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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 5, 2017

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Assistant Director
David Alan Lagos

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

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Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
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Jennifer C. Peterson

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the victim's lack of "adult supervision." These findings of fact were not considered in the Court of Appeals' analysis of defendant's Eighth Amendment claim. **State v. Thomsen, 475.**

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Jurisdiction—in rem—military benefits—Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent's wife at the time of his death) to the original divorce action, the trial court did not err by declining to dismiss the third-party complaint for lack of personal jurisdiction over third-party defendant. The subject matter of controversy was property located in North Carolina, giving the trial court *in rem* jurisdiction. **Ellison v. Ellison, 386.**

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SEARCH AND SEIZURE—Continued

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Sentencing—aggravating factor—DVPO—position of trust or confidence— The trial court did not err when sentencing defendant for feloniously violating a Domestic Violence Protective Order (DVPO) against his former girlfriend by finding as an aggravating factor that he took advantage of a position of trust or confidence. Defendant's argument to the contrary assumes that "trust and confidence" automatically exists in all of the "personal relationships" provided by the DVPO statute, but the definition of personal relationship under N.C.G.S. § 50B-1(B) does not include any element which would require proof of a position of trust or confidence or the abuse of that position any evidence offered by the State to show that defendant took advantage of a position of trust or confidence may be used to establish a statutory aggravating factor. **State v. Edgerton, 460.**

STATUTES

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Trusts—statutory Payable on Death account—did not supplant common law Totten Trust—Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the statutory Payable on Death account is the sole means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. The General Assembly expressed a clear intent for the Payable on Death statute (N.C.G.S. § 54-109.57) to *supplement*, not to supplant, the existing common law of trust formation. **Nelson v. State Emps. Credit Union, 447.**

Trusts—Totten Trust—summary judgment—Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the credit union had failed to show that a common law Totten trust had been created. The credit union presented undisputed evidence that the grantor created a common law Totten trust as a matter of law: the grantor expressed his intent to create a trust, identified the specific sum of money to be placed into the trust account, and identified the beneficiary of the trust. **Nelson v. State Emps. Credit Union, 447.**

Trusts—two summary judgment proceedings—different issues—statutory trust—common law trust—Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the trial court (Judge Baddour) did not impermissibly overrule an earlier summary judgment ruling by Judge Blount. Judge Baddour did not rule that Judge Blount's summary judgment order—which only considered whether the credit union had violated N.C.G.S. § 54-109.57—was erroneous. Rather, Judge Baddour ruled that, notwithstanding the statutory violation found by Judge Blount, the credit union should prevail under the common law. **Nelson v. State Emps. Credit Union, 447.**

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.

ELLISON v. ELLISON

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

HANNELORE ELLISON, PLAINTIFF
v.
HENRY P. ELLISON, DEFENDANT (DECEASED)
AND
ELIZABETH SMITH-ELLISON, THIRD-PARTY DEFENDANT

No. COA14-1401

Filed 4 August 2015

1. Jurisdiction—in rem—military benefits

Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent's wife at the time of his death) to the original divorce action, the trial court did not err by declining to dismiss the third-party complaint for lack of personal jurisdiction over third-party defendant. The subject matter of controversy was property located in North Carolina, giving the trial court *in rem* jurisdiction.

2. Divorce—equitable distribution order—beneficiary of military benefits

Where decedent disobeyed an equitable distribution order to name plaintiff (his ex-wife) as beneficiary of his military Survivors Benefit Plan and plaintiff thereafter joined third-party defendant (decedent's wife at the time of his death) to the original divorce action, the trial court did not err by entering summary judgment in favor of plaintiff. A prior court order designated plaintiff as beneficiary of the plan, and third-party defendant failed to participate in the action.

Appeal by Third-Party Defendant from judgment entered 2 October 2014 by Judge A. Elizabeth Keever in District Court, Cumberland County. Heard in the Court of Appeals 18 May 2015.

