen water quality standard for Class C-Sw waters of the State.
>
> $25,000 for violation of 15A N.C.A.C. 2B.0211(3)(c); by allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State.

The ALJ found the imposition of civil penalties under 15A N.C.A.C. 2B.0211(3)(b) and 15A N.C.A.C. 2B.0211(3)(c) were erroneous, but upheld the imposition of the $25,000.00 fine under N.C. Gen. Stat. § 143-215.1(a)(6). The EMC imposed a total maximum civil penalty of $50,000.00 against House of Raeford for violation of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c).

The superior court assessed a civil penalty of $25,000.00 for violation of N.C. Gen. Stat § 143-215.1(a)(6) for causing or permitting waste to be discharged into or intermixed with the waters of the State in violation of the water quality standard set forth in 15A N.C.A.C. 2B.0211(3)(c). DENR argues the superior court erred by determining that House of Raeford was fined "twice for the same violation," and assessing only one civil penalty. We disagree.

The General Assembly has authorized the assessment of civil penalties of "not more than twenty-five thousand dollars" for eleven itemized violations based on acts or failures to act. N.C. Gen. Stat. § 143-215.6A(a)

(1) – (11) (2013). The statute does not impose any limitation on the number of violations to be found as a result of an unauthorized discharge.

The violation of 15A N.C.A.C. 2B.0211(3)(b) related to the dissolved oxygen water quality standard is not at issue. The EMC concluded the penalty should be vacated, and DENR sets forth no argument related to that violation. DENR asserts that the civil penalties under N.C. Gen. Stat § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c) were assessed as a result of the same physical discharge of material into the creek, but each violation is based upon a separate act or failure to act. We disagree.

N.C. Gen. Stat. § 143-215.1(a)(6) provides that no person shall:

> Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State *in violation of the water quality standards applicable to the assigned classifications* or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.

N.C. Gen. Stat. § 143-215.1(a)(6) (2013) (emphasis supplied). DENR specifically alleged House of Raeford had "violated N.C. Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications."

The second maximum penalty assessment was for "violation" of 15A N.C.A.C. 2B.0211(3)(c), a subsection of the North Carolina Administrative Code that sets forth water quality standards. Section 15A N.C.A.C. 2B.0211 is entitled "Fresh Surface Water Quality Standards for Class C Waters." The regulation provides:

> (3) Quality standards applicable to all fresh surface waters:
>
> . . . .
>
> (c) Floating solids, settleable solids, or sludge deposits: only such amounts attributable to sewage, industrial wastes or other wastes as shall not make the water unsafe or unsuitable for aquatic life and wildlife or impair the waters for any designated uses.

15A N.C.A.C. 2B.0211(3)(c) (2011).

In contrast to the language of N.C. Gen. Stat. § 143-215.1(a)(6), the regulation is not prohibitory, nor does it mandate some action. It merely sets forth the water quality standards for Class C waters. N.C. Gen. Stat. § 143-215.1(a)(6) allows for a penalty for violating the water quality standards set forth in 15A N.C.A.C. 2B.0211(3)(c). While under other circumstances there may be grounds to impose separate penalties associated with a single discharge, a violation of N.C. Gen. Stat. § 143-215.1(a)(6) does not exist without a violation of the water quality standard. The superior court properly determined the two penalties assessed by the EMC were duplicative and impermissible. This argument is overruled.

VII. Deference to the EMC's Decision

DENR asserts the superior court erred by failing to defer to the EMC's Final Agency Decision, which upheld DENR's assessment of two civil penalties based upon violations of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c). DENR argues the superior court should have deferred to the EMC's Decision, wherein EMC interpreted its own regulations, and based on the EMC's expertise in administering the statutory program delegated to it by the General Assembly. We disagree.

DENR is vested with the statutory authority to administer the State's "program of water and air pollution control and water resource management." N.C. Gen. Stat. § 143-211(c) (2013). The EMC is responsible for promulgating rules and policies regulating the State's surface water resources. *See* N.C. Gen. Stat. §§ 143-214.1, 143-215.1, 143-215.6A (2013). "[A]n administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation." *Pamlico Marine Co. v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986).

Our Supreme Court explained:

> Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the *validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In re Appeal of N.C. Sav. & Loan League, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (emphasis supplied). "An agency interpretation of a

relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 724, 670 S.E.2d 629, 635 (2009) (citation and quotation marks omitted).

The ALJ and the superior court both ruled that DENR improperly assessed duplicative penalties for discharging into the waters of the State in violation of N.C Gen. Stat. § 143-215.1(a)(6), and for violating the water quality standard set forth in 15A N.C.A.C. 2B.0211(3)(c). The superior court properly reviewed and ruled the EMC Final Decision and assessment of the two additional maximum civil penalties was error. This assignment of error is overruled.

VIII. Conclusion

The superior court did not err in concluding that substantial circumstantial evidence was presented that House of Raeford violated the provisions of N.C Gen. Stat. § 143-215.1(a)(6) by discharging material into the creek. The superior court properly concluded that imposition of two separate penalties under N.C Gen. Stat. § 143-215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c) was in error.

We remand to the superior court with instructions to remand to the finder of fact for further findings regarding House of Raeford's actions, timeliness, and other evidence in light of the eight statutory factors set forth in N.C. Gen. Stat. § 143B-282.1(b), and for further consideration of the amount of any civil penalty to be imposed. The judgment of the superior court is affirmed in part, and remanded in part.

AFFIRMED IN PART, REMANDED IN PART.

Chief Judge McGEE and Judge GEER concur.

IN RE M.A.E.

[242 N.C. App. 312 (2015)]

IN THE MATTER OF M.A.E., K.M.E., AND E.G.H.

No. COA15-144

Filed 21 July 2015

1. Evidence—hearsay—out-of-court statements of abused child—trauma of testifying

In an action involving the alleged abuse and neglect of children, the trial court did not abuse its discretion by admitting the out-of-court statements of one of the children (Eve) under the residual hearsay exception in Rule 803(24). Although the trial court did not expressly find that Eve was unavailable to testify, the findings were consistent with the testimony of a mental health counselor who recommended that the child not be required to testify due to the resultant confusion, anxiety, and trauma.

2. Evidence—hearsay—out-of-court statement of abused child—circumstantial guarantees of trustworthiness

In an action involving the alleged abuse and neglect of children, the out-of-court-statements of one of the children (Eve) had circumstantial guarantees of trustworthiness. Inconsistencies have no bearing on hearsay statements circumstantial guarantees of trustworthiness. In determining that Eve's statements had circumstantial guarantees of trustworthiness, the trial court found that she was unable to testify at trial without hampering her progress in therapy; was motivated to speak the truth to both a DSS social worker and a forensic interviewer; and was competent because she could express herself and understood her duty to tell the truth.

3. Appeal and Error—admission of hearsay—other evidence—no prejudice—not reviewed

In an action involving the alleged abuse and neglect of children, the admission of hearsay statements from one of the children (Eddie) was not prejudicial to the adjudication of the children as abused was not reviewed on appeal. The trial court's findings and conclusions are supported by sufficient evidence independent of Eddie's statements.

4. Child Abuse and Neglect—disposition—children's emotional health considered—second ground of adjudication—not reviewed on appeal

A second theory of child abuse was not reviewed on appeal, despite the mother's contention that the additional ground for

adjudication could affect the court's dispositional authority, where the facts that established the children's status as abused and the adjudication of neglect provided sufficient justification for the court to address their emotional health as a part of its disposition.

Appeal by respondent-parents from orders entered 21 October 2014 and 19 November 2014 by Judge Christine Underwood in Iredell County District Court. Heard in the Court of Appeals 29 June 2015.

Lauren Vaughan, for petitioner-appellee Iredell County Department of Social Services.

Melanie Stewart Cranford and Susan M. Ervin, for guardian ad litem.

Richard Croutharmel, for respondent-appellant mother.

Ryan McKaig, for respondent-appellant father J.E.

Mary McCullers Reece, for respondent-appellant father D.H.

CALABRIA, Judge.

Respondent-parents (collectively, "Respondents") appeal from an order adjudicating the minor children M.A.E. ("Eddie")[1] and K.M.E. ("Eve") abused and neglected juveniles and adjudicating the minor child E.G.H. ("Harriet") a neglected juvenile. We affirm.

I. Background

Respondent-mother ("Mother") is the mother of all three juveniles and is married to Respondent-father D.H. ("Respondent D.H."), who is Harriet's biological father.[2] At the time Iredell County Department of Social Services ("DSS") became involved with the family, the juveniles were living with Mother and Respondent D.H. in Iredell County. Respondent-father J.E. ("Respondent J.E.") is Eddie and Eve's biological father and Harriet's legal father, and he resides in South Carolina.

1. We adopt the pseudonyms used by the parties to preserve the juveniles' privacy.

2. We adopt the trial court's unchallenged finding that Respondent D.H. is Harriet's biological father.

On 13 May 2013, DSS filed juvenile petitions seeking adjudication of twelve-year-old Eddie, eight-year-old Eve, and six-year-old Harriet as abused and neglected. According to Child Protective Services ("CPS") reports, DSS alleged Eddie was sleeping on the streets "due to the fighting in the home" and Mother and Respondent D.H.'s alcohol abuse; that Respondent D.H.'s spankings left "marks and bruises" on Eddie and Eve; and that Eve had disclosed that Eddie repeatedly sexually abused her and Harriet. Eve reported, *inter alia*, that Eddie "takes his pants off and private out and puts it in her butt[,]" "sucks on her chest[,]" and that she "saw 'gooey stuff' come from his penis [and] onto [her] Teddy Bear." A subsequent investigation by DSS confirmed that Eddie repeatedly sexually abused Eve and that Eve had reported the abuse to Mother, Respondent D.H., and Respondent J.E. Eddie admitted "that he put his 'dick' in [Eve's] butt" but denied touching Harriet. Eddie also stated that Respondent D.H. "beat him bad recently leaving marks up and down his back[,]" and that Mother "was aware but did not do anything."

On 10 May 2013, during an emergency assessment meeting at DSS, Respondents "admitted to having knowledge of the sexual abuse of the girls by [Eddie] but did nothing to protect them from the ongoing abuse." The report stated that Respondents "admitted they did not report the abuse for fear that they would be arrested and the children would be removed from the home." Moreover, "[n]umerous extended family members knew of the abuse as well but failed to report it or protect the children." Mother and Respondent D.H. further acknowledged spanking the minor children, which had "on rare occasions left marks" on them, and they also acknowledged frequently arguing in their presence. As a result of its investigation, DSS obtained non-secure custody of the three children on 13 May 2013.

Prior to the adjudicatory hearing, DSS filed two motions seeking to introduce into evidence a series of hearsay statements made by the minor children:

(1) Eve's statements to DSS social worker Carol Roulhac ("Ms. Roulhac") at Eve's elementary school on 8 May 2013;

(2) Eve and Harriet's videotaped statements to forensic interviewer Colleen Medwid ("Ms. Medwid") at the Dove House Children's Advocacy Center on 9 May 2013;

(3) Eve and Harriet's statements to their Aunt, Peggy Brown ("Aunt Peggy") at her home on various dates;

(4) Eddie's statements to Ms. Roulhac and Mooresville Police Detective John Vanderbilt ("Detective Vanderbilt") at Eddie's residence on 8 May 2013;[3]

(5) Eddie's videotaped statements to Detective Todd Marcum ("Detective Marcum") and Detective Vanderbilt at the Mooresville Police Department ("MPD") on 9 May 2013;

(6) Eddie's videotaped statements to Detective Marcum and Detective Amy Dyson ("Detective Dyson") at the MPD on 10 May 2013.

DSS sought introduction of the statements under the residual exception to the hearsay rule in N.C. Gen. Stat. § 8C-1, Rule 803(24).

After hearing the evidence and arguments of the parties, the trial court admitted the following statements pursuant to Rule 803(24): (1) Eve's statements to Ms. Roulhac at school on 8 May 2013; (2) Eve's statements to Ms. Medwid at the Dove House on 9 May 2013; (3) Eddie's statements to Ms. Roulhac and Detective Vanderbilt at his residence on 8 May 2013; and (4) Eddie's statements to Detectives Marcum and Vanderbilt at the MPD on 9 May 2013. The court found these statements possessed circumstantial guarantees of trustworthiness and were more probative on relevant issues than any other evidence available to DSS through reasonable efforts. It further found that their admission would serve the interest of justice. The court declined to admit Harriet's statements to Ms. Medwid at the Dove House, Eve and Harriet's statements to Aunt Peggy, and Eddie's 10 May 2013 statements to Detectives Dyson and Marcum, finding that they lacked both the indicia of trustworthiness and the probative value required for admission under Rule 803(24).

After an adjudicatory hearing, the trial court entered an adjudication order on 21 October 2014. The trial court concluded that Eddie and Eve were abused juveniles, "in that [their] parent . . . or caretaker has committed, permitted, or encouraged the commission of a sex offense [by,] with[,] or upon [them] in violation of the criminal law, and has created or allowed to be created serious emotional damage to the juvenile[s]." The trial court further concluded that each of the three minor children were neglected juveniles in that they do "not receive proper care, supervision, or discipline from [their] parent . . . or caretaker," and "live[ ] in an environment injurious to [their] welfare."

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3. In the trial court's Order on Motion to Introduce Hearsay, Finding of Fact 32 misstates that this videotaped interview took place on 9 May 2013.

After a dispositional hearing, the trial court entered a disposition order on 19 November 2014 continuing DSS custody of all three children. The trial court found that any visitation by Respondents would be contrary to the children's best interests "and will likely impede and/or cause a regression in the progress they have made in therapy." The court further determined that DSS should cease efforts toward reunification of the children with Respondents since such efforts "would be futile and . . . inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time[,]" and that Respondents "have subjected these juveniles to aggravating circumstances as defined in N.C. [Gen. Stat.] § 7B–101(2)." *See* N.C. Gen. Stat. § 7B–101(2) (2013) (defining aggravated circumstances as "[a]ny circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including . . . sexual abuse."); *see also* N.C. Gen. Stat. §§ 7B–507(b)(1)-(2), 7B–905(c) (2013). Respondents appeal.

II. Arguments on Admission of Hearsay Under Rule 803(24)

On appeal, Respondents each challenge the trial court's use of Rule 803(24) to admit Eddie and Eve's hearsay statements into evidence. Specifically, Respondents contend that the trial court abused its discretion in determining that Eddie and Eve's statements (1) were more probative on the issue than any other evidence which DSS could procure through reasonable efforts and (2) had circumstantial guarantees of trustworthiness. Mother also contends that Eddie's statements to Detectives Marcum and Vanderbilt on 9 May 2013 fail to serve the interests of justice. Respondents, however, do not challenge the trial court's findings and conclusions that DSS provided proper notice of its intent to introduce Eve's statements; that the statements are not covered by another exception to the hearsay rule; or that the statements concern material facts relevant to adjudication.

III. Standard of Review and Applicable Law

> Admission of evidence [under Rule 803(24)] is addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown. An abuse of discretion warranting reversal results only upon a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision. The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.

Brissett v. First Mount Vernon Indus. Loan Ass'n, __ N.C. App. __, __, 756 S.E.2d 798, 803 (2014) (citations omitted) (internal quotations omitted). Therefore, "[w]e will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied." *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988) (citation omitted), *disapproved on other grounds by State v. Jackson*, 348 N.C. 644, 652–53, 503 S.E.2d 101, 106 (1998).

"Hearsay" is defined as any "statement, other than one made . . . while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2013). Our Rules of Evidence make hearsay inadmissible "except as provided by statute or by these rules." N.C. Gen. Stat. § 8C–1, Rule 802 (2013). "Rule 803 of the Rules of Evidence . . . sets out the exceptions to the hearsay rule that apply regardless of the availability of the person making the statement." *Little v. Little*, __ N.C. App. __, __, 739 S.E.2d 876, 879 (2013). Subsection 24 allows for the admission of

> [a hearsay] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C–1, Rule 803(24). "The rule further requires that notice be given to the opposing party, 'to provide the adverse party with a fair opportunity to prepare to meet the statement.' " *N.C. Dep't of Transp. v. Cromartie*, 214 N.C. App. 307, 318, 716 S.E.2d 361, 368 (2011) (quoting N.C. Gen. Stat. § 8C–1, Rule 803(24)).

In *Smith*, our Supreme Court established the protocol for trial courts when deciding whether to admit hearsay under Rule 803(24).

> The trial court must determine in this order:
>
> (A) Has proper notice been given?
>
> (B) Is the hearsay not specifically covered elsewhere?
>
> (C) Is the statement trustworthy?

> (D) Is the statement material?
>
> (E) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?
>
> (F) Will the interests of justice be best served by admission?
>
> The trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness[.]

Deanes, 323 N.C. at 515, 374 S.E.2d at 255 (citing *State v. Smith*, 315 N.C. 76, 92–96, 337 S.E.2d 833, 844–46 (1985)).

IV. Eve's Statements

[1] Respondents each challenge the trial court's use of Rule 803(24) to admit Eve's out-of-court statements to both Ms. Roulhac on 8 May 2013 and to Ms. Medwid on 9 May 2013. They argue that the trial court abused its discretion by determining that Eve's statements were more probative on the issues than other evidence reasonably available to DSS and that her statements were sufficiently trustworthy. We disagree.