Sullivan & Tanner, P.A., by Mark E. Sullivan, for Plaintiff-Appellee.

Lewis, Deese, Nance, Briggs & Hardin, LLP, by Renny W. Deese, for Third-Party Defendant-Appellant.

McGEE, Chief Judge.

Hannelore Ellison ("Plaintiff") and Henry P. Ellison ("Mr. Ellison")[1] were married on 22 June 1972, and had three children together. Plaintiff and Mr. Ellison separated in March of 1997. The trial court entered an equitable distribution order on 30 April 2002 in which "[t]he parties agree[d] that the contents of [the] order represents their agreement as to their marital property division and the same shall be a full and final settlement of any pending claims for equitable distribution." Pursuant to the 30 April 2002 order, Mr. Ellison was "ordered to maintain the Survivors Benefit Plan [("SBP")] on his pension naming . . . Plaintiff as beneficiary. [Mr. Ellison] shall immediately execute any forms or make necessary arrangements to insure . . . Plaintiff is listed as the beneficiary." At the time of the 30 April 2002 order, Mr. Ellison was retired from the United States Army and was receiving retirement benefits. The SBP is a plan, managed by the Defense Finance and Accounting Service ("DFAS"), available to eligible military retirees whereby some retirement pay is withheld monthly to participate in a plan to provide a surviving spouse, former spouse, or other designate, with monthly benefits upon the death of the participating serviceperson. Because Plaintiff and Mr. Ellison were married when Mr. Ellison retired, Plaintiff became the beneficiary of the SBP upon Mr. Ellison's retirement. 10 U.S.C. § 1448(a). Plaintiff and Mr. Ellison were divorced on 7 December 2006, and Mr. Ellison re-married twice. His second wife died, and he married Elizabeth Smith-Ellison ("Defendant") on 19 January 2010. Mr. Ellison died on 20 November 2011.

Mr. Ellison failed to designate Plaintiff as the former spouse beneficiary of the SBP as required by the 30 April 2002 order.[2] Plaintiff failed to obtain a "deemed election" within the one-year period following entry of the 30 April 2002 equitable distribution order, or within one year following entry of the divorce decree on 7 December 2006, which incorporated

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1. Mr. Ellison was the defendant in the original divorce action. Elizabeth Ellison was brought into this action as the third-party defendant. However, because Elizabeth Ellison is the relevant party in this appeal, we will refer to her simply as "Defendant".

2. Defendant, citing 10 U.S.C. 1448(b)(3)(A)(II)(iii), contends that Mr. Ellison was required to make the election of Plaintiff as beneficiary within one year of the entry of the divorce decree. However, 10 U.S.C. 1448(b)(2), not 10 U.S.C. 1448(b)(3), is the applicable paragraph in this case. Unlike 10 U.S.C. 1448(b)(3), 10 U.S.C. 1448(b)(2) does not contain a time limit for the serviceperson to make an election of a former spouse as beneficiary. Because Mr. Ellison is deceased and cannot make an election, we do not address whether there is any time limit for election of a former spouse pursuant to 10 U.S.C. 1448(b)(2).

the 30 April 2002 order, as required by 10 U.S.C. § 1450(f)(3).[3] Plaintiff apparently did not realize, until after Mr. Ellison's death in 2011, that Mr. Ellison had failed to abide by the trial court's order, and had not elected her as beneficiary of the SBP. At that time, according to Plaintiff, DFAS informed her that her only recourse was to apply to the Army Board for the Correction of Military Records ("the Board"), seeking to have them change the designated beneficiary on Mr. Ellison's SBP records to Plaintiff.

According to Plaintiff, the Board informed her that it could not

> act on applications for correcting SBP beneficiary designations without either: the consent of all interested parties who may have an interest in the benefit, or a court order finding that the individual concerned [Defendant] has no right to the SBP payments . . . where the individual [Defendant] has been made a party to the action in which the said order is entered.

The trial court found as fact in its 9 June 2014 order for joinder:

> In order for the court-awarded SBP payments to be effectuated to [ ] Plaintiff, she must have either: a notarized affidavit from [Defendant] relinquishing her rights to the benefit in favor of [ ] Plaintiff, or an order declaring that [ ] Plaintiff is the rightful beneficiary of the benefit. The [Board] requires that [Defendant] be joined as a party before said order is entered.

Apparently Defendant was not willing to give the required consent. If Plaintiff were to obtain the order requested by the Board, the Board would then consider her application. If the Board changes the record to indicate Plaintiff is the designated beneficiary of the SBP, Plaintiff could then apply to DFAS seeking to have them recognize her as the legitimate beneficiary, and provide her with the SBP benefits.

Plaintiff filed a motion on 28 May 2014 to join Defendant as a third-party defendant in her original divorce action. Plaintiff filed

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3. The 7 December 2006 order granting divorce incorporated the 10 April 2002 equitable distribution order, and further ordered both parties to do whatever was necessary "to effectuate the provisions of this Decree." Because it is irrelevant whether the 10 April 2002 order or the 7 December 2006 order constitutes the last order directing Mr. Ellison to elect Plaintiff as the SBP beneficiary, we do not reach a decision concerning whether the order for divorce constituted a new and enforceable order for the purposes of 10 U.S.C. § 1450(f)(3).

a third-party complaint against Defendant on 23 June 2014 seeking an order ruling that Defendant "has no interest in the former-spouse payments of Mr. Ellison's [SBP.]" The trial court granted Plaintiff's motion to join Defendant by order entered 9 June 2014. Defendant made a limited appearance "for the sole purpose of contesting personal jurisdiction and to quash the Order for Joinder dated June 9, 2014, as requested in my concurrently filed Motion to Quash." Defendant's notice of limited appearance and motion to quash for lack of personal jurisdiction were both filed on 27 June 2014. Defendant filed a motion to dismiss on 25 July 2014, based upon lack of personal jurisdiction. Plaintiff moved for summary judgment on 27 August 2014.

Plaintiff's motion for summary judgment was heard on 2 October 2014. Summary judgment in favor of Plaintiff was entered by order filed on 2 October 2014, which stated "that [P]laintiff [was] entitled to judgment as requested in her motion, as a matter of law. [P]laintiff [was] the rightful beneficiary of the [SBP] annuity of [Mr. Ellison] as of the date of his death." Defendant appeals.

I.

[1] In Defendant's second argument, which we address first, she contends that the trial court erred in failing to dismiss the third-party complaint because the trial court lacked personal jurisdiction over Defendant. We disagree.

The trial court indicated that it believed it had *in rem* jurisdiction, and that it also obtained personal jurisdiction over Defendant because certain filings in the matter served to waive her objection to personal jurisdiction. We hold the trial court had jurisdiction *in rem*.

> A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:
>
> > (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, *or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein.* This subdivision

> shall apply whether any such defendant is known or unknown.

N.C. Gen. Stat. § 1-75.8 (2013) (emphasis added). Defendant states in her brief: "The fact that there exists 'personal property' in North Carolina in which [Defendant] may have an interest, because of equitable distribution, is not alone sufficient to establish jurisdiction over [her] or her property." Defendant does not contest that the interest in the SBP constitutes personal property located in North Carolina, so we do not address that issue.[4] Defendant argues that the SBP issue was part of the equitable distribution action between Plaintiff and Mr. Ellison and, therefore, *in rem* jurisdiction could not apply. Defendant cites *Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988) for the proposition that:

> In an equitable distribution action, the court is exercising jurisdiction over the interests of persons in property and not over a "status" of the parties. Exercise of this jurisdiction must meet the minimum contacts standard of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (defendant and forum State must have minimum contacts such that exercise of jurisdiction does not offend " 'traditional notions of fair play and substantial justice.' "). *Shaffer*, 433 U.S. at 212, 53 L.Ed.2d at 703.