A. More Probative than Other Evidence Reasonably Available to DSS

Respondents D.H. and J.E. challenge the trial court's conclusion that Eve's statements are "more probative on the point for which they are offered than any other evidence which [DSS] can procure through reasonable efforts[.]" They contend that the trial court failed to properly consider Eve's availability to testify in person at the adjudicatory hearing.

As our Supreme Court has noted,

> [a]lthough the availability of a witness is deemed immaterial for purposes of Rule 803(24), that factor enters into the analysis of admissibility under subsection (B) of that Rule which requires that the proffered statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." If the witness is available to testify at trial, the "necessity" of admitting his or her statements through the testimony of a "hearsay" witness very often is greatly diminished if not obviated altogether.

State v. Fearing, 315 N.C. 167, 171–72, 337 S.E.2d 551, 554 (1985) (citations omitted) (internal quotations omitted).

In the instant case, the trial court made the following findings and conclusions:

> 10. It would be detrimental to the welfare of these juveniles to compel them to testify in court. They would likely suffer from anxiety, which could cause behavioral disruptions. The formality of the courtroom setting itself would likely be overwhelming, but being questioned by different attorneys over a long period of time, even in a closed-circuit situation would likely cause anxiety and negatively affect the juveniles in their placement, at school and in the social context. Further, causing these children to testify could hamper the progress they are making in therapy.
>
> . . .
>
> 33. The proffered hearsay statements of [Eve] to Carol Roulhac on May 8, 2013 . . . and statements of [Eve] to Colleen Medwid on May 9, 2013 are more probative on the point for which they are offered than any other evidence which the proponent can procure through reasonable efforts due to the age, risk and bias of [Eve].
>
> . . .
>
> 4. The following hearsay statements . . . have circumstantial guarantees of trustworthiness and are more probative on the point for which they are offered than any other evidence which [DSS] can procure through reasonable efforts: Statements of [Eve] to Carol Roulhac on May 8, 2013 . . . [and] to Colleen Medwid on May 9, 2013.

The findings in paragraph 10 are consistent with the testimony of Jodi Province ("Ms. Province"), Eve's therapist and an expert in "mental health counseling for children under the age of ten[.]" Ms. Province "strongly recommend[ed]" that Eve not "be required to testify in this matter" due to the resultant confusion, anxiety, and trauma she would experience. Ms. Province was also concerned that Eve's testimony would not be truthful because she "may feel guilt and maybe feel like she is getting someone in trouble and that she doesn't want anyone to be in trouble."

Although the trial court did not expressly find Eve unavailable to testify, the evidence supports the court's determination that Eve's out-of-court statements are more probative than other evidence reasonably available to DSS.

B. Circumstantial Guarantees of Trustworthiness

[2] Respondents next argue that Eve's out-of-court statements do not have circumstantial guarantees of trustworthiness. We disagree.

As an initial matter, we reject Mother and Respondent J.E.'s contentions that the alleged inconsistencies in Eve's statements detract from their trustworthiness. Under Rule 803(24), such inconsistencies have no bearing on hearsay statements' "circumstantial guarantees of trustworthiness[.]" "The relevant circumstances in determining trustworthiness include only those that surround *the making of the statement*." *State v. Waddell*, 351 N.C. 413, 422, 527 S.E.2d 644, 650–51 (2000) (citation omitted) (internal quotations omitted). As Respondents each note, "[t]he trial court *must not* consider the corroborative nature of the statement when determining whether it qualifies as residual hearsay." *State v. Champion*, 171 N.C. App. 716, 722, 615 S.E.2d 366, 371 (2005) (emphasis added). Therefore, any inconsistencies in Eve's statements are irrelevant in determining whether each statement has circumstantial guarantees of trustworthiness.

In assessing whether a declarant's statement "had circumstantial guarantees of trustworthiness equivalent to those present in an established exception to the hearsay rule[,]" the trial court must consider the following factors:

> (1) whether the declarant had personal knowledge of the underlying events,
>
> (2) whether the declarant is motivated to speak the truth or otherwise,
>
> (3) whether the declarant has ever recanted the statement, and
>
> (4) whether the declarant is available at trial for meaningful cross-examination.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citing *State v. King*, 353 N.C. 457, 479, 546 S.E.2d 575, 592 (2001)). No single factor is dispositive. *Smith*, 315 N.C. at 94, 337 S.E.2d at 845. Rather, the court "should focus upon the factors that bear on the declarant at the time of making the out-of-court statement and should keep in mind

that the peculiar factual context within which the statement was made will determine its trustworthiness." *Id.* "[T]he issue is not whether [the declarant's] statement is objectively accurate; the determinative question is whether [the declarant] was motivated to speak truthfully when he made it." *State v. Sargeant*, 365 N.C. 58, 66, 707 S.E.2d 192, 197 (2011).

In the instant case, the trial court found that "[t]he circumstances surrounding the hearsay statements made by [Eve] to Social Worker Roulhac on May 8, 2013 . . . [and] at the Dove House [to Ms. Medwid on 9 May 2013] have circumstantial guarantees of trustworthiness." The trial court supported this determination with detailed findings about the circumstances under which Eve made these statements. Although the court did not expressly address the four *Valentine* factors, this omission is not fatal. "If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *Sargeant*, 365 N.C. at 65, 707 S.E.2d at 196. "We will review the record" and the trial court's evidentiary findings to "make our own determination." *Valentine*, 357 N.C. at 518, 591 S.E.2d at 853.

In addressing the *Valentine* factors, Respondents do not contest that Eve has personal knowledge of the events or that Eve never recanted her statements. Although Respondents D.H. and J.E. contend that the trial court did not make specific findings that Eve was unavailable for trial, we have already addressed and dismissed this argument. The trial court found, and Respondents do not challenge, that requiring Eve to testify would be "detrimental to [her] welfare" and "could hamper the progress [she is] making in therapy." Accordingly, the record reveals sufficient evidence supporting the trial court's determination that Eve was unavailable to stand trial.

Under the *Valentine* factors, Respondents have one remaining challenge to the circumstantial guarantees of trustworthiness of Eve's hearsay statements: whether Eve was "motivated to speak the truth or otherwise" when she made her out-of-court statements to Ms. Roulhac and Ms. Medwid. *See Valentine*, 357 N.C. at 518, 591 S.E.2d at 852. Ms. Roulhac met with Eve in a private room at her school to ask her about a CPS report concerning allegations of domestic violence. During the interview, Ms. Roulhac asked Eve "if she knew the difference between a 'good touch and a bad touch.' " Eve responded, "My brother [Eddie] came in my room last night and touched my butt[,]" and proceeded to describe his actions in more detail. The trial court found that Eve made these disclosures "in a comfortable and 'safe' environment[;]" that Ms.

Roulhac "did not use leading questions" or "ask [Eve] many specific questions[;]" that Eve "spoke in a 'very matter of fact' manner" and "did not appear to be afraid or upset[;]" and that Eve "used age-appropriate language to discuss" the abuse. Therefore, we find that Eve was motivated to speak truthfully to Ms. Roulhac.

The trial court made similar findings regarding Eve's videotaped statements to Ms. Medwid on 9 May 2013. The trial court noted Eve's demeanor, her age-appropriate language, and the sensitive nature of her disclosures. The trial court also found that Ms. Medwid, a trained forensic interviewer, "adhered to the protocol" established by the Dove House, a "licensed and accredited child advocacy center[.]" We find that Eve was also motivated to speak truthfully to Ms. Medwid. Therefore, the trial court did not abuse its discretion in finding that Eve's statements contained circumstantial guarantees of trustworthiness under a *Valentine* factors analysis.

In challenging the trial court's finding that Eve's statements contained circumstantial guarantees of trustworthiness, Mother contends that the trial court abused its discretion by finding Eve competent to stand trial without assessing whether she understood the difference between truth and fantasy. Mother contends that the trial court's findings that Eve understood "the difference between a truth and a lie" but would be unlikely to "understand the concept of swearing on a Holy Bible" was "tantamount to passing on her competence to testify as a witness" and effectively resolved the dispositive issue in the case: "Eve's veracity." We disagree.

Our Rules of Evidence establish a presumption of competency under N.C. Gen. Stat. § 8C–1, Rule 601(a) (2013). The presumption may be rebutted by a showing that a witness is "(1) incapable of expressing himself or herself concerning the matter as to be understood . . . or (2) incapable of understanding the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C–1, Rule 601(b) (2013).

In order to assess circumstantial guarantees of trustworthiness, the court necessarily considers one's ability to express herself and her understanding of truth. For example, the trial court found that Harriet's statements at the Dove House lacked the guarantees of trustworthiness required by Rule 803(24), in part, because she "was extremely difficult to understand" and "did not appear to even understand what happened during the interview."

Even so, there is sufficient evidence to support the trial court's finding that Eve was competent to testify at trial, although we note that Eve

did not testify. Eve was eight years old in May 2013. Ms. Province, Eve's therapist and an expert in "mental health counseling for children under the age of ten[,]" testified that Eve had the ability to remember and recant her experiences and also understand "the need to tell . . . the truth about what's happened[.]" Ms. Province further stated that children of Eve's age generally would not understand the "significance" of swearing on a Bible. Ms. Medwid described for the court the "truth/lie" technique she uses to determine whether a child who is at least six years of age is able to distinguish truth from falsity. In addition to employing this technique, Ms. Medwid asked Eve not to guess at a response if she did not know the answer to a question, and to correct Ms. Medwid if she said anything that was mistaken. Even without our presumption of competency, this is sufficient evidence that Eve was capable of expressing herself and understood the duty to tell the truth.

In determining that Eve's statements had circumstantial guarantees of trustworthiness, the trial court found that Eve was unable to testify at trial without hampering her progress in therapy; was motivated to speak the truth to both Ms. Roulhac and Ms. Medwid; and was competent because she could express herself and understood her duty to tell the truth.

The trial court properly analyzed the admissibility of Eve's statements under Rule 803(24). Therefore, the court did not abuse its discretion in determining that Eve's out-of-court statements were more probative on the issues than other evidence reasonably available to DSS, in finding circumstantial guarantees of trustworthiness in Eve's statements to Ms. Roulhac and Ms. Medwid, and in admitting Eve's out-of-court statements to Ms. Roulhac and Ms. Medwid at the adjudicatory hearing.

V. Eddie's Statements

[3] We decline to review the trial court's admission of Eddie's statements to Ms. Roulhac and Detective Vanderbilt on 8 May 2013, and his videotaped statements to Detectives Marcum and Vanderbilt at the police department on 9 May 2013 under Rule 803(24) for an abuse of discretion.

> The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its findings.

> Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence.

In re Huff, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000) (citations omitted) (internal quotation marks omitted).

In the instant case, the trial court's findings and conclusions are supported by sufficient evidence independent of Eddie's statements. Specifically, Eve's properly-admitted statements, Respondents' statements to Ms. Roulhac and law enforcement, and Eddie's adjudication of delinquency for second-degree rape and sexual offense support the findings in the adjudication order. Ms. Roulhac testified that Eve "disclose[d] that [Eddie] had touched her in her butt." During her interview with Ms. Medwid, she similarly described Eddie coming into her room, placing his penis inside her "private"—both her "front part" and her "butt"—and moving "up and down." Eve said that she showed Mother and Respondent D.H. the "gooey stuff" Eddie left on her blanket and that she complained to each of her parents about Eddie's sexual abuse on multiple occasions over a period of two years. In her statement to Detectives Dyson and Marcum, Mother acknowledged that Eve told her in 2012 that Eddie had taken her and Harriet into a closet, asked them to suck on his penis, and then "made [Harriet] do it." Respondent J.E. admitted that both Eve and Mother told him about Eddie "molesting his sisters[.]" Additionally, DSS introduced a copy of the trial court's 22 August 2013 order adjudicating Eddie delinquent based upon his admission to three counts of second-degree statutory rape under N.C. Gen. Stat. § 14–27.3 and three counts of second-degree statutory sexual offense under N.C. Gen. Stat. § 14–27.5 against his sisters. Therefore, we conclude that Respondents were not prejudiced by the admission of Eddie's hearsay statements and decline to review whether the trial court erred in admitting his statements.

VI. Adjudication of Abuse under N.C. Gen. Stat. § 7B–101(1)

Mother and Respondent D.H. claim that the trial court erred in entering adjudications of abuse as to Eddie and Eve. We disagree.

> In reviewing the trial court's decision, we must determine whether the findings of fact are supported by clear, cogent and convincing evidence, and whether the findings support the court's conclusions of law. If there is competent evidence, the findings of the trial court are binding on appeal. An appellant is bound by any unchallenged findings of fact. Moreover, erroneous findings unnecessary to the determination do not constitute reversible

> error where the adjudication is supported by sufficient additional findings grounded in competent evidence. We review conclusions of law *de novo*.

In re B.S.O., __ N.C. App. __, __, 760 S.E.2d 59, 62 (2014) (citations omitted) (internal quotation marks omitted).

Our Juvenile Code defines an abused juvenile, *inter alia*, as one whose parent or caretaker

> [c]ommits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14–27.2; rape of a child by an adult offender, as provided in G.S. 14–27.2A; second degree rape as provided in G.S. 14–27.3; first-degree sexual offense, as provided in G.S. 14–27.4; sexual offense with a child by an adult offender, as provided in G.S. 14–27.4A; second degree sexual offense, as provided in G.S. 14–27.5[.]

N.C. Gen. Stat. § 7B–101(1)(d) (2013). Mother and Respondent D.H. contend that neither the evidence nor the trial court's findings support adjudication under N.C. Gen. Stat. § 7B–101(1)(d). Mother asserts that "there was no 'clear and convincing' evidence that she, or either father, knew or had reason to know that Eddie had or would perpetrate a sex offense enumerated in N.C. Gen. Stat. § 7B–101(1)(d) against Eve." Respondent D.H. similarly contends that the "evidence did not show that [Respondents] committed, permitted[,] or encouraged Eddie to commit a sex offense on Eve." Mother and Respondent D.H. specifically challenge the trial court's finding 31 that they "were aware that [Eddie] was committing sexual assaults on [Eve] and failed to take appropriate remedial measures to ensure the child's safety."

In the instant case, the trial court made findings based on evidence regarding the allegations that Eddie repeatedly sexually abused Eve, even after Respondents learned of the abuse. The trial court found "that [Eddie] penetrated [Eve] anally with his penis on multiple occasions, even after [Mother] and [Respondent D.H.] learned of the abuse." Ms. Roulhac testified that Eve "disclose[d] that [Eddie] had touched her in her butt." During Eve's forensic interview with Ms. Medwid, Eve similarly described Eddie coming into her room, placing his penis inside her "private"—both her "front part" and her "butt"—and moving "up and down." Eve said that Eddie moved up and down either on or inside her "private" forty times and had put his penis inside her butt twenty times. Eve also told Ms. Medwid that "gooey stuff" came out of Eddie's penis

and got onto her legs, blanket, and teddy bear. Ms. Medwid provided the trial court with the anatomical diagram Eve used to show what Eddie had done to her. These incidents began when Eve was six or seven years old and occurred at both the family's previous and current residences.

Detective Dyson testified that Eddie had been adjudicated delinquent "for the acts against his sisters[.]" DSS introduced a copy of the trial court's 22 August 2013 order adjudicating Eddie delinquent based upon his admission to three counts of second-degree statutory rape under N.C. Gen. Stat. § 14–27.3 and three counts of second-degree statutory sexual offense under N.C. Gen. Stat. § 14–27.5. A parent permitting either offense to be committed by or upon a minor child constitutes abuse under N.C. Gen. Stat. § 7B–101(1)(d). Therefore, there is sufficient evidence that Eddie repeatedly sexually abused Eve.

There is also evidence regarding the challenged finding that "[t]hese parents were aware that [Eddie] was committing sexual assaults on [Eve] and failed to take appropriate remedial measures to ensure the child's safety." Eve said that she showed Mother and Respondent D.H. the "gooey stuff" Eddie left on her blanket and that she complained to each of her parents about Eddie's sexual abuse on multiple occasions over a period of two years. Eve also told her grandmother, aunt, and uncle about the abuse.

In her statement to Detectives Dyson and Marcum, Mother acknowledged Eve told her in 2012 that Eddie had taken her and Harriet into a closet, asked them to suck on his penis, and then "made [Harriet] do it." Mother told Ms. Roulhac that Eve had complained of Eddie sexually abusing her on four occasions, and Mother expressed her concern that Harriet's bedwetting and developmental delays "were the result of Eddie sexually abusing her." Despite these concerns and Eve's repeated disclosures, Mother and Respondent D.H. admitted that "[Eddie]'s bedroom remained upstairs, right across from the girls' bedroom. That the parents' bedroom remained downstairs. They did not make any plans to put the girls in the room with them."

Mother explained to detectives that she was "scared" to contact DSS or the police because Respondent J.E. warned her she would be arrested. Respondent J.E. admitted that both Eve and Mother told him about Eddie "molesting his sisters[.]" He told Mother and Respondent D.H. not to "call law enforcement because [Eddie] is going to be charged and the kids are going to be removed from the home." Respondent D.H. claimed that his relatives told him to "keep it in house."

This is sufficient evidence of Respondents' repeated disregard of Eve's disclosures. Therefore, we hold that the evidence and the trial court's findings fully support the trial court's conclusion that Eddie and Eve were abused juveniles, in that their parent or caretaker permitted Eddie to commit an act upon Eve pursuant to N.C. Gen. Stat. § 7B–101(1)(d). Specifically, we note Eve's 2012 disclosure to Mother of Eddie's oral penetration upon then-five-year-old Harriet; Eve's additional unheeded disclosures to each Respondent; Eve's statement that Eddie engaged in twenty acts of anal intercourse with her between 2012 and May 2013; and Eddie's admission to delinquency for three counts of second-degree statutory rape and three counts of second-degree statutory sexual offense against his sister. Therefore, we find that the trial court properly adjudicated Eddie and Eve as abused juveniles pursuant to N.C. Gen. Stat. § 7B–101(1)(d).

[4] Mother and Respondent D.H. also challenge the trial court's conclusion that Eddie and Eve were abused juveniles under N.C. Gen. Stat. § 7B–101(1)(e), in that their parent or caretaker "created or allowed to be created serious emotional damage to the juvenile[s.]" Because we uphold the adjudications of abuse under N.C. Gen. Stat. § 7B–101(1)(d), we decline to review the trial court's second theory of abuse. Mother suggests that this additional ground for the adjudication may affect the scope of the court's dispositional authority under N.C. Gen. Stat. § 7B–904 (2013). We are not persuaded. The facts that establish Eddie and Eve's status as abused under N.C. Gen. Stat. § 7B–101(1)(d) and the adjudication of neglect provide sufficient justification for the court to address Eddie and Eve's emotional health as part of its disposition.

VII. Conclusion

The trial court did not abuse its discretion in admitting Eve's out-of-court statements under the residual hearsay exception in Rule 803(24). The admission of Eddie's hearsay statements was not prejudicial to the adjudication of the juveniles as abused and, therefore, we decline to review whether this admission was in error. The evidence and the trial court's findings of fact supported its conclusions that Eddie and Eve were abused and neglected juveniles, and that Harriet was a neglected juvenile. Therefore, we affirm the trial court's adjudication order.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

JACQUELINE M. JACKSON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, RESPONDENT, AND GOLDEN AGE OF LEXINGTON, INC., EMPLOYER

No. COA14-1247

Filed 21 July 2015

1. Appeal and Error—preservation of issues—issue not raised below

A discharged employee who brought an Employment Security Division proceeding failed to preserve any challenge to the consideration of a witness's written statement by not objecting to its introduction at the hearing before the appeals referee. Petitioner could have raised a hearsay argument for correction before the appeals referee, when all the evidence in this matter was collected, and not at the various levels of review.

2. Employer and Employee—unemployment benefits—misconduct

A discharged nursing assistant was disqualified from receiving unemployment benefits where she was discharged for work-related "misconduct"—namely, that she failed to report to a supervising nurse when a resident under her care fell and suffered a broken ankle. Statements and testimony supported the findings by the Board that were contested.

Appeal by Respondent and Employer from order entered 11 June 2014 by Judge Beecher R. Gray in Davidson County Superior Court. Heard in the Court of Appeals 7 April 2015.

Legal Aid of North Carolina, Inc., by Alicia C. Edwards, Janet McAuley Blue, John R. Keller, and Celia Pistolis, for Petitioner-appellee.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr. and Amanda R. Pickens, for Employer-appellant.

North Carolina Department of Commerce, Division of Employment Security, Legal Services Section, by Thomas H. Hodges, Jr. and Sheena J. Cobrand for Respondent-appellant.

DILLON, Judge.

Jacqueline M. Jackson ("Petitioner") was discharged from her employment with Golden Age of Lexington, Inc. ("Employer"). The Board of Review at the North Carolina Department of Commerce, Division of Employment Security ("Division") determined that Petitioner was disqualified to receive unemployment benefits. On appeal, the superior court reversed the Board of Review's decision and held that Petitioner was not disqualified to receive unemployment benefits. Employer and the Division (hereafter "Appellants") appeal the superior court's order. For the following reasons, we reverse the superior court's order.

I. Background

Employer operates a nursing facility. Petitioner worked for Employer as a certified nursing assistant. In August 2013, Employer terminated Petitioner's employment because she failed to report to Employer a "patient fall" which had occurred the prior week.

Petitioner filed for unemployment benefits. An adjudicator inside the Division ruled that Petitioner was not qualified to receive unemployment benefits because she had been "discharged for misconduct connected with the work." Petitioner appealed this decision to an appeals referee within the Division.

Following a hearing in which evidence was taken, the appeals referee entered a decision agreeing with the adjudicator's determination that Petitioner was not eligible to receive benefits. Petitioner appealed to the Division's Board of Review. The Board of Review affirmed the appeals referee's decision that Petitioner was disqualified for unemployment benefits. Petitioner filed a petition in superior court for judicial review of the Board of Review's decision.

Following a hearing on the matter, the superior court *reversed* the Board of Review's decision and held that Petitioner was entitled to benefits. Specifically, the superior court held that there was no *competent* evidence at the initial hearing before the adjudicator that a patient had, in fact, fallen during Petitioner's watch. Appellants filed notice of appeal from the superior court's order.

II. Analysis

Employer contends that Petitioner is ineligible for unemployment benefits because she was discharged for cause. Employer contends that Petitioner was discharged for failing to report that a patient had fallen

out of her wheelchair as required by Employer's policies. (A nurse or other attendant is required to report any patient fall so that the patient can be evaluated by a doctor.)

Petitioner claims that she was not required to file a report because the patient in question did not fall from her wheelchair but had merely slumped in the wheelchair, as she testified before the adjudicator. Petitioner contends – and the superior court agreed – that Employer failed to produce any *competent* evidence before the appeals referee that the patient had, in fact, fallen. Rather, Petitioner contends that the only evidence before the appeals referee that a fall had occurred was offered in the form of incompetent hearsay. Specifically, Employer offered the written statement of another nurse, Ms. Hyatt, that the patient was on the floor when Petitioner called her into the patient's room to assist her.

A. Waiver of objection

[1] Appellants argue, *inter alia*, that Petitioner failed to preserve any challenge to the consideration by the fact finder of Ms. Hyatt's written statement by failing to object to its introduction at the hearing before the appeals referee. We agree.

Our Supreme Court has stated that hearsay evidence *which is not properly objected to* "is entitled to be considered for whatever probative value it may have." *Quick v. United Ben. Life Ins.*, 287 N.C. 47, 59, 213 S.E.2d 563, 570 (1975). *See also Skipper v. Yow*, 249 N.C. 49, 56, 105 S.E.2d 205, 210 (1958); *State v. Bryant*, 235 N.C. 420, 423, 70 S.E.2d 186, 188 (1952); *In re Dunston*, 12 N.C. App. 33, 34, 182 S.E.2d 9, 9 (1971). And a factual determination by a fact finder can be sustained even where the only evidence offered to prove the fact is hearsay which was not objected to. *See Quick*, *supra*; *Skipper*, *supra*.

In matters appealed to the superior court from the Division, the findings of fact made by the Division "shall be conclusive and binding [on the superior court where] . . . supported by competent evidence." N.C. Gen. Stat. § 96-4(q) (2013).[1]

Here, Ms. Hyatt's testimony is relevant in this case because it tends to show that the patient under Petitioner's care did, in fact, fall from

1. We note that Employment Security Commission Regulations state that in hearings before an appeals referee, "the rules of evidence do not apply," however, the appeals referee shall consider factors such as "the right of the party against whom the evidence is offered to confront the witness against [her]." ESC Regulation No. 14.18(I). As to these rules, we further note that pursuant to 2011 N.C. Sess. Laws 401, effective 1 November 2011, the Employment Security Commission of North Carolina became the Division of Employment Security within the North Carolina Department of Commerce.

her wheelchair. At the hearing before the appeals referee, Employer introduced the substance of Ms. Hyatt's testimony through her written statement rather than by calling her as a witness. The appeals referee gave Petitioner's attorney opportunities throughout the course of the hearing to object to the introduction of Ms. Hyatt's written statement, and Petitioner could have done so on the basis that she should be afforded the opportunity to confront the witness. She was expressly asked by the referee whether there was any objection to Ms. Hyatt's statement being allowed into evidence, to which she responded, "No." Ms. Hyatt's statement was made part of the evidentiary record as an exhibit, "for whatever evidentiary value they may hold[,]" over no objection from Petitioner. Also, when the referee questioned Petitioner based on Ms. Hyatt's statements, Petitioner raised no objection. Accordingly, we hold that the appeals referee properly considered Ms. Hyatt's testimony offered in the form of her written statement. *See Natz v. Emp't Sec. Comm'n*,, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477 (holding that "[a] litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible"), *affirmed* by 290 N.C. 473, 226 S.E.2d 340 (1976).

Petitioner argues that she did object to Ms. Hyatt's statement by raising hearsay arguments on appeal from the appeals referee's decision to the Board of Review[2] and on appeal before the superior court. Here, the Board of Review and superior court were acting as reviewing courts. N.C. Gen. Stat. § 96-15(e) permits the Board of Review to "affirm, modify, or set aside any decision of an appeals referee" and to "make a decision on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence[.]" In *Nantz*, the petitioner failed to object during the evidentiary phase of the matter and therefore waived appellate review. 28 N.C. App. at 630, 222 S.E.2d at 477. Likewise,

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2. Petitioner's brief from before the Board of Review was not initially included in the record on appeal filed in this Court. However, Appellant's brief stated (1) that Petitioner did not object at the administrative hearing or at any point prior to her judicial appeal and (2) that it was too late for her to raise her hearsay arguments upon appeal to the superior court. On 20 January 2015, Petitioner filed a N.C. R. App. P. 9(b)(5) supplement to the printed record on appeal to include her brief filed with the Board of Review. On 18 February 2015, Appellants moved to strike Petitioner's Rule 9(b)(5) supplement to the printed record, arguing that it was not filed with or before the Superior Court when it made its decision and pursuant to Rule 9(a)(2)(d) & (e) and Rule 9(b)(5) cannot be included in the record on appeal to this Court. However, as it was supplemented to the record in direct response to Appellants' waiver argument, we consider Appellee's brief before the Board of Review, pursuant to N.C. R. App. P. 2 and deny Appellant's motion to strike.

here, the only evidence was taken before the appeals referee. The Board of Review decided the issue based on the evidentiary record before it without taking "additional evidence" and the superior court "heard the argument of the parties, examined the Record on Appeal and review the evidence therein contained." Therefore, the only time at which Petitioner could have raised a hearsay argument, so that the error could be corrected, was before the appeals referee when all the evidence in this matter was collected.

Petitioner further argues that she preserved her hearsay argument at the hearing before the referee because she argued that Employer had not met his burden and the only competent evidence before the referee was Petitioner's testimony. However, Petitioner never objected specifically to the introduction of Ms. Hyatt's statement when it was being introduced, and, therefore, Ms. Hyatt's statement became competent evidence upon which the appeals referee could base a decision.

Petitioner also argues that her objection was preserved because objections based on questions presented by the appeals referee are automatically preserved pursuant to N.C. Gen. Stat. § 1A-1, Rule 46(a)(3).[3] We note that Rule 46 could be applicable to the appeals referee's questioning of Petitioner regarding the content in Ms. Hyatt's statements. However, Rule 46 does not preserve any objection to the introduction of the statement itself.

B. Termination for misconduct

[2] "In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006). "A determination that an employee has engaged in misconduct under [N.C. Gen. Stat. § 96-14.6] is a conclusion of law." *Bailey v. Div. of Empl. Sec.*, ___ N.C. App. ___, ___, 753 S.E.2d 219, 221 (2014).

A claimant is presumed to be entitled to unemployment benefits, but this is a rebuttable presumption, with the burden on the employer to show circumstances which would disqualify the claimant. *Intercraft Indus. Corp v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982). An individual can be disqualified for employment benefits if they are determined to be terminated from employment for "misconduct connected

3. Rule 46(a)(3) states that "[n]o objections are necessary with respect to questions propounded to a witness by the court or a juror but it shall be deemed that each such question has been properly objected to and that the objection has been overruled and that an exception has been taken to the ruling of the court by all parties to the action." N.C. Gen. Stat. § 1A-1, Rule 46(a)(3) (2013).

with the work." N.C. Gen. Stat. § 96-14.6(a)(2013). "Misconduct" is defined as follows:

> (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
>
> (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

N.C. Gen. Stat. § 96-14.6(b).[4] The employer has the burden of showing the employee's disqualification from unemployment benefits on the basis of misconduct. *Lynch v. PPG Indus.*, 105 N.C. App. 223, 225, 412 S.E.2d 163, 165 (1992).

The Board of Review determined that Petitioner was disqualified from receiving unemployment benefits because she was discharged from employment as a nursing assistant for work-related "misconduct," namely that she failed to report to a supervising nurse when a resident under her care fell and suffered a broken ankle. The trial court stated that only hearsay evidence supported the Board of Review's findings of fact concerning the fall and that, without these findings, the Board of Review's conclusion denying Petitioner unemployment benefits could not be sustained:

> 3. Claimant was discharged from this job for failing to report a fall by a resident.
>
> . . . .
>
> 7. At approximately 7 p.m., [the resident] had bruising and swelling on her right ankle and foot. The employer thought the resident had merely bumped her foot on something. However, as the employer began to ask questions of staff, she learned the resident had fallen while in the care of the claimant. Tabitha Hyatt, another certified nursing assistant had assisted the claimant with placing the resident back into her wheelchair. Ms. Hyatt wrote

4. What constituted "misconduct" was previously defined in N.C. Gen. Stat. § 96-14. However, this statute was repealed by Session Laws 2013-2, s.2(a), effective 1 July 2013, and replaced by N.C. Gen. Stat. § 96-14.1 *et seq.*

> a statement for the employer which stated in pertinent part: that as she was walking up the hall, the claimant approached her and asked her for her help. Ms. Hyatt and the claimant walked to room 200. The resident was in the bathroom and the claimant asked Ms. Hyatt to help her get the resident up. The resident was on the floor when Ms. Hyatt entered the room. A copy of Ms. Hyatt's statement in its entirety is a part of the record and marked Commission exhibit 3H.
>
> . . . .
>
> 10. The resident's slip, even by claimant's explanation that she required assistant to put the resident back in her chair required reporting to the employer. The claimant was concerned about injury to the resident because she asked the resident if she was ok and noted that the resident did not complain of pain.

Ms. Hyatt's statement says that she observed the resident on the floor. Ms. Dunaway testified for Employer that the resident was in Petitioner's care at the time of the incident and Petitioner never reported the fall to Employer. The unchallenged findings further state that it was Employer's policy that required all residents "to be assessed by a nurse prior to being picked up from the floor after a fall[;]" that "an employee may be discharged immediately when his presence or conduct constitutes a significant problem or when his conduct is detrimental to the . . . residents[;]" and that "any . . . physical abuse to residents . . . will result in dismissal on the first offense[.]" Petitioner waived any hearsay objections to Ms. Hyatt's statement and Ms. Hyatt's statement, along with corroborating testimony from Ms. Holloway, support the contested Board of Review's findings. We hold that these findings support the Board of Review's determination that Employer met its burden to show that Petitioner was discharged from her employment for "misconduct" and was properly denied benefits pursuant to N.C. Gen. Stat. § 96-14.6.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order overruling the Board of Review's determination that Petitioner was discharged from her employment for misconduct related to her employment and thereby disqualified for unemployment benefits.

REVERSED.

Judges ELMORE and GEER concur.

STATE v. LOWE

[242 N.C. App. 335 (2015)]

STATE OF NORTH CAROLINA
v.
DAVID MATTHEW LOWE

No. COA14-1360

Filed 21 July 2015

1. Search and Seizure—residence—warrant—probable cause—marijuana residue found in bag in garbage—anonymous tip

The trial court did not err by concluding the warrant authorizing the search of a residence was supported by probable cause. Based on the totality of circumstances, the presence of marijuana residue found in a bag pulled from Turner's garbage, the anonymous tip that Turner was "selling, using and storing" narcotics in his home, and Turner's history of drug-related arrests, in conjunction, formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence.

2. Search and Seizure—motion to suppress evidence—probable cause—search of vehicle exceeded scope of warrant

The trial court erred in a drugs case by denying defendant's motions to suppress evidence. Although a warrant was supported by probable cause, the search of a visitor's vehicle in the driveway exceeded the scope of the warrant for the residence. The underlying judgments were vacated and remanded for further proceedings.

Appeal by defendant from judgments entered 8 July 2014 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 5 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Daphne Edwards for defendant-appellant.

INMAN, Judge.

This appeal concerns the validity of a search warrant for a home and the scope of that warrant, as related to a vehicle in the driveway not owned or controlled by the resident of the home.

David Matthew Lowe ("defendant") appeals from judgments entered after he pled guilty to one count each of trafficking in

methylenedioxymethamphetamine ("MDMA") by possession, trafficking in MDMA by transportation, and possession with intent to sell and deliver lysergic acid diethylamide ("LSD"). On appeal, defendant argues that the trial court erred by denying his motions to suppress because: (1) the search warrant issued for the residence where the vehicle containing defendant's belongings was parked lacked probable cause; and (2) even if the search warrant were validly issued, the search of the vehicle exceeded the scope of the warrant.