Carroll, 88 N.C. App. at 455, 363 S.E.2d at 873-74. First, we do not recognize the present action as one for equitable distribution. It is unclear that SBP benefits are allocated pursuant to equitable distribution, but assuming *arguendo* that they are, this appeal is not from the equitable distribution order, but from an order determining the rightful beneficiary of the SBP. Nonetheless, the requirements of fair play and substantial justice must be satisfied before in rem jurisdiction may be exercised over Defendant. *Shaffer v. Heitner*, 433 U.S. 186, 212, 53 L. Ed. 2d 683 (1977) ("We therefore conclude that all assertions of state-court jurisdiction [including *in rem*] must be evaluated according to the standards set forth in *International Shoe* and its progeny."); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

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4. Because "our case law comports with the general understanding that in rem is but one type of personal jurisdiction[,]" Defendant can waive contested issues of *in rem* jurisdiction. *Coastland Corp. v. N.C. Wildlife Resources Comm'n*, 134 N.C. App. 343, 346, 517 S.E.2d 661, 663 (1999).

We hold that the requirements of *International Shoe* and its progeny are satisfied in this instance. In *Lessard v. Lessard* this Court held the following:

> The estate of the defendant's deceased daughter is personal property in this State and the relief demanded is to exclude the defendant from any interest in this property. No question has been raised as to service pursuant to Rule 4(k). This brings this action within the provisions of G.S. 1-75.8(1) and gives the court jurisdiction.

Lessard v. Lessard, 68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984). The relief sought in the present action, like in *Lessard*, is to exclude Defendant from any interest in property located in North Carolina. When the subject matter of the controversy is property located in North Carolina, the constitutional requisites for jurisdiction will generally be met.

> [W]e find the combination of the following factors sufficient to establish the requisite connection between the defendant and the forum: (1) The presence of the property in this State, especially in light of (2) the relationship between the property and the cause of action. As the *Shaffer* Court pointed out, the mere presence of property in the forum may "suggest the existence of other ties among the defendant, the State, and the litigation, . . ." *Shaffer v. Heitner*, *supra*, at 209, 97 S.Ct. at 2582, 53 L.Ed.2d at 701. *See also Gro-Mar Public Relations*, *Inc. v. Billy Jack Enterprises*, *Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978). A significant tie develops when the property is *related* to the underlying controversy. In such a case, "it would be unusual for the State where the property is located not to have jurisdiction. . . . [T]he defendant's claim to property located in the State would normally indicate that [she] expected to benefit from the State's protection of [her] interest." *Shaffer v. Heitner*, *supra* at 209, 97 S.Ct. at 2581, 53 L.Ed.2d at 700. We think it indisputable that the property in the present case is related to and, indeed, is the source of the controversy between the plaintiff and the defendant.

Canterbury v. Hardwood Imports, 48 N.C. App. 90, 93-94, 268 S.E.2d 868, 870-71 (1980). It is indisputable that the property in this case was the source of the controversy before the trial court. We hold that the

trial court properly exercised *in rem* jurisdiction. This argument is without merit.

II.

[2] In Defendant's first argument, she contends that the trial court erred in granting summary judgment because "there were genuine issues of material facts as to why Plaintiff failed to comply with the statutory deadlines for being designated beneficiary of Defendant's [SBP]." We disagree.

Defendant argues that because the trial court "conducted no inquiry, and received no evidence, as to why [Plaintiff] failed to comply with the statutory requirements and what the effect of that failure was[,]" there were issues of material fact concerning Plaintiff's failure, and summary judgment was improper. Defendant's focus on Plaintiff's failure to comply with the requirements of the United States Code ("the Code") related to perfecting her interest in the SBP is misplaced. Mr. Ellison was ordered to take the steps necessary to designate Plaintiff as the former spouse beneficiary of his SBP by order entered on 25 April 2002. Mr. Ellison failed to comply with the order, and did not take the required steps to designate Plaintiff as the former spouse beneficiary pursuant to 10 U.S.C. § 1448(b)(2). The Code allows a former spouse to obtain a "deemed election" as the SBP beneficiary in certain circumstances:

> **(A) Deemed election upon request by former spouse.** -- If a person described in paragraph (2) or (3) of section 1448(b) of this title is required (as described in subparagraph (B)) to elect under section 1448(b) of this title to provide an annuity to a former spouse and such person then fails or refuses to make such an election, such person shall be deemed to have made such an election if the Secretary concerned receives the following:
>
> > **(i) Request from former spouse. --** A written request, in such manner as the Secretary shall prescribe, from the former spouse concerned requesting that such an election be deemed to have been made.
> >
> > **(ii) Copy of court order or other official statement.** -- Either --
> >
> > > **(I)** a copy of the court order, regular on its face, which requires such election or incorporates, ratifies, or approves the written agreement of such person; or

> **(II)** a statement from the clerk of the court (or other appropriate official) that such agreement has been filed with the court in accordance with applicable State law.
>
> **(B) Persons required to make election.** -- A person shall be considered for purposes of subparagraph (A) to be required to elect under section 1448(b) of this title to provide an annuity to a former spouse if —
>
> **(i)** the person enters, incident to a proceeding of divorce, dissolution, or annulment, into a written agreement to make such an election and the agreement (I) has been incorporated in or ratified or approved by a court order, or (II) has been filed with the court of appropriate jurisdiction in accordance with applicable State law; or
>
> **(ii)** the person is required by a court order to make such an election.
>
> **(C) Time limit for request by former spouse.** -- An election may not be deemed to have been made under subparagraph (A) in the case of any person unless the Secretary concerned receives a request from the former spouse of the person within one year of the date of the court order or filing involved.

10 U.S.C. § 1450(f)(3) (2014). Defendant is correct, and Plaintiff admits, that Plaintiff failed to follow the requirements to obtain a deemed election pursuant to 10 U.S.C. § 1450(f)(3) within one year of entry of the relevant order as required by 10 U.S.C. § 1450(f)(3)(C). Plaintiff was not seeking, and the trial court did not attempt, to order DFAS to elect Plaintiff as the former spouse beneficiary of the SBP in contradiction to the mandates of 10 U.S.C. § 1450(f)(3). The ultimate decision of whether Plaintiff is designated the beneficiary of the SBP continues to lie with DFAS.

Upon realizing that Mr. Ellison had not designated her as beneficiary of the SBP, and also realizing that she had failed to force a deemed election pursuant to 10 U.S.C. § 1450(f)(3) within one year of entry of the relevant order, Plaintiff applied to the Board to have her listed on the appropriate records as beneficiary. In its 9 June 2014 order joining Defendant in this action, the trial court found as fact:

> 3. [Defendant] has an interest in the Survivor Benefit Plan annuity that was awarded to the Plaintiff in this action.
>
> 4. In order for the court-awarded SBP payments to be effectuated to [ ] Plaintiff, she must have either: a notarized affidavit from [Defendant] relinquishing her rights to the benefit in favor of [ ] Plaintiff, or an order declaring that [ ] Plaintiff is the rightful beneficiary of the benefit. The Board of Corrections for Military Records requires that [Defendant] be joined as [a] party before said order is entered.
>
> 5. [Defendant] has failed to provide an affidavit relinquishing her rights, and therefore an order must be entered that declares that [ ] Plaintiff is the rightful beneficiary.

Defendant has not challenged these findings of fact and, therefore, they are binding on appeal. *Langston v. Richardson*, 206 N.C. App. 216, 219, 696 S.E.2d 867, 870 (2010). The trial court was acting in response to a request from the Board to enter the order in this matter.