Although we conclude that the warrant was supported by probable cause, we agree with defendant that the search of the vehicle exceeded the scope of that warrant. Therefore, we reverse the trial court's denial of defendant's motion to suppress, vacate the underlying judgments, and remand for further proceedings.

Background

On 24 September 2013, Detective K.J. Barber ("Det. Barber") of the Raleigh Police Department filed an affidavit in support of a search warrant with the local magistrate. In the affidavit, Det. Barber swore to the following facts:

> In September of 2013, I received information that a subject that goes by the name "Mike T" was selling, using and storing narcotics at 529 Ashbrooke [sic] Dr. Through investigative means, I was able to identify Terrence Michael Turner as a possible suspect.
>
> Terrence Michael [T]urner, AKA: Michael Cooper Turner has been charged with PWISD Methylenedioxymethamphetamine, Possess Dimethyltryptamine, PWISD Psylocybin, PWISD Cocaine, Possess Heroin, PWIMSD Schedule I, Maintain a Vehicle/Dwelling, Trafficking in MDMA, Conspire to sell Schedule I and other drug violations dating back to 2001.
>
> On 9/24/2013 I conducted a refuse investigation at 529 Ashebrook Dr. St [sic] Raleigh, NC 27609. The 96 gallon City of Raleigh refuse container was at the curb line in front of 529 Ashebrook Dr.
>
> Detective Ladd removed one bag of refuse from the 96 gallon container and we took it to a secured location for further inspection. Inside the bag of refuse, I located correspondence to Michael Turner of 529 Ashebrook Dr. Raleigh, NC 27600, also in this bag of refuse, I located

> a small amount of marijuana residue in a fast food bag, which tested positive as marijuana utilizing a Sirche #8 field test kit.

Based on these facts and his experience and training as a narcotics officer, Det. Barber averred to his belief that illegal narcotics, including marijuana, were being stored in and/or sold from Turner's residence. Det. Barber's affidavit described the residence to be searched as 529 Ashebrook Drive, but did not specify any vehicles to search. The magistrate issued a warrant to search 529 Ashebrook Drive.

On 25 September 2013, Det. Barber and other officers executed a search of the residence. Inside the home the officers encountered Turner and two overnight guests—defendant and defendant's girlfriend, Margaret Doctors ("Ms. Doctors"). Parked in the driveway of Turner's home was a Volkswagen rental car, which the officers learned was being leased by Ms. Doctors and operated by both defendant and Ms. Doctors. The officers were aware at that time that Turner had no connection to the vehicle, other than it being parked in his driveway. A search of the Volkswagen revealed a book bag containing documents with defendant's name and controlled substances.[1]

Defendant was indicted on 2 December 2013. Prior to trial, he moved to suppress all evidence against him on two grounds: (1) the warrant authorizing the search of Turner's residence was not supported by probable cause, and (2) even if the search warrant were validly issued, the search of the Volkswagen exceeded the scope of the warrant. The trial court conducted an evidentiary hearing on these motions on 7 and 8 July 2014. At the hearing, Det. Barber testified that he surveilled Turner's residence multiple times before applying for the search warrant, but never saw the Volkswagen until the day of the search. He also testified that he had never seen defendant at Turner's residence prior to the day of the search. Det. Barber said that it was normal protocol for police to search vehicles located on the premises of a residence for which they had a search warrant.

The trial court denied defendant's motions to suppress. It first concluded that the tip given to Det. Barber, corroborated by the presence of marijuana residue found in Turner's trash, was sufficient to establish probable cause to search his residence for the presence of narcotics. Second, the trial court concluded that the search of the Volkswagen did

1. As will be discussed in more detail below, the precise nature of the contraband found in the vehicle is unclear from the record.

not exceed the scope of the warrant because the vehicle was parked within the curtilage of the home, which was specifically identified by address and physical description in the warrant.

After the trial court denied his motions to suppress, defendant pled guilty to all charges. He was sentenced to 35 to 51 months imprisonment for each count of trafficking in MDMA, which were to run concurrently, as well as 7 to 18 months imprisonment on the charge of possession with intent to sell and deliver LSD, set to run consecutive to the previous sentence. Defendant filed timely notice of appeal from these judgments.

I. Probable Cause

[1] Defendant first argues that the warrant authorizing the search of Turner's residence was not supported by probable cause, and therefore any evidence gained from that search should have been suppressed.[2] We disagree.

"Our scope of review of an order denying a motion to suppress evidence is 'whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Johnson*, 98 N.C. App. 290, 294, 390 S.E.2d 707, 709-10 (1990) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review the trial court's conclusions of law *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007).

Although we review the trial court's conclusions of law *de novo*, we must be cognizant of the notion that "great deference should be paid a magistrate's determination of probable cause and that after-the-fact scrutiny should *not* take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (emphasis added). In addressing whether a search warrant is supported by probable cause, we apply a "totality of the circumstances" test, *State v. Beam*, 325 N.C. 217, 220-21, 381 S.E.2d 327, 329 (1989), by which an affidavit is sufficient if it establishes "reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256. "Probable cause does not mean actual and positive cause nor import absolute certainty," *id.*, and as such, "the duty of a reviewing

2. The State does not contest on appeal whether defendant has standing to challenge the officers' search of Turner's home.

court is simply to ensure that the magistrate had a 'substantial basis' to conclude that probable cause existed," *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)).

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Riggs, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (alterations in original) (citations and quotation marks omitted). However, the magistrate may not act merely as a "rubber stamp for the police." *State v. Bulla*r, 267 N.C. 599, 601, 148 S.E.2d 565, 567 (1966).

Defendant cites *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), in support of his argument that the search warrant here was issued without probable cause. In *Benters*, our Supreme Court held that where an unidentified informant's tip that the defendant was growing marijuana "amounts to little more than a conclusory rumor," the State is not "entitled to any great reliance on it," and instead, "the officers' corroborative investigation must carry more of the State's burden to demonstrate probable cause." *Id.* at 669, 766 S.E.2d at 600. The State in *Benters* argued that officers presented corroborative evidence including: (1) utility records indicating power consumption consistent with a marijuana growing operation in a residence owned by the defendant; (2) the existence in plain view of gardening equipment such as potting soil, fertilizer, seed trays, and pump type sprayers in the absence of any gardens or potted plants on the outside of the home; and (3) the officers' expertise and knowledge of the defendant. *Id.* at 669, 766 S.E.2d at 601. After examining these contentions under a "totality of the circumstances" test, the Court held that:

> [T]he officers' verification of mundane information, . . . statements regarding [the] defendant's utility records, and the officers' observations of [the] defendant's gardening supplies are not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause, notwithstanding the officers' professional training and experience. Furthermore, the material allegations

> set forth in the affidavit are uniformly conclusory and fail to provide a substantial basis from which the magistrate could determine that probable cause existed.

Id. at 673, 766 S.E.2d at 603. Specifically with regard to the gardening equipment, the Court noted that "[n]othing here indicates a fair probability that contraband or evidence of a crime will be found in a particular place beyond [the officer's] wholly conclusory allegations." *Id.* at 672, 766 S.E.2d at 602 (quotation marks omitted).

The facts before us differ significantly from those in *Benters*. Here, Det. Barber conducted a refuse search of defendant's trash, the legality of which is not contested. In one of the bags, Det. Barber found correspondence to Turner at the address in question and a small amount of marijuana residue in a fast food bag.

Defendant concedes in his brief on appeal that "residue of marijuana might be indicative of drug use," but he argues that this evidence did not sufficiently corroborate the anonymous tip that Turner was selling drugs. This distinction is irrelevant. It is well-established in North Carolina that "a residue quantity of a controlled substance, despite its not being weighed, is sufficient to convict a defendant of possession of the controlled substance[.]" *State v. Williams*, 149 N.C. App. 795, 798-99, 561 S.E.2d 925, 927 (2002); *see also State v. Thomas*, 20 N.C. App. 255, 257, 201 S.E.2d 201, 202 (1973). Possession of controlled substances in violation of N.C. Gen. Stat. § 90-95 (2013) was identified by Det. Barber in the affidavit supporting the warrant as the specific crime for which he sought further evidence in the search of Turner's home. The affidavit also makes clear that Det. Barber received information that Turner was "selling, *using* and *storing* narcotics" at his residence.

Therefore, unlike in *Benters*, the magistrate here was presented with direct evidence of the crime for which the officers sought to collect evidence. Although there were many reasons the gardening equipment may have been outside the defendant's house in *Benters*, the presence of marijuana residue in defendant's trash offers far fewer innocent explanations. As our Supreme Court noted in *Sinapi*, when faced with evidence collected from a refuse search, a magistrate may "rely on his personal experience and knowledge related to residential refuse collection to make a practical, threshold determination of probable cause," and he is "entitled to infer that the garbage bag in question came from [the] defendant's residence and that items found inside that bag were probably also associated with that residence." *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (holding that a search warrant was supported by probable

cause where the defendant had been arrested twice for drug-related offenses and eight marijuana plants were recovered from a garbage bag outside the defendant's home). Although the amount of marijuana in this case differs substantially from that in *Sinapi*, the reasoning establishing probable cause is the same. While the classification of crimes as misdemeanors or felonies may differ based on the quantity of contraband, the threshold determination of whether behavior is criminal or not is binary; possession of eight marijuana plants is equally as unlawful as possession of marijuana residue. *See Williams*, 149 N.C. App. at 798-99, 561 S.E.2d at 927. Defendant offers no legal support for the argument that search warrants must be supported by probable cause of a certain type or severity of crime as opposed to criminal behavior in general.

Similarly to our Supreme Court in *Sinapi*, many courts in other jurisdictions have recognized that "the recovery of drugs or drug paraphernalia from the garbage contributes significantly to establishing probable cause." *U.S. v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) (holding that marijuana seeds and stems found in the defendant's garbage were sufficient standing alone to establish probable cause because "simple possession of marijuana seeds is itself a crime under both federal and state law"); *see also U.S. v. Colonna*, 360 F.3d 1169, 1175 (10th Cir. 2004) (holding that evidence of drugs in the defendant's trash cover, while potentially indicating only personal use, was sufficient to establish probable cause because "all that is required for a valid search warrant is a fair probability that contraband or evidence of a crime will be found in a particular place") (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 543 (1983)).

Accordingly, based on the totality of the circumstances, we hold that the presence of marijuana residue found in a bag pulled from Turner's garbage, the anonymous tip that Turner was "selling, using and storing" narcotics in his home, and Turner's history of drug-related arrests, in conjunction, formed a substantial basis to conclude that probable cause existed to search his home for the presence of contraband or other evidence. *See Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365; *Beam*, 325 N.C. at 221, 381 S.E.2d at 329. Therefore, we affirm the trial court's denial of defendant's motions to suppress on this ground.

II. Search of the Vehicle

[2] Defendant next argues that the search of the Volkswagen in Turner's driveway exceeded the scope of the warrant issued to search Turner's residence. After careful consideration, we agree.

There is long-standing precedent in North Carolina and other jurisdictions that, "*[a]s a general rule*, 'if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car.' " *State v. Courtright*, 60 N.C. App. 247, 249, 298 S.E.2d 740, 742 (1983) (emphasis added) (quoting *State v. Reid*, 286 N.C. 323, 326, 210 S.E.2d 422, 424 (1974)); *see also State v. Logan*, 27 N.C. App. 150, 151, 218 S.E.2d 213, 214-15 (1975). Because "[a]uthority to search a house gives officers the right to search cabinets, bureau drawers, trunks, and suitcases therein, though they were not described," *Reid*, 286 N.C. at 326, 210 S.E.2d at 424, it follows that the search of other personal property belonging to the defendant—such as a vehicle—would also be authorized, assuming that the property was within the curtilage of the home. *See*, *e.g.*, *Courtright*, 60 N.C. App. at 250-51, 298 S.E.2d at 742-43 (holding that the search of the defendant's vehicle parked six or seven inches into the yard of the defendant's residence was lawful even though the vehicle was not identified in the search warrant because it was within the curtilage of the premises, which the Court noted is an area "within which the owner or possessor assumes the responsibilities and pleasures of ownership or possession").

Here, it is undisputed that the Volkswagen parked in Turner's driveway was within the curtilage of the residence that the officers were authorized to search pursuant to the warrant. Therefore, the State argues that the holdings of *Courtright*, *Reid*, and *Logan* require us to affirm the trial court's denial of defendant's motion to suppress. We are unpersuaded.

The crucial fact distinguishing this case from *Courtright*, *Reid*, and *Logan* relates to law enforcement officers' knowledge about the ownership and control of the vehicle. In each of the cases relied on by the State, the individual associated with the premises identified in the search warrant unquestionably owned and operated the vehicle that was searched at that location. *See Courtright*, 60 N.C. App. at 249, 298 S.E.2d at 741 (1983) (noting that the officers had observed the vehicle at the defendant's home and knew it was registered in the defendant's name before searching it); *Reid*, 286 N.C. at 326-27, 210 S.E.2d at 424 (emphasizing "the wisdom of the cases which hold a search warrant for contraband on specifically described premises, contemplates the search of any automobile *belonging to the owner* and parked thereon") (emphasis added); *Logan*, 27 N.C. App. at 151, 218 S.E.2d at 214 (characterizing the vehicle searched at the defendant's premises as the "defendant's automobile").

Here, the target of the search was Turner. However, officers knew prior to searching the Volkswagen in the driveway that it did not belong to Turner. At the evidentiary hearing on defendant's motions to suppress, Det. Barber testified that prior to the search, he had never seen the Volkswagen at Turner's residence. He further testified that after the officers went into Turner's home, they established that the vehicle was being rented by Ms. Doctors, operated by defendant and Ms. Doctors, and that Turner had neither dominion nor control over the vehicle.

These facts distinguish this case from *Courtright*, *Reid*, and *Logan*. The reasoning justifying the holdings of those opinions simply does not apply here. We note that our appellate courts have yet to determine the precise issue raised in this case—whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant. However, we find guidance in the holdings from this Court addressing the constitutionality of searches of persons at the premises identified in a validly executed search warrant and from other jurisdictions addressing the dispositive issue before us.

The seminal case on the constitutionality of searching visitors at a location identified in a valid warrant is *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238 (1979). In *Ybarra*, police officers obtained a warrant supported by probable cause to search a tavern at which the defendant was a patron. *Id.* at 88, 62 L. Ed. 2d at 243. The defendant was searched pursuant to that warrant, and the officers found drugs in his pocket. *Id.* at 89, 62 L. Ed. 2d at 243. The Court held:

> It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91, 62 L. Ed. 2d at 245 (citations omitted).

Because "[t]he Fourth and Fourteenth Amendments protect 'the legitimate expectations of privacy' of persons, not places," *id.*, we are not persuaded by the State's argument that the search of the Volkswagen was permissible under the scope of the warrant solely because the vehicle was within the curtilage of the residence to be searched. The State's proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search. We decline to stray so far from the reasoning of *Ybarra* and our cases applying that decision. *See*, *e.g.*, *State v. Smith*, 222 N.C. App. 253, 729 S.E.2d 120 (2012); *State v. Cutshall*, 136 N.C. App. 756, 526 S.E.2d 187 (2000).

Instead, we find persuasive the reasoning of courts in other jurisdictions holding that a warrant authorizing the search of a house or business does not automatically cover the search of a vehicle owned, operated, or controlled by a stranger to the investigation. *See*, *e.g.*, *State v. Barnett*, 788 S.W.2d 572, 575 (Tex. Crim. App. 1990) (citing *Ybarra* in support of its holding that "the presence of an automobile on suspected premises, without more, does not give rise to search that automobile"); *Dunn v. State*, 292 So.2d 435 (Fla. Dist. Ct. App. 1974) (holding that a search of the defendant's van was unlawful even though it was parked in the driveway of the premises identified in a valid search warrant because the officers had no indication that the vehicle was connected in any way to the target of the search). We note that the United States Courts of Appeals are split with regard to whether the target of the investigation must actually own the vehicle in question, or whether objective indicia of control are sufficient to justify the search. *See*, *e.g.*, *U.S. v. Pennington*, 287 F.3d 739, 745 (8th Cir. 2002) (noting that a warrant to search a residence includes vehicles within the curtilage "except, for example, the vehicle of a guest or other caller"); *U.S. v. Patterson*, 278 F.3d 315, 318-19 (4th Cir. 2002) (noting that the scope of a search warrant includes "automobiles on the property or premises that are owned by or are under the dominion and control of the premises owner or which reasonably appear to be so controlled"); *U.S. v. Evans*, 92 F.3d 540, 543-44 (7th Cir. 1996) (holding that "it does not matter whose [vehicle] it is unless it obviously belonged to someone wholly uninvolved in the criminal activities going on in the house").

Based on the foregoing principles, we conclude that the search of the Volkswagen exceeded the scope of the warrant to search Turner's residence for contraband. Therefore, the evidence found in the vehicle

is subject to suppression. *See State v. Larkin*, __ N.C. App. __, __, 764 S.E.2d 681, 687 (2014).

Nevertheless, the State argues that the evidence gained from the search of the Volkswagen should not be excluded, because it falls under the "good faith exception" to the exclusionary rule. N.C. Gen. Stat. § 15A-974(a)(2) (2013) provides "[e]vidence shall not be suppressed . . . if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful." The State contends that because Det. Barber testified it was his department's policy to search all vehicles within the curtilage of the premises for which they had a search warrant, regardless of the vehicle's connection to the target of the search, the officers had an "objectively reasonable, good faith" belief that the search of the Volkswagen was permissible. We disagree.

The good faith exception to the exclusionary rule stems from the United States Supreme Court's holding in *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677 (1984). In declining to apply the exclusionary rule where the investigating officers acted in objectively reasonable reliance on a warrant issued by a magistrate which was later held to be invalid, the Court reasoned that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921, 82 L. Ed. 2d at 697. As our Supreme Court has stated, "[t]he exclusionary rule was designed to deter police misconduct, not a judge's errors." *State v. Welch*, 316 N.C. 578, 588, 342 S.E.2d 789, 794 (1986).

Here, contrary to the State's contention, the error in searching the Volkswagen lies solely with the officers conducting that search, not the magistrate who issued the warrant for Turner's home. As evidenced by Det. Barber's testimony that he had seen neither the Volkswagen nor defendant prior to the execution of the search, it is evident that the magistrate had no knowledge of them either. Therefore, because the misconduct in this case is attributable to the police (either in the form of their internal policies, as Det. Barber contended, or the isolated actions of the officers in this case), the good faith exception to the exclusory rule is inappropriate here.

In sum, we hold that the search of the vehicle exceeded the scope of the search warrant and violated defendant's rights under the Fourth Amendment. Accordingly, we reverse the trial court's denial of defendant's motion to suppress evidence obtained from the vehicle.

Finally, we note that the record raises the question of whether contraband attributable to defendant was found during the search of Turner's home, which we held above was valid.[3] The inventory of items seized does not specify which items were found in the vehicle, which were found in the home, or where in the home items were found. Because we are unable to determine which, if any, of defendant's convictions appealed were based on evidence gained from the valid search of the home, we remand this matter to the trial court to determine what portion of the contraband was subject to suppression consistent with this decision and the resulting effect on each of the charges for which defendant was convicted. If the trial court is unable to make a determination as to what portion of the contraband was found in the house as opposed to the vehicle, then all underlying judgments must be vacated.

Conclusion

After careful review, we conclude that the warrant to search Turner's residence was valid and supported by probable cause. However, the search of the Volkswagen exceeded the scope of the warrant, and any evidence obtained thereby is subject to suppression.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Judges BRYANT and DAVIS concur.

3. During the suppression hearing, counsel for defendant conceded that contraband was found in the room that defendant and his companion were occupying. Neither defendant nor the State addresses in their respective briefs this fact or how it might affect the analysis of the legal issues raised on appeal.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. COA14-1345

Filed 21 July 2015

1. Juveniles—interrogation—right to have parent present—ambiguous request

Where a 16-year-old juvenile asked an interrogating officer, "Can I call my mom?" the trial court's findings that the juvenile's request was at best ambiguous and that he never made an unambiguous request to have his mother present were supported by competent evidence.

2. Juveniles—interrogation—right to have parent present—ambiguous request—clarification required

The trial court erred in concluding that the officer complied with the provisions of N.C.G.S. § 7B-2101 in questioning a juvenile where a 16-year-old juvenile asked an interrogating officer, "Can I call my mom?" His request to call his mother was ambiguous, and the officer was required to clarify whether he was invoking his right to have a parent present during the interview.

Appeal by Defendant from order entered 20 February 2014 by Judge Forrest D. Bridges and judgment entered 4 June 2014 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 June 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jennifer St. Clair Watson, for the State.

Goodman Carr, PLLC, by W. Rob Heroy, for Defendant.

STEPHENS, Judge.

In this appeal, we consider a matter of first impression: Whether an ambiguous statement made by a juvenile which implicates his statutory right to have a parent present during a custodial interrogation requires that the law enforcement officer conducting the interview clarify the meaning of the juvenile's statement before continuing her questioning. For the reasons discussed herein, we conclude that it does.

Factual and Procedural Background

This appeal arises from Defendant Felix Ricardo Saldierna's attempt to suppress a confession he gave to police officers while in custody. On 17 and 18 December 2012, several homes in Charlotte were broken into, burglarized, and vandalized. Saldierna was arrested at his home in Fort Mill, South Carolina on 9 January 2013 in connection with those crimes. Saldierna, who was then 16 years old, was transported to Moss Justice Center in York County, South Carolina, where he was questioned by Detective Aimee[1] Kelly of the Charlotte-Mecklenburg Police Department ("CMPD"). Kelly conducted an interview with Saldierna in the booking area of the justice center. Audio of the entire interview was recorded ("the recording"). The recording reveals the following: Saldierna stated that he was bi-lingual, but read Spanish better than English. At the start of the interview, Saldierna told Kelly that his English was "good," but that he might ask her to explain some things more slowly. However, after this remark, Saldierna never clearly indicated that he did not understand Kelly's questions or statements.

Before asking Saldierna any questions about the crimes, Kelly read him his rights and asked him whether he understood them. During the interview, Kelly gave Saldierna written Juvenile Waiver of Rights forms in both English and Spanish. Kelly read each part of the English language form to Saldierna as he followed along on the forms in both languages. After reading each paragraph, Kelly asked Saldierna if he understood the right discussed in that paragraph and had him initial the copy of the form in English to indicate that he did. Kelly also asked Saldierna to confirm verbally that he understood each right as she read them to him. Saldierna answered "yeah" or "yes ma'am" to all but one of Kelly's inquiries. Due to the poor quality of the audio recording, Saldierna's response to Kelly's informing him of his right to have an attorney present during the interview is unintelligible, but he responded "yes ma'am" to Kelly's next statement and question, "If I want to have a lawyer with me during questioning one will be provided to me at no cost before any questioning. Do you understand that?"

Saldierna initialed each statement of rights on the form and the option "I DO wish to answer questions now WITHOUT a lawyer, parent, guardian, or custodian here with me" and signed the form. The transcript of the recording reveals the following exchange then occurred:

---

1. Kelly's first name is spelled "Aimee" in the hearing transcript, but the briefs of both parties and some other documents in the record on appeal spell her name "Amy."

K[elly]:	It is 1/9/13. It is 12:10PM. [unintelligible background talking among officers]
[Saldierna]:	Um, Can I call my mom?
K[elly]:	Call your mom now?
[Saldierna]:	She's on her um. I think she is on her lunch now.
K[elly]:	You want to call her now before we talk?
K[elly] [to other officers]:	He wants to call his mom.
[Saldierna]:	Cause she's on, I think she's on her lunch.
[Other officer]:	[unintelligible] He left her a message on her phone.
[Saldierna]:	But she doesn't speak English.

[conversation among officers]

K[elly]:	I have mine. Can he dial it from a landline you think?

[more unintelligible conversation among officers]

[Other officer]:	[S]tep back outside and we'll let you call your mom outside. [unintelligible]. You're going to have to talk to her. Neither one of us speak Spanish, ok.

[more unintelligible conversation among officers]

[Saldierna can be heard on phone. Call is not intelligible.]

[Sound of door closing].

K[elly]:	12:20: Alright Felix, so, let's talk about this thing going on. . . .

At this point, Kelly continued her interview with Saldierna, and, over the course of the next hour, he confessed his involvement in the incidents in Charlotte the previous December.

On 22 January 2013, Saldierna was indicted on two counts of felony breaking and entering and one count each of conspiracy to commit breaking and entering and conspiracy to commit common law larceny after breaking and entering.[2] On 9 October 2013, Saldierna moved to suppress his confession. The trial court, the Honorable Forrest D. Bridges, Judge presiding, heard the motion on 31 January 2014, and, at the conclusion of the hearing, orally denied Saldierna's motion. The court entered a written order memorializing that ruling on 20 February 2014 that contained the following findings of fact:

> 1. That Defendant was in custody.
>
> 2. That Defendant was advised of his juvenile rights pursuant to North Carolina General Statute § 7B-2101.
>
> 3. That Detective Kelly of the Charlotte-Mecklenburg Police Department advised Defendant of his juvenile rights.
>
> 4. That Defendant was advised of his juvenile rights in three manners. Defendant was advised of his juvenile rights in spoken English, in written English, and in written Spanish.
>
> 5. That Defendant indicated that he understood his juvenile rights as given to him by Detective Kelly.
>
> 6. That Defendant indicated he understood his rights after being given and reviewing a form enumerating those rights in Spanish.
>
> 7. That Defendant indicated he understood that he had the right to remain silent. Defendant understood that to mean that he did not have to say anything or answer any questions. Defendant initialed next to this right at number 1 on the English rights form provided to him by Detective Kelly to signify his understanding.

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2. Only these four indictments are included in the record on appeal. However, the transcript of plea lists five additional offenses, including breaking and entering, conspiracy, and larceny, which were dismissed by the State pursuant to the plea agreement. The file numbers of those offenses suggest that they arose from the events of December 2012.

8. That Defendant indicated he understood that anything he said could be used against him. Defendant initialed next to this right at number 2 on the English rights form provided to him by Detective Kelly to signify his understanding.

9. That Defendant indicated he understood that he had the right to have a parent, guardian, or custodian there with him during questioning. Defendant understood the word parent meant his mother, father, stepmother, or stepfather. Defendant understood the word guardian meant the person responsible for taking care of him. Defendant understood the word custodian meant the person in charge of him where he was living. Defendant initialed next to this right at number 3 on the English rights form provided to him by Detective Kelly to signify his understanding.

10. That Defendant indicated he understood that he had the right to have a lawyer and that he had the right to have a lawyer there with him at the time to advise and help him during questioning. Defendant initialed next to this right at number 4 on the English rights form provided to him by Detective Kelly to signify his understanding.

11. That Defendant indicated he understood that if he wanted a lawyer there with him during questioning, a lawyer would be provided to him at no cost prior to questioning. Defendant initialed next to this right at number 5 on the English rights form provided to him by Detective Kelly to signify his understanding.

12. That Defendant initialed a space below the enumerated rights on the English rights form that stated the following: "I am 14 years old or more and I understand my rights as explained by Detective Kelly. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below."

13. That Defendant's signature appears on the English rights form below the initialed portions of the form. Defendant's signature appears next to the date, 1-9-13, and

the time, 12:10. Detective Kelly signed her name as a witness below Defendant's signature.

14. That after being informed of his rights, informing Detective Kelly he wished to waive those rights, and signing the rights form, Defendant communicated to Detective Kelly that he wished to contact his mother by phone. Defendant was given permission to do so.

15. That Defendant attempted to call his mother, but was unable to speak to her.

16. That Defendant indicated that his mother was on her lunch break at the time he tried to contact her.

17. That Defendant did not at that time or any other time indicate that he changed his mind regarding his desire to speak to Detective Kelly. That Defendant did not at that time or any other time indicate that he revoked his waiver.

18. That Defendant only asked to speak to his mother.

19. That Defendant did not make his interview conditional on having his mother present or conditional on speaking to his mother.

20. That Defendant did not ask to have his mother present at the interview site.

21. That, upon review of the totality of the circumstances, the [c]ourt finds that Defendant's request to speak to his mother was at best an ambiguous request to speak to his mother.

22. That at no time did Defendant make an unambiguous request to have his mother present during questioning.

23. That Defendant never indicated that his mother was on the way or could be present during questioning.

24. That Defendant made no request for a delay of questioning.

Based upon those findings, the trial court made the following conclusions of law:

1. That the State carried its burden by a preponderance of the evidence that Defendant knowingly, willingly, and understandingly waived his juvenile rights.

> 2. That the interview process in this case was consistent with the interrogation procedures as set forth in North Carolina General Statute § 7B-2101.
>
> 3. That none of Defendant's State or Federal rights were violated during the interview conducted of Defendant.
>
> 4. That statements made by Defendant were not gathered as a result of any State or Federal rights violation.

On 4 June 2014, Saldierna came back before the trial court, the Honorable Jesse B. Caldwell, Judge presiding, and entered guilty pleas to two charges each of felony breaking and entering and conspiracy to commit breaking and entering, specifically reserving his right to appeal the denial of his motion to suppress. The court imposed a sentence of 6-17 months, suspended that sentence, and placed Saldierna on 36 months of supervised probation. Saldierna gave notice of appeal in open court.

Discussion

Saldierna argues that the trial court erred in denying his motion to suppress the confession he gave to Kelly. Specifically, Saldierna contends that: (1) his request to call his mother was an unambiguous invocation of his right to have a parent present during a custodial interrogation, and that, in the alternative, (2) if his request was ambiguous, due to Saldierna's status as a juvenile, Kelly was required to make further inquiries to clarify whether he actually meant that he was invoking his right to end the interrogation until his mother was present.

I. Standard of review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Likewise, "[t]o determine whether the interrogation has violated [the] defendant's rights, we review the findings and conclusions of the trial court." *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002).

Here, Saldierna fails to specify which findings of fact he challenges as unsupported by competent evidence, but he does assert that his request to call his mother "was not ambiguous[ ] and that he directly

sought to have a parent present [during the interview]." Accordingly, we consider whether competent evidence before the trial court supported findings of fact 18-22, which address that factual issue.

Saldierna alternatively contends that, if his request to call his mother was ambiguous, Kelly was required to clarify whether Saldierna was invoking his right to have a parent present during a custodial interrogation as guaranteed by section 7B-2101. Finally, Saldierna argues that the trial court did not appropriately consider his juvenile status in determining that his waiver of rights was knowing and voluntary. As with his arguments regarding the trial court's findings of fact, Saldierna's challenges to the trial court's conclusions of law are not clearly identified and delineated. However, his arguments appear to implicate both conclusions of law 1 and 2, and thus, we further consider whether each is supported by the trial court's findings of fact.

II. Findings of fact 18-22: clarity of request to have a parent present during interview

[1] Saldierna first contends that his question— "Can I call my mom?" —is similar to the unambiguous requests to have a parent present made by the juvenile defendants in *Branham* and *State v. Smith*, 317 N.C. 100, 343 S.E.2d 518 (1986), o*verruled in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). We find both cases distinguishable and hold that the trial court's findings of fact, specifically that Saldierna's request to speak to his mother was "at best an ambiguous request" and that Saldierna never made an "unambiguous request to have his mother present during questioning[,]" are supported by competent evidence.

In *Branham*, "[a]fter being advised of his juvenile rights, [the] defendant indicated and had the officers write on the form that he wanted his mother present. Although she was in the building at the time of the interrogation, the officers did not bring her to [the] defendant, but told him he could continue with his statement anyway." 153 N.C. App. at 93, 569 S.E.2d at 25. The defendant subsequently gave the officers a confession that was later admitted against him at trial. *Id.* This Court held that, "[b]ecause [the] defendant invoked his right to have a parent present during interrogation, all interrogation should have ceased. Since it did not, the trial court erred by denying [the] defendant's motion to suppress his statement, which was elicited in violation of [section] 7B-2101." *Id.* at 99, 569 S.E.2d at 29.

Similarly, in *Smith*, the "defendant, after being advised of his statutory right to have a parent present during police questioning, requested

that his mother be brought to the station." 317 N.C. at 107, 343 S.E.2d at 522. Despite a clear and undisputed request to wait until his mother arrived before the interrogation resumed, various police officers continued to provide the defendant information about what his co-defendant was claiming and to ask the defendant whether he wanted give his side of the story. *Id.* It was that ongoing engagement with the juvenile defendant following his clear request to have a parent present that resulted in a new trial for the defendant. *Id.* at 108, 343 S.E.2d at 522.

Here, in contrast, Saldierna made a request to call his mother, but made no unequivocal verbal request to have his mother present during questioning, as in *Smith*, nor did he make any written notation of that request on the waiver form he signed, as in *Branham*. A careful reading of Saldierna's arguments to this Court shows an alternative contention that his ambiguous request to call his mother should be interpreted in the totality of the circumstances as an invocation of his right to have a parent present during the interview. While we decline Saldierna's invitation to reach that interpretation, our discussion in Part III manifests our concern that this ambiguous statement calls into question the trial court's conclusion of law that no violation of his rights occurred.

III. Conclusion of law 2: compliance with section 7B-2101

[2] Saldierna's primary argument on appeal is that, if his request to call his mother was an ambiguous statement possibly implicating his right under section 7B-2101 to have a parent present during the custodial interrogation, Kelly was required to "clarify[his] desire to proceed without his mother" before she continued questioning him. We find Saldierna's contentions on this point persuasive.

In recognition of the special status of persons under the age of eighteen, our State's Juvenile Code provides specific interrogation procedures for juveniles:

> Any juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a) (2013).[3] Subsections (a)(1), (2), and (4) of this statute simply codify the so-called *Miranda* rights guaranteed to both adults and juveniles by the Fifth Amendment to the United States Constitution. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966) (holding that all persons subjected to custodial police interrogations must be advised of their rights to remain silent and to counsel and informed that any statements they make may be used against them in a later legal proceeding). However, subsection (a)(3) is *not* the codification of a federal constitutional right, but rather our General Assembly's grant to the juveniles of North Carolina of a purely statutory protection *in addition* to those identified in *Miranda*. *See, e.g.*, *State v. Fincher*, 309 N.C. 1, 12, 305 S.E.2d 685, 692 (1983) ("The failure to advise [the juvenile] defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude because this privilege is statutory in origin and does not emanate from the Constitution."); *see also State v. Yancey*, 221 N.C. App. 397, 399, 727 S.E.2d 382, 385 (2012). This distinction is critical to our resolution of the issue raised by Saldierna.

As both Saldierna and the State note in their appellate arguments, precedent firmly establishes that invocation of one's *Miranda* rights must be clear and unequivocal. Thus, a "suspect must unambiguously request counsel. . . . Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994) (citations and internal quotation marks omitted). Accordingly, the Court explicitly "decline[d] to adopt a rule requiring officers to ask clarifying questions" when a suspect's statement regarding counsel is ambiguous. *Id.* at 461, 129 L. Ed. 2d at 373. Likewise, our Supreme Court has held that a juvenile defendant must make an unambiguous statement in order to invoke his right to remain silent. *State v. Golphin*, 352 N.C. 364, 451-52, 533 S.E.2d 168, 225 (2000) (citing, *inter alia*, *Davis*), *cert denied*,

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3. The rights now guaranteed to juveniles pursuant to section 7B-2101 were originally codified in N.C. Gen. Stat. § 7A-595, which was repealed effective 1 July 1999 and then re-codified as part of our Juvenile Code. *See* 1998 N.C. Sess. Laws 202. Although the wording differed slightly in section 7A-595, the substance of its subsections (a)(1)-(4) are indistinguishable from that in subsections (a)(1)-(4) of section 7B-2101.

532 U.S. 931, 149 L. Ed. 2d 305 (2001). In that case, the Court found no error in the admission of the juvenile defendant's inculpatory statement made after his equivocal comment that "he didn't want to say anything about the jeep [connected to a murder]." *Id.* In sum, with regard to a defendant's *Miranda* rights to remain silent and to have an attorney present during a custodial interrogation, the law is clear: Such rights must be unequivocally invoked and, where a defendant makes an ambiguous statement touching on those rights, law enforcement officials have no obligation to clarify the defendant's intent or desire. Further, under *Golphin*, this rule applies with equal force to juvenile defendants. *See id.*

However, this case law regarding invocation of the *Miranda* rights guaranteed by the federal Constitution and codified in subsections 7B-2101(a)(1), (2), and (4) does *not* control our analysis of a juvenile's ambiguous statement possibly invoking the purely statutory right granted by our State's General Assembly in section 7B-2101(a)(3). Further, while our appellate courts have addressed the effect of a juvenile's unambiguous invocation of his right to have a parent present during a custodial interrogation, *see, e.g.*, *Smith*, 317 N.C. at 107, 343 S.E.2d at 522; *Branham*, 153 N.C. App. at 93, 569 S.E.2d at 25, we are aware of no case in this State which has considered the implications of a juvenile's *ambiguous* reference to that protection.

The State urges this Court to apply the same analysis and rule regarding ambiguity to a juvenile's right to have a parent present during questioning as we must apply to the *Miranda* rights codified in section 7B-2101(a). However, our review of the provisions of section 7B-2101 reveals an understanding by our General Assembly that the special right guaranteed by subsection (a)(3) is different from those rights discussed in *Miranda* and, in turn, reflects the legislature's intent that law enforcement officers proceed with great caution in determining whether a juvenile is attempting to invoke this right.[4]

First, and most obviously, the right to have a parent present during custodial interrogations is not a constitutional right provided to all suspects of whatever age. Instead, it is an *additional* protection specifically granted through our Juvenile Code to the children of our State, a right which goes beyond the protections offered to adult suspects during

4. We offer no opinion regarding Saldierna's assertion that a logical extension of the recent holding in *J.D.B. v. North Carolina*, __ U.S. __, 180 L. Ed. 2d 310 (2011), would require that law enforcement officers clarify ambiguous statements by juveniles which could implicate the *Miranda* rights included in section 7B-2101, and that, in turn *Golphin* must be overruled. That issue is not before us in the instant appeal.

interrogations. *See*, *e.g.*, N.C. Gen. Stat. § 7B-2101; *Fincher*, 309 N.C. at 12, 305 S.E.2d at 692. That our legislature would choose to extend such a special protection to the children of this State is neither surprising nor unique to the circumstance of police interrogations. As the United States Supreme Court has recently observed,

> [a] child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.
>
> Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on. Addressing the specific context of police interrogation, we have observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. Describing no one child in particular, these observations restate what any parent knows — indeed, what any person knows — about children generally.
>
> Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court's own generalizations, the legal disqualifications placed on children as a class — *e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent — exhibit the settled understanding that the differentiating characteristics of youth are universal.

J.D.B., __ U.S. at __, 180 L. Ed. 2d at 323-24 (citations, internal quotation marks, and ellipses omitted).[5]

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5. Because it is undisputed that Saldierna was in custody and thus entitled to the protections of section 7B-2101 at the time of his interview with Kelly, the United States

Indeed, section 7B-2101(b) recognizes that such "differentiating characteristics of youth" render certain juveniles particularly dependent on their parents (or other responsible adults) when faced with custodial interrogations:

> When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

N.C. Gen. Stat. § 7B-2101(b). In other words, juveniles under the age of 14 *cannot waive* their rights to have either a parental figure or an attorney present when making an inculpatory statement while in custody, an additional protection not available to adults in a like situation. *See id.* We also take notice that our General Assembly, like the United States Supreme Court, appears to have found persuasive concerns about the special vulnerability of juveniles subject to custodial interrogations: In May 2015, it amended this statute, applicable to offenses committed on or after 1 December 2015 to extend the special protections of subsection 7B-2101(b) to any juvenile "less than 16 years of age[.]" *See* 2015 N.C. Sess. Laws 58. While we recognize that this amendment would not have applied to Saldierna, even had it been in effect at the time of the then-16-year-old's custodial interrogation, we find it instructive that the lawmakers elected by the citizens of our State have determined that children only months younger than Saldierna *can never waive* the right to have a parental figure or attorney present during such a high-stakes and potentially life-altering procedure. This determination by our legislative branch lends significant additional support to our holding: That an ambiguous statement touching on a juvenile's right to have a parent

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Supreme Court's decision in *J.D.B.* is not directly applicable to Saldierna's argument on appeal. *See J.D.B.*, __ U.S. at __, 180 L. Ed. 2d at 318 (holding that "the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*"). Nonetheless, this discussion of the well-recognized distinctions between children and adults in various everyday and legal contexts provides a useful framework for understanding the provisions of section 7B-2101 and resolving the issues before us in this case.

present during an interrogation triggers a requirement for the interviewing officer to clarify the juvenile's meaning.[6]

In sum, in reviewing the trial court's order denying Saldierna's motion to suppress his confession, we conclude that the findings of fact regarding the ambiguous nature of Saldierna's statement, "Can I call my mom[,]" are supported by competent evidence. However, because we conclude that Saldierna's ambiguous statement required Kelly to clarify whether he was invoking his right to have a parent present during the interview, we hold that the trial court erred in concluding that Kelly complied with the provisions of section 7B-2101. Accordingly, we reverse the trial court's order, vacate the judgments entered upon Saldierna's guilty pleas, and remand to the trial court with instructions to grant the motion to suppress and for further proceedings.

VACATED, REVERSED, and REMANDED.

Judges BRYANT and DIETZ concur.

6. We find telling Kelly's response when, just after asking to call his mother, Saldierna explained that he believed she was on her lunch break at that time:"You want to call her *now before we talk*?"(Emphasis added). Kelly's question indicates that she believed Saldierna *might be* asking to delay the interview, at least until he had a chance to speak to his mother. The trial court's unchallenged finding of fact establishes that Saldierna was not able to reach his mother before Kelly resumed her questioning.

STATE v. WILLIAMS

[242 N.C. App. 361 (2015)]

STATE OF NORTH CAROLINA
v.
TEON JAMELL WILLIAMS, DEFENDANT

No. COA14-1101

Filed 21 July 2015

1. Drugs—amended indictment—identity of controlled substance—essential element of crime

The trial court erred by allowing the State to amend Count One of the indictment charging defendant with possession with intent to manufacture, sell, or deliver a Schedule 1 substance by changing the name of the substance from "Methylethcathinone" to "4-Methylethcathinone." The identity of the controlled substance is an essential element of the crime. The amendment, which added an essential element, therefore was a substantial alteration and impermissible. The Court of Appeals vacated defendant's conviction for this charge.

2. Drugs—indictment—possession with intent to manufacture, sell, or deliver a Schedule 1 substance—catch-all provision

The Court of Appeals rejected defendant's argument that Count Two of the indictment charging him with possession with intent to manufacture, sell, or deliver a Schedule 1 substance was defective. The indictment was not required to state that the substances at issue were Schedule 1 solely by virtue of their conformity with characteristics set forth in the "catch-all" provision of N.C.G.S. § 90-89(5)(j).

3. Drugs—maintaining a dwelling—motion to dismiss

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. The State presented sufficient evidence that defendant resided at the place where the substance was seized and that the residence was being used for keeping or selling controlled substances.

Appeal by defendant from judgments entered 10 January 2014 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 3 February 2015.

Roy Cooper, Attorney General, by Richard E. Slipsky, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Hannah H. Love, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Teon Jamell Williams ("Defendant") appeals from his convictions for two counts of possession with intent to manufacture, sell, or deliver ("PWIMSD") a Schedule I substance, one count of maintaining a dwelling for the purpose of keeping or selling a controlled substance, and having attained the status of an habitual felon. On appeal, he argues that the trial court erred in (1) allowing the State to amend one count of its indictment charging Defendant with PWIMSD; (2) entering judgment on the two counts of PWIMSD because the indictment, even as amended, was fatally defective such that the trial court lacked subject matter jurisdiction; (3) denying his motion to dismiss one of the counts of PWIMSD; and (4) denying his motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. After careful review, we find no error in part and vacate in part.

Factual Background

The State presented evidence at trial tending to establish the following facts: In the spring of 2013, Defendant and Laura Morrison ("Morrison") were living together in a mobile home on Oak Knoll Drive in Iredell County, North Carolina with Morrison's children. Both Defendant and Morrison were on supervised probation at the time, and Morrison's probation officer, Randy McDaniel ("McDaniel"), arranged to conduct a search of the residence pursuant to a condition of Morrison's probation that she submit to warrantless searches of her person, property, vehicle, or residence conducted by a probation officer at reasonable times. McDaniel proceeded to contact Defendant's probation officer, Alex Cashion ("Cashion"), to inform her of his intention to perform a search of the residence.

On 1 May 2013 at approximately 12:30 p.m., McDaniel and Cashion arrived at the Oak Knoll Drive residence to conduct the search. Defendant answered the door and informed the officers that he was alone in the home. Cashion told Defendant of their intention to search the residence, and Defendant consented to the search. Investigator Tenita Huffman ("Investigator Huffman") of the Statesville Police Department arrived at the residence shortly thereafter to assist McDaniel and Cashion in executing the search.

The Oak Knoll Drive residence had two bedrooms with Morrison and Defendant occupying the left bedroom and Morrison's children using the right bedroom. Investigator Huffman searched the left bedroom and observed that the closet within the bedroom contained both men's and women's clothing. She examined the articles of men's clothing hanging on the lower rack of the closet and proceeded to search through the pockets of approximately 20 pairs of pants. In the pocket of a pair of gray sweatpants, Investigator Huffman felt "a round ball" containing a "soft substance." When she removed the item from the pants pocket, she saw that it was a plastic bag that contained a white substance. She also observed that there were numerous plastic corner baggies[1] within the larger bag.

Because the Oak Knoll Drive residence did not lie within the Statesville city limits, the Iredell County Sheriff's Office was notified so that deputy sheriffs could come to the residence for the purpose of arresting Defendant. Deputies from the Sheriff's Office arrived at the residence and continued the search of the home. In addition to the plastic bag containing the white substance and corner baggies, officers also discovered a set of digital scales and $460.00 in cash concealed in a Bible placed on top of a dresser in the left bedroom.

The white substance in the plastic bag was sent to the crime laboratory within the Sheriff's Office for testing. Misty Icard ("Icard"), a forensic drug chemist and the director of the crime laboratory, performed a series of tests on the substance to determine its properties. Icard concluded from the results of the tests that the substance "contained 4-methylethcathinone and methylone which are controlled substances also known as bath salts."

On 1 July 2013, a grand jury indicted Defendant on two counts of PWIMSD a Schedule I controlled substance, listing "Methylethcathinone" in Count One and "Methylone" in Count Two as the Schedule I substances Defendant possessed. The grand jury also issued bills of indictment charging Defendant with maintaining a dwelling to keep or sell controlled substances and with having attained habitual felon status. On 19 December 2013, the trial court granted the State's motion to amend the PWIMSD indictment to add the numerical prefix "4-" to Count One of the indictment, thereby alleging that Defendant possessed

1. A "corner baggie" was defined by Investigator Huffman during her trial testimony as "the corner of a plastic baggie that's been snipped off" to form a smaller bag.

"4-Methylethcathinone" (instead of "Methylethcathinone" as Count One of the indictment had originally alleged).

A jury trial was held beginning on 8 January 2014 in Iredell County Superior Court before the Honorable Julia Lynn Gullett. The jury found Defendant guilty of all charges, and the trial court entered judgment on the jury's verdicts. Defendant was sentenced to two consecutive terms of 90 to 120 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

I. Indictment for PWIMSD Charges

Defendant raises two distinct challenges to the indictment for the PWIMSD charges. First, he asserts that the trial court erred in permitting the State to amend the indictment for Count One of the PWIMSD charge. Second, he contends that notwithstanding the amendment, the indictment for both Count One and Count Two remained fatally defective. We address each of these arguments in turn.

A. Amendment of Indictment as to Count One

[1] Defendant's first argument is that the trial court erred by permitting the State to amend Count One of the indictment charging him with PWIMSD by changing the substance Defendant allegedly possessed from "Methylethcathinone" to "*4*-Methylethcathinone." (Emphasis added.)

It is well established that "[a] felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). An indictment that "fails to state some essential and necessary element of the offense" is fatally defective, *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (citation and quotation marks omitted), *disc. review improvidently allowed*, 349 N.C. 289, 507 S.E.2d 38 (1998), and if the indictment at issue is fatally defective, the superior court lacks subject matter jurisdiction over the case, *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012).

N.C. Gen. Stat. § 15A-923 provides that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2013). "Our Supreme Court has interpreted the term 'amendment' under N.C.G.S. § 15A-923(e) to mean any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. De la Sancha Cobos*, 211 N.C. App. 536, 541, 711 S.E.2d 464, 468 (2011) (citation and quotation marks omitted). "In determining whether an amendment is a substantial

alteration, we must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial." *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006) (citation and quotation marks omitted).

This Court has held that (1) amending an indictment to add an essential element to the allegations contained therein constitutes a substantial alteration and is therefore impermissible, *see De la Sancha Cobos*, 211 N.C. App. at 541, 711 S.E.2d at 468; while (2) an amendment that simply corrects an error unconnected and extraneous to the allegations of the essential elements of the offense is not a substantial alteration and is permitted, *see State v. White*, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010) (explaining that amendment to nonessential language in indictment did not fundamentally alter nature of charge asserted because "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage" (citation and quotation marks omitted)).

In order to address Defendant's argument, it is necessary to understand the statutory framework classifying controlled substances and setting out the penalties for manufacturing, selling, delivering, and possessing such substances. The North Carolina Controlled Substances Act lists and categorizes various drugs, substances, and immediate precursors into six schedules. N.C. Gen. Stat. § 90-87(5) (2013). N.C. Gen. Stat. § 90-95 provides that possession of a Schedule I substance with the intent to manufacture, sell, or deliver is a Class H felony. N.C. Gen. Stat. § 90-95(a)(1), (b)(1) (2013).

Substances classified under Schedule I — the schedule relevant to Defendant's convictions for PWIMSD — are listed in N.C. Gen. Stat. § 90-89. Schedule I substances have been deemed to require the highest level of state regulation and have "a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision." N.C. Gen. Stat. § 90-89 (2013). Schedule I lists various opiates, opium derivatives, hallucinogens, depressants, and stimulants by their chemical and trade names. Among the Schedule I stimulants are cathinones, a class of drugs that have a base chemical structure of 2-amino-1-phenyl-1-propanone. N.C. Gen. Stat. § 90-89(5)(b). In light of the multitude of ways in which a synthetic, or man-made, cathinone can be derived and modified from this base structure, N.C. Gen. Stat. § 90-89(5) also includes a "catch-all" provision in subsection (j) of the statute, which encompasses — and classifies as Schedule I substances — the universe of substances that are formed through the following variations on the cathinone base structure:

> A compound, other than bupropion, that is structurally derived from 2-amino-1-phenyl-1-propanone by modification in any of the following ways: (i) by substitution in the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl, or halide substituents, whether or not further substituted in the phenyl ring by one or more other univalent substituents; (ii) by substitution at the 3-position with an alkyl substituent; or (iii) by substitution at the nitrogen atom with alkyl or diakyl groups or by inclusion of the nitrogen atom in a cyclic structure.

N.C. Gen. Stat. § 90-89(5)(j).

Thus, pursuant to this statutory provision, compounds that are both (1) derived from the base structure of a cathinone; and (2) chemically modified in one of the three statutorily-defined ways, fall within Schedule I of the Controlled Substances Act. *See id.* Such synthetic compounds are commonly referred to as "bath salts," and according to the testimony of Icard, the State's expert witness at trial, 4-methylethcathinone and methylone are two examples of substances falling into this category.

Our caselaw establishes that "[w]hen a defendant has been charged with possession of a controlled substance, the identity of the controlled substance that defendant allegedly possessed is considered to be an essential element which must be alleged properly in the indictment." *State v. Ahmadi-Turshizi*, 175 N.C. App. 783, 784-85, 625 S.E.2d 604, 605, *disc. review denied*, 360 N.C. 484, 631 S.E.2d 133 (2006). In *Ahmadi-Turshizi*, the defendant was charged with various drug offenses by means of indictments that "identified the controlled substance that he allegedly possessed, sold and delivered as 'methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act.' " *Id.* at 785, 625 S.E.2d at 605. We held that the indictments were defective because they omitted the numerical prefix from the chemical name of the substance possessed by the defendant. *Id.* at 786, 625 S.E.2d at 606.

> Defendant's indictment listed the controlled substance he allegedly possessed, sold, and delivered to be "methylenedioxymethamphetamine" but failed to include "3,4" as required. Schedule I does not include any substance which contains any quantity of "methylenedioxymethamphetamine." As the substance listed in defendant's indictment does not appear in Schedule I of our Controlled Substances Act, the indictment is fatally flawed and each

> of defendant's convictions for felonious possession of methylenedioxymethamphetamine, with the intent to sell and deliver, sale of methylenedioxymethamphetamine, and delivery of methylenedioxymethamphetamine, must be vacated.

Id. at 786, 625 S.E.2d at 605-06.

In so holding, we relied upon *State v. Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412, *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005), in which this Court similarly vacated the defendant's conviction of a possessory offense because the indictment did not include the numerical prefix of the controlled substance and thus did not correspond with the substance as listed in the Controlled Substances Act. We concluded that the omission of the numerical prefix was a defect that could not be regarded as a "mere technicality, for the chemical and legal definition of these substances is itself technical and requires precision." *Id.* at 332, 614 S.E.2d at 415 (citation and quotation marks omitted). Therefore, because the substance described in the defendant's indictment was not a Schedule I controlled substance, we held that the indictment charging the defendant with possession of a Schedule I controlled substance was fatally defective. *Id.* at 333, 614 S.E.2d at 415.

The State attempts to distinguish the present case from *Ledwell* and *Ahmadi-Turshizi* on essentially two grounds. First, the State notes that unlike in those cases, the controlled substance at issue here is not specifically listed by name in Schedule I of the Controlled Substances Act. Rather, 4-methylethcathinone — the substance that forms the basis of Count One of Defendant's indictment — constitutes a Schedule I substance under the "catch-all" provision of N.C. Gen. Stat. § 90-89(5)(j).

Because 4-methylethcathinone is not specifically listed by name in Schedule I, the State contends that (1) the omission of the prefix "4-" in the original indictment in the present case is less problematic than the omission of the numerical prefixes in *Ledwell* and *Ahmadi-Turshizi*; and (2) amending the indictment to include the prefix was merely the correction of a clerical error rather than a substantial alteration. We are unable to agree.

The State does not contend that methylethcathinone — the substance identified in Defendant's *original* indictment in Count One — is classified as a Schedule I controlled substance. However, it is undisputed by the parties that 4-methylethcathinone is a Schedule I controlled substance because it meets the conditions of N.C. Gen. Stat. § 90-89(5)(j), the "catch-all" provision, in that it is (1) structurally derived from

2-amino-1-phenyl-1-propanone; and (2) modified from that base structure in ways that are described within subsection (j).

An indictment that charges a defendant with PWIMSD a Schedule I substance must allege the possession of a substance that falls within Schedule I. The original indictment as to Count One did not satisfy this requirement, and as such, it was fatally defective. *See Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414 (holding that possession of Schedule I controlled substance indictment was "facially insufficient" where it failed to allege substance actually classified in Schedule I). Thus, the amendment here cannot be described as a mere alteration to language extraneous to the allegations of the essential elements of the offense because — to the contrary — the amended language *supplied* an essential element to Count One that was previously lacking in the indictment for this charge. [2]

Second, the State argues that *Ledwell* and *Ahmadi-Turshizi* are distinguishable because the defendants in those cases "were actually tried on the faulty charges" whereas here, the State was permitted to amend the indictment and Defendant was then tried pursuant to the amended indictment. However, because we hold that the amendment effectively added an essential element that was previously absent, it constituted a substantial alteration and, as a result, was legally impermissible. *See De la Sancha Cobos*, 211 N.C. App. at 542, 711 S.E.2d at 469 (where fatally flawed indictment was "[m]aterially amend[ed]" in attempt to cure defect, defendant's conviction must be vacated). As such, because the amendment here could not cure the defective nature of the original indictment, the distinction argued by the State does not change our conclusion that Defendant's conviction on Count One cannot stand.

Finally, the State notes that Defendant did not object to the amendment. However, Defendant's acquiescence to the amendment is irrelevant to our analysis because "a party cannot consent to subject matter jurisdiction." *Id.*; *see also LePage*, 204 N.C. App. at 49, 693 S.E.2d at 165 (explaining that the facial insufficiency of an indictment and the

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2. The State argues that *State v. Davis*, 223 N.C. App. 296, 733 S.E.2d 191 (2012), is more analogous to the present case than *Ledwell* or *Ahmadi-Turshizi* because it also involved a "catch-all" statutory provision. However, *Davis* addressed whether a fatal variance existed between the indictment and the proof at trial regarding the defendant's charge of trafficking in opium — *not* whether the indictment itself was fatally defective by failing to properly allege a controlled substance (such that the trial court lacked subject matter jurisdiction over the case in the first place). *Id.* at 299, 733 S.E.2d at 192-93. As such, *Davis* is not applicable.

resulting lack of jurisdiction by the trial court "may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court"). Accordingly, we conclude that Defendant's conviction on Count One of PWIMSD must be vacated.

B. Alleged Failure of Indictment to Adequately Apprise Defendant of Charges

[2] Defendant next argues that the PWIMSD indictment was also facially invalid because it did not specifically indicate that the substances at issue were Schedule I controlled substances solely by virtue of their conformity with the characteristics set forth in the "catch-all" provision of N.C. Gen. Stat. § 90-89(5)(j). Defendant contends that in order to be valid, an indictment charging a defendant with PWIMSD a Schedule I controlled substance must provide notice of the State's "intent to prosecute a defendant for possession of a substance falling within the catch-all provision of § 90-89(5)(j) where the substance is not otherwise named in the statute." Because we have already vacated Count One of the charge of PWIMSD, we need only address Count Two of the indictment, which asserts that Defendant possessed "Methylone, which is included in Schedule I of the North Carolina Controlled Substances Act."

On appeal, this Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "The purpose of an indictment is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused." *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (citation, quotation marks, brackets, and ellipses omitted). Consequently, as discussed in the previous section, "[a]n indictment . . . charging a statutory offense must allege all of the essential elements of the offense." *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975); *see also* N.C. Gen. Stat. § 15A-924(a)(5) (explaining that indictment must contain allegations supporting every essential element of criminal offense in order to be valid). The offense of PWIMSD under N.C. Gen. Stat. § 90-95(a)(1) has the following three elements: (1) possession of a substance; (2) that is a controlled substance; and (3) with the intent to manufacture, sell, or deliver that controlled substance. *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001).

Here, Count Two of the PWIMSD indictment alleges each of these essential elements. It states that (1) Defendant possessed methylone; (2) methylone is a controlled substance "which is included in Schedule I"; and (3) Defendant possessed the methylone with the intent to

manufacture, sell, or deliver it. While the indictment for Count Two does not reference the specific subsection of N.C. Gen. Stat. § 90-89 that makes methylone *a Schedule I controlled substance*, the indictment sufficiently apprised Defendant of the nature of the charge against him by both tracking the language of N.C. Gen. Stat. § 90-95(a)(1) *and* alleging the possession of a substance that is, in fact, *a Schedule I controlled substance* (unlike the original indictment relating to Count One). As such, we do not believe that the indictment was required to expressly state the fact that methylone, while not expressly mentioned by name in N.C. Gen. Stat. § 90-89, falls within the "catch-all" provision of N.C. Gen. Stat. § 90-89(5)(j). *See State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012) ("The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." (citation and quotation marks omitted)). Defendant's argument on this issue is therefore overruled.

II. Denial of Motion to Dismiss

Defendant next contends that the trial court erred in denying his motions to dismiss as to (1) one count of PWIMSD; and (2) the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance. We address each of his contentions in turn.

A. PWIMSD

Defendant argues that because N.C. Gen. Stat. § 90-89(5) states that "any material, compound, *mixture*, or preparation that contains any quantity of" a substance that meets the characteristics of subsection (j) is a Schedule I substance, the evidence presented at trial was only sufficient to support one count — rather than two counts — of PWIMSD because the substance found at Defendant's residence was a *mixture* of two such compounds contained within a single bag. N.C. Gen. Stat. § 90-89(5) (emphasis added). For this reason, he contends, the trial court should have allowed only *one* count of PWIMSD to go to the jury. In making this argument, Defendant does not challenge the sufficiency of the evidence to support his conviction of possession of methylone with intent to manufacture, sell, or deliver; instead, he only contests the adequacy of the evidence to support two separate counts of PWIMSD.

However, Defendant's argument on this issue is premised on the fact that he was convicted of *both* counts of PWIMSD. Because, as discussed above, we are vacating his conviction as to Count One, we need not address this issue.

B. Maintaining a Dwelling for the Purpose of Keeping or Selling a Controlled Substance

[3] Finally, Defendant contends that the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling a controlled substance because the State failed to establish either that (1) Defendant kept or maintained the Oak Knoll Drive residence; or (2) Defendant used the Oak Knoll Drive residence for the purpose of keeping or selling a controlled substance. We disagree.

In order to survive a defendant's motion to dismiss as to this charge, the State must present substantial evidence that the defendant "(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance." *State v. Fuller*, 196 N.C. App. 412, 424, 674 S.E.2d 824, 832 (2009) (citation and quotation marks omitted).

1. "Kept or Maintained a Dwelling" Element

With regard to the first element of the offense, "[f]actors which may be taken into consideration in determining whether a person keeps or maintains a dwelling include ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent." *State v. Baldwin*, 161 N.C. App. 382, 393, 588 S.E.2d 497, 506 (2003). None of the above factors is dispositive, and the court must consider the totality of the circumstances when determining whether the evidence was sufficient to support the conclusion that the defendant kept or maintained the dwelling. *Id.*; *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001).

Here, the State put forth evidence that (1) Defendant received mail addressed to him at the Oak Knoll Drive residence; (2) Defendant's probation officer had visited Defendant at the Oak Knoll Drive residence on numerous occasions, "most likely in excess of 10 [times]" to conduct "routine home contacts" in order to ensure that Defendant was in compliance with the conditions of his probation; (3) several of Defendant's personal effects were recovered during the search of the residence, including a pay stub and protective gear from Defendant's employment; and (4) Defendant placed a phone call from the Iredell County Detention Center and informed the other party on the line that law enforcement officers had "come and searched *his* house and found two ounces of Molly."[3] (Emphasis added.) Defendant argues that this evidence was

3. Icard testified at trial that "Molly" is a street name that is used to refer to both ecstas and bath salts.

insufficient to show that he "maintained or kept" the dwelling because while it indicated that he "lived in the house" at Oak Knoll Drive, it did not demonstrate that he was financially or otherwise responsible for the dwelling and its upkeep.

This Court has previously explained that although "*occupancy*, without more, will not support the element of 'maintaining' a dwelling . . . . evidence of *residency*, standing alone, *is* sufficient to support the element of maintaining." *State v. Cowan*, 194 N.C. App. 330, 337, 669 S.E.2d 811, 817 (2008) (citation, quotation marks, and alterations omitted and emphasis added); *see also State v. Shine*, 173 N.C. App. 699, 707, 619 S.E.2d 895, 900 (2005) (concluding that "the trial judge properly found that a reasonable jury could conclude that defendant kept or maintained [the] property" where defendant's probation officer "visited him at the property five weeks prior to the execution of the search warrant, and defendant confirmed it was his residence"). Indeed, in *State v. Spencer*, 192 N.C. App. 143, 664 S.E.2d 601 (2008), *disc. review denied*, 363 N.C. 380, 680 S.E.2d 208 (2009), this Court expressly held that a defendant's own statement that he resided at the dwelling in question constituted "substantial evidence that defendant maintained [that] dwelling" and was sufficient to withstand the defendant's motion to dismiss the charge of maintaining a dwelling for the keeping or selling of a controlled substance. *Id.* at 148, 664 S.E.2d at 605.

In his brief, Defendant asserts that our more recent precedents involving this issue such as *Spencer* are inconsistent with our prior decisions in *State v. Bowens*, 140 N.C. App. 217, 535 S.E.2d 870 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001); *State v. Kraus*, 147 N.C. App. 766, 557 S.E.2d 144 (2001); and *State v. Harris*, 157 N.C. App. 647, 580 S.E.2d 63 (2003), and should be disregarded on that basis. In *Bowens*, *Kraus*, and *Harris*, however, the evidence presented by the State only demonstrated that the defendant temporarily occupied the building or dwelling in question and did not establish that the defendant actually lived there. *See Harris*, 157 N.C. App. at 652-53, 580 S.E.2d at 66-67 (evidence showing defendant was seen at residence "several times over a period of two months" and had some personal papers at residence, none of which listed residence's address as his address, was insufficient to establish that defendant maintained residence); *Kraus*, 147 N.C. App. at 769, 557 S.E.2d at 147 (evidence that defendant occupied motel room "for less than twenty-four hours" and had access to room key was insufficient to show that defendant maintained motel room to keep or sell controlled substances); *Bowens*, 140 N.C. App. at 221-22, 535 S.E.2d at 873 (evidence was insufficient to support charge

of maintaining dwelling to keep or sell controlled substances where defendant was seen entering and exiting dwelling eight to ten times over course of two to three days and police officer testified that he "believed" Defendant lived at dwelling but "offered no basis for that opinion").

As such, we discern no inconsistency between *Spencer* and *Bowens*, *Kraus*, and *Harris*. Therefore, we hold that the State's evidence in the present case that Defendant resided at the Oak Knoll Drive residence was sufficient to support the jury's finding as to the element of the offense that he maintained or kept a dwelling.

2. "For the Purpose of Keeping or Selling" Element

With regard to the third element of this offense, Defendant argues that the State failed to establish that the Oak Knoll Drive residence was used for keeping or selling a controlled substance. "In determining whether a defendant maintained a dwelling for the purpose of selling illegal drugs, this Court has looked at factors including the amount of drugs present and paraphernalia found in the dwelling." *State v. Battle*, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005) (emphasis omitted). Our Court has also noted that the discovery of "a large amount of cash" in the dwelling or building can indicate that a particular place is being used to keep or sell controlled substances. *Frazier*, 142 N.C. App. at 366, 542 S.E.2d at 686.

Here, the State presented evidence that a bag containing 39.7 grams of a substance consisting of 4-methylethcathinone and methylone was discovered inside the pocket of a pair of men's pants within Defendant's bedroom closet alongside another plastic bag, which contained "numerous little corner baggies." A set of digital scales and $460.00 in twenty dollar bills were also found in Defendant's bedroom. The State elicited testimony from a Statesville Police Department narcotics officer that (1) corner baggies are typically used when drugs are packaged and sold in smaller amounts; (2) digital scales are often utilized in the sale of narcotics to "weigh out specific amounts of narcotics"; and (3) purchases of controlled substances are frequently made in $20 increments.

We conclude that this evidence was sufficient to permit "a reasonable jury to conclude that the residence in question was being used for keeping or selling controlled substances." *Shine*, 173 N.C. App. at 708, 619 S.E.2d at 900 (evidence that digital scales "of the type frequently used to weigh controlled substances" were found in residence in close proximity to two bags of cocaine and pieces of scrap paper with names and dollar amounts written on them was sufficient to show residence was used for keeping or selling controlled substances); *see State v. Rich*,

87 N.C. App. 380, 383-84, 361 S.E.2d 321, 324 (1987) (evidence of "materials related to the use and sale of cocaine," which included two bags of cocaine of differing levels of purity, numerous small plastic bags, and tools "commonly used in repackaging and selling cocaine," was sufficient to sustain conviction for maintaining dwelling for purpose of keeping or selling controlled substances). Accordingly, Defendant's argument on this issue lacks merit.

Conclusion

For the reasons stated above, we vacate Defendant's conviction on Count One of PWIMSD arising from Defendant's possession of 4-methylethcathinone. We conclude that the trial court did not err in entering judgment on Defendant's convictions for the remaining charges, and those convictions shall remain undisturbed.[4]

NO ERROR IN PART; VACATED IN PART.

Judges ELMORE and TYSON concur.

4. When the trial court entered judgment, it sentenced Defendant to 90 to 120 months imprisonment for Count One of PWIMSD. In a separate judgment, the trial court consolidated Count Two of PWIMSD with the maintaining a dwelling for the purpose of keeping or selling a controlled substance offense and sentenced Defendant to a second term of 90 to 120 months to run consecutively. Because we are vacating Count One, which was not consolidated for judgment with Defendant's other convictions, we need not remand to the trial court for resentencing. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (explaining that remanding for resentencing is necessary only when conviction being vacated was consolidated with other convictions that were upheld on appeal).

TIMES NEWS PUBL'G CO. v. ALAMANCE-BURLINGTON BD. OF EDUC.

[242 N.C. App. 375 (2015)]

THE TIMES NEWS PUBLISHING COMPANY D/B/A *TIMES-NEWS*, PLAINTIFF
v.
THE ALAMANCE-BURLINGTON BOARD OF EDUCATION, D/B/A ALAMANCE-BURLINGTON SCHOOLS OR THE ALAMANCE-BURLINGTON SCHOOL SYSTEM; & DR. WILLIAM HARRISON, IN HIS CAPACITY AS INTERIM SUPERINTENDENT OF ALAMANCE-BURLINGTON SCHOOL SYSTEM, DEFENDANTS

No. COA15-99

Filed 21 July 2015

Public Records—school board—closed session—resignation of superintendent—in camera review

The minutes of a school board's closed meeting at which the superintendent resigned and was given a $200,000 severance package should have been examined in camera by the trial court judge after plaintiff requested the minutes and defendant claimed that they concerned an exempt personnel matter. Core personnel information such as the details of work performance and the reasons for an employee's departure remain permanently exempt from disclosure. But other aspects of the board's discussion in the closed session, including the board's own political and policy considerations, are not protected from disclosure. On remand, the trial court must review the minutes and determine which information is exempt from disclosure and which should be disclosed to the public. Furthermore, when the trial court's determination following an in camera review is disputed by the public body seeking to avoid disclosure, the trial court (or the appellate court, where necessary) should not hesitate to stay the disclosure order pending appeal by the aggrieved party.

Appeal by plaintiff from order entered 9 December 2014 by Judge Lucy N. Inman in Alamance County Superior Court. Heard in the Court of Appeals 6 April 2015.

The Bussian Law Firm, by John A. Bussian, for plaintiff-appellant.

Tharrington Smith, LLP, by Deborah R. Stagner, Neal A. Ramee, and Rebecca Fleishman, for defendants-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Mark J. Prak, Julia C. Ambrose, and Timothy G. Nelson, for amicus curiae North Carolina Association of Broadcasters and North Carolina Press Association.

Christine T. Scheef and Allison B. Schafer for amicus curiae North Carolina School Boards Association.

DIETZ, Judge.

In October 2013, the superintendent of the Alamance-Burlington County Schools agreed to a new, four-year employment contract approved by the local school board. Just seven months later, the school board held a closed meeting where the superintendent abruptly resigned and the board approved a $200,000 severance payment. The Times News Publishing Company then filed a request for the meeting minutes of the closed session so that it could report on the school board's handling of the superintendent's departure.

In particular, the Times News sought to learn why the school board paid $200,000 in taxpayer money to a departing school employee just months after that employee signed a contract agreeing to stay for four more years. But the school board refused to hand over the minutes, arguing that the closed meeting concerned a "personnel matter" and therefore the meeting minutes were totally exempt from our State's public record and open meeting laws.

For the reasons discussed below, we reject the school board's argument that the closed meeting minutes are categorically exempt from public disclosure because they concern a personnel matter. Under Supreme Court precedent, a trial court presented with an Open Meetings Law claim concerning closed meeting minutes must review the minutes *in camera*—meaning in private, not in open court—and "tailor the scope of statutory protection in each case" based on the contents of the minutes and their importance to the public. *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 480, 412 S.E.2d 7, 16 (1992). As the Supreme Court explained, "[c]ourts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law." *Id.*

As explained below, under the test established in *Poole*, core personnel information such as the details of work performance and the reasons for an employee's departure will remain permanently exempt from disclosure. But other aspects of the board's discussion in the closed session, including the board's own political and policy considerations, are not protected from disclosure. On remand, the trial court must review

the minutes and determine which information is exempt from disclosure and which should be disclosed to the public. Accordingly, we remand this case for an *in camera* review of the meeting minutes consistent with this opinion.

Facts and Procedural History

Dr. Lillie Cox became the Superintendent of the Alamance-Burlington School System in 2011. In October 2013, Dr. Cox and the Alamance-Burlington Board of Education agreed to extend Dr. Cox's contract to 2017. Seven months later, on 30 May 2014, Dr. Cox abruptly resigned from her position after a closed meeting of four of the seven members of the school board. The school board agreed to pay $200,000 as a severance payment and to pay out $22,000 in unused vacation pay.

On 6 October 2014, Plaintiff Times News Publishing Company made a written request to the school board for access to the meeting minutes "for purposes of inspection, examination, and copying pursuant to the Public Records Act." The Times News specifically requested the "production of the unredacted minutes of the Alamance-Burlington Board of Education's specially called meeting or meetings, including any closed sessions in or about May of 2014 relating to the continued employment of the then current Superintendent of Schools." The school board did not produce the unredacted meeting minutes.

On 24 October 2014, the Times News filed a complaint and application for an order compelling disclosure of the unredacted meeting minutes, alleging that the school board violated the Open Meetings Law and Public Records Act by refusing to produce the minutes. The school board filed a motion to dismiss and answer on 19 November 2014. On 1 December 2014, the trial court held a hearing on the motion to dismiss. The trial court granted the motion, concluding "that the records sought by plaintiffs are not public records subject to disclosure under the Public Records Act," and therefore the Times News "failed to state a claim for which relief can be granted." The Times News timely appealed.

Analysis

The crux of this case is the interplay between various state laws enacted to ensure public access to government records.

The first of these laws, and the most important for purposes of this case, is the Open Meetings Law. The Open Meetings Law generally requires that "each official meeting of a public body shall be open to the public, and any person is entitled to attend such meeting." N.C. Gen.

Stat. § 143-318.10(a) (2013). The law permits "closed sessions" of a public body only in limited circumstances, including any meeting to discuss "the qualifications, competence, performance, character, [or] fitness, . . . of an individual public officer or employee." N.C. Gen. Stat. § 143-318.11(a)(6).

The law also requires that "[e]very public body shall keep full and accurate minutes of all official meetings, including any closed sessions." N.C. Gen. Stat. § 143-318.10(e). When a public body meets in a closed session,

> it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. *Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.*

Id. (emphasis added). Thus, the Open Meetings Law provides (1) that minutes (or a recording) must be taken during closed sessions; (2) that those minutes "shall be public records within the meaning of the Public Records Law"; and (3) that those minutes "may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session." *Id.*

The second relevant law is the Public Records Act, which generally provides that "public records and public information" compiled by state and local governments "are the property of the people" and should be open to inspection by the public. N.C. Gen. Stat. § 132-1(b) (2013). Like the Open Meetings Law, the Public Records Act has exceptions. Among those exceptions is Section 115C-319 of the General Statutes, which states that "[p]ersonnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment with local boards of education shall not be subject to inspection and examination" under the Public Records Act. N.C. Gen. Stat. § 115C-319 (2013). The term "personnel file" is defined, in relevant part, as "any information gathered by the local board of education" relating to "the individual's application, selection or nonselection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation,

disciplinary action, or termination of employment *wherever located or in whatever form*." *Id.* (emphasis added). Thus, the Public Records Act, and its accompanying limitation in Section 115C-319, categorically prohibit public disclosure of certain personnel information of current and former school employees.

The central issue in this case is how these two laws interact. The school board contends that the minutes of the closed meeting are a "personnel file" because they contain "information gathered by the local board of education" concerning the superintendent's "termination of employment" and related personnel matters. Thus, the school board argues that the minutes are categorically exempt from public disclosure under N.C. Gen. Stat. § 115C-319.

The Times News contends that the minutes of the closed meeting, whether they are a "personnel file" or not, are governed by the Open Meetings Law, which provides that minutes may be withheld from the public only "so long as public inspection would frustrate the purpose of a closed session." N.C. Gen. Stat. § 143-318.10(e). Thus, the Times News argues that the trial court was required to conduct an *in camera* review of the minutes and to assess whether disclosure would frustrate the purpose of the closed session.

Our Court has never addressed this precise issue, but we find guidance in the Supreme Court's decision in *News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). The plaintiffs in *Poole* sought (among other things) meeting minutes from a special commission formed to investigate "alleged improprieties relating to the men's basketball team at North Carolina State University." *Id.* at 470, 412 S.E.2d at 10. Although the Supreme Court held that the commission was not subject to the Open Meetings Law, the opinion addressed the interplay between that law and the Public Records Act. Specifically, the Supreme Court held that the Open Meetings Law "provides an exception to the Public Records Act for minutes, which would ordinarily be public records, so long as public inspection would frustrate the purpose of the executive session." *Id.* at 480, 412 S.E.2d at 16 (internal quotation marks omitted).[1] The Supreme Court then held that assessing whether disclosure would frustrate the purpose of a closed session "requires consideration of time and content factors, *allowing courts to tailor the scope of statutory*

1. The General Assembly moved the relevant statutory language from Section 143-318.11(d) to Section 143-318.10(e) two years after *Poole*, but the language itself did not change. *See* 1993 N.C. Sess. Laws 181.

protection in each case." *Id.* (emphasis added). The Supreme Court concluded with an instruction that lower courts "should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law." *Id.*

Thus, our Supreme Court has established that the determination of whether information may be withheld under the Open Meetings Law because it would "frustrate the purpose of the closed session" is not a determination that can be made unilaterally by the public body that created the minutes. Instead, where the withholding of information is challenged in court, the court must review those minutes *in camera*—meaning in private, without revealing the contents in open court—using the balancing test from *Poole* quoted above.

But, importantly, in rejecting the Defendants' argument that disclosure of the commission's closed session minutes could chill "free and frank decision-making" by government agencies, the Supreme Court in *Poole* noted that this concern "must yield to the decision of the General Assembly, which enacted several specific exceptions to the Public Records Act, none of which *permanently protects* a deliberative process like that of the Commission after the process has ceased." *Id.* at 481, 412 S.E.2d at 16 (emphasis added). In other words, the Supreme Court acknowledged that there are categories of "exceptions to the Public Records Act" that are permanent—meaning that passage of time is not a factor in whether that information should be released to the public. But the Supreme Court concluded that the information discussed by the special commission in *Poole* was not covered by any of those permanent statutory exceptions because the Commission was not the employer of the state employees mentioned in the meeting minutes. As a result, the minutes "d[id] not meet the definition of 'personnel file' information . . . because the information was not 'gathered' by the employer state agency." *Id.* at 483, 412 S.E.2d at 18.

In light of this language from *Poole*, we hold that N.C. Gen. Stat. § 115C-319—which states that the "personnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment with local boards of education shall not be subject to inspection and examination" under the Public Records Act—creates the type of permanent exception identified in *Poole*. If school personnel files were intended to remain confidential only while the individual remained employed by the school district, the General Assembly would not have applied the exception to "former employees." *Id.* As

it is written, the exception for personnel files is permanent and does not expire with the passage of time. Thus, under *Poole*, when a public body enters a closed session to discuss personnel information that falls within the scope of N.C. Gen. Stat. § 115C-319, disclosure of that personnel information *always* would frustrate the purpose of the closed session and thus may be withheld under N.C. Gen. Stat. § 143-318.10(e).

But that does not mean that *all* contents of closed session minutes in personnel cases are beyond disclosure. When a public body meets—particularly one made up of elected officials—the discussion of a personnel matter often could include political and policy considerations broader than the "core" personnel information described in Section 115C-319. Moreover, as we explained above, when the withholding is challenged in court, it is for the trial court, not the school board, to assess what is and is not subject to disclosure under this legal test.

In light of our holding today, we must remand this case to the trial court to conduct an *in camera* review of the meeting minutes consistent with this opinion and our Supreme Court's decision in *Poole*. On remand, the trial court should separate core personnel information from other, related information that is subject to disclosure, keeping in mind the Supreme Court's admonition in *Poole* that "[c]ourts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law." *Poole*, 330 N.C. at 480, 412 S.E.2d at 16.[2]

In closing, we note that under the "personnel file" exception to the Public Records Act, many of the specific facts about the superintendent's departure may remain permanently hidden from the public—perhaps an unintended outcome for a law meant to limit secrecy in government. But we are an error-correcting body, not a policy-making or law-making one. What we can say is that, even under the law as it is written today, there may be some information from the school board's closed session that is subject to public disclosure. Accordingly, we remand this case to the trial court to conduct an *in camera* review of the contents of the closed meeting minutes.

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2. We anticipate that there will be times when the trial court's determination following *in camera* review is disputed by the public body seeking to avoid disclosure. Because the court system cannot un-ring the bell once information has been publicly disclosed, the trial court (or this Court, where necessary) should not hesitate to stay the disclosure

Conclusion

We reverse and remand this case for the trial court to conduct an in camera review of the requested meeting minutes consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

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order pending appeal by the aggrieved party. The General Assembly has instructed that these actions "shall be accorded priority by the trial and appellate courts," N.C. Gen. Stat. § 132-9(a), and thus the appeals process will be resolved far faster than ordinary litigation in the appellate courts.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JULY 2015)

BATTLE v. MEADOWBROOK MEAT CO., INC. No. 14-1059	N.C. Industrial Commission (13-708656)	Affirmed
CHARLES v. CHARLES No. 15-196	Cumberland (09CVD5873)	Affirmed in part, reversed and remanded in part
DENNY v. DENNY No. 14-770	Mecklenburg (12CVD3135)	Dismissed
DENNY v. DENNY No. 14-771	Mecklenburg (12CVD3135)	Reversed and Remanded
DOMINGUEZ v. FRANCISCO DOMINGUEZ MASONRY, INC. No. 14-1307	N.C. Industrial Commission (499636)	Affirmed
E. TOWN MKT., L.P. v. 550 FOODS, LLC No. 15-46	Mecklenburg (13CVS11727)	Affirmed
GREENSBORO SCUBA SCH., LLC v. ROBERTSON No. 14-1126	Guilford (12CVS9928)	Affirmed
HESTER v. HESTER No. 14-1335	Mecklenburg (11CVD18658)	Dismissed
IN RE A.C. No. 15-259	Wake (13JA136)	Affirmed
IN RE A.E.L. No. 15-27	Jackson (12JT20-22)	Affirmed
IN RE B.B.M.B. No. 14-1386	Johnston (12JT134)	Affirmed
IN RE J.A.K. No. 14-1383	Caldwell (13JA128)	Affirmed
IN RE JERRY'S SHELL, LLC No. 13-223-2	Rowan (12CVS660)	Affirmed
IN RE R.B.L. No. 14-1043	Alamance (13JB4)	No Error

IN RE T.H. No. 14-1146	Martin (12JB51) (13JB21)	Affirmed in part, vacated and remanded in part
JENSEN v. JESSAMY No. 15-35	Mecklenburg (13CVS12521)	Affirmed
JORDAN v. JORDAN No. 15-108	Union (12CVS3050)	Affirmed
MARSICO v. NEW HANOVER CNTY. BD. OF EDUC. No. 14-1370	New Hanover (14CVS1397)	Affirmed
PORTER v. BRYANT No. 14-1165	Mecklenburg (14CVD6337)	Affirmed
STATE v. BADSON No. 14-1321	Wake (12CRS206740)	No Error
STATE v. DAVIS No. 15-101	Wayne (11CRS50259) (13CRS5061)	No Error
STATE v. HAMLIN No. 14-1191	Transylvania (13CRS244) (13CRS247)	No Error
STATE v. INGRAM No. 14-1305	Avery (12CRS50621)	Vacated
STATE v. JEFFERIES No. 14-1313	Guilford (12CRS96692) (12CRS96694)	No Error
STATE v. LESTER No. 14-1392	No Error (13CRS55497-99) (14CRS89-90)	Buncombe
STATE v. MITCHELL No. 15-14	Wake (13CRS3110)	No Error
STATE v. PORTER No. 14-1032	Wake (13CRS222020)	No error in part; vacated in part; and remanded
STATE v. PROPST No. 15-59	Davidson (13CRS53730) (13CRS53731) (14CRS1194)	No Error

STATE v. SILVER No. 14-1213	Nash (12CRS52636)	No Error
STATE v. SMYRE No. 14-1178	Iredell (12CRS58005)	Dismissed
STATE v. WEEKS No. 15-81	Cleveland (12CRS51056) (1CRS3114-15)	No Error
WALKER v. HOLDEN TEMPORARIES, INC. No. 14-1389	N.C. Industrial Commission (Y03230)	Affirmed
WARD v. NUCAPITAL ASSOCS., INC. No. 14-1249	Wake (14CVD2595)	Reversed and Remanded
WELCH v. WILLEY No. 14-1264	Pitt (08CVD3727)	Reversed
WILLIS v. WILLIS No. 14-1090	Moore (13CVS1337)	Affirmed

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