Further, contrary to Defendant's entire argument on appeal, the issue before the trial court, and now before us, has to do with the requirements of the Board, not the requirements of DFAS and the Code for obtaining a deemed election pursuant to 10 U.S.C. § 1450(f)(3). The reasons for Plaintiff's failure to act within the time limit set in 10 U.S.C. § 1450(f)(3)(C) were irrelevant to the trial court's ruling on summary judgment. Plaintiff will have to try and convince the Board that correction of the relevant records to include her as the former spouse beneficiary will "correct an error or remove an injustice[:]"

> **(a)(1)** The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. . . . .
>
> . . . .
>
> **(3)** Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

10 U.S.C. § 1552 (2014). "[The Board] is a civilian body within the military service, with broad-ranging authority . . . 'to correct an error or remove an injustice' in a military record, § 1552(a)(1)." *Clinton v. Goldsmith*, 526 U.S. 529, 538, 143 L. Ed. 2d 720 (1999); *see also Porter v. U.S.*, 163 F.3d 1304, 1324 (Fed. Cir. 1998) ("Section 1552 of title 10 conveys broad authority to the corrections boards regarding how they may exercise their statutory responsibilities, and contains no prescriptions on how they may fulfill their statutory charge.").

The trial court's ruling in this case simply answers the request the Board made to Plaintiff to obtain a court order, with Defendant joined as a party, determining the rightful beneficiary of the SBP so far as the trial court, which entered the original order designating Plaintiff as beneficiary, was concerned. Based upon the prior order of the trial court designating Plaintiff as beneficiary, and Defendant's failure to participate in the action – and therefore failure to present any argument or evidence that she was the rightful beneficiary – we hold that there were no issues of material fact in this matter, and summary judgment was properly granted in favor of Plaintiff. We do not suggest the 2 October 2014 summary judgment mandates any particular resolution of Plaintiff's application to the Board, or any further proceedings she may have with DFAS or any other federal entity.

AFFIRMED.

Judges ELMORE and GEER concur.

THE ESTATE OF JERRY JACOBS, THE ESTATE OF ANN SHEPARD, THE ESTATE OF CONNIE TINDALL, AND THE ESTATE OF JOE (WILLIAM DALLAS) WRIGHT, PLAINTIFFS
v.
STATE OF NORTH CAROLINA, DEFENDANT

No. COA15-146

Filed 4 August 2015

Statutes—compensation to persons erroneously convicted of felonies—posthumous pardons

Where four deceased persons received posthumous pardons of innocence and their estates filed petitions for compensation under Article 8, Section 48 of the General Statutes, the Court of Appeals affirmed the order of the Full Industrial Commission dismissing the estates' claims. The plain and unambiguous language of the statute does not allow compensation based on posthumous pardons of innocence.

Appeal by plaintiffs from order entered 24 July 2014 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 4 June 2015.

Ferguson Chambers & Sumter, P.A., by James E. Ferguson, II, and Irving Joyner, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorneys General Amar Majmundar and Olga E. Vysotskya de Brito, for the State.

INMAN, Judge.

In this case, we must determine whether the estates of four deceased persons may recover from the government compensation for the wrongful convictions of decedents who received posthumous pardons of innocence. Although both the State and this Court solemnly acknowledge the profound harm caused by the wrongful imprisonment of any person, we affirm the Full Commission's order dismissing plaintiffs' claims because the statute does not allow compensation based upon posthumous pardons of innocence.

Background

On 6 February 1971, amidst a series of violent confrontations between black and white citizens following the court-ordered desegregation of public schools, Mike's Grocery Store in Wilmington was

firebombed, and the perpetrators attacked the police and fire rescue personnel who responded to the scene. In 1972, Jerry Jacobs, Anne Shepard, Connie Tindall, and Joe Wright, along with six others (collectively known as the "Wilmington Ten"), were arrested, convicted, and sentenced to various prison terms for these crimes.

In 1980, the United States Court of Appeals for the Fourth Circuit overturned their convictions, holding that the members of the Wilmington Ten had been denied the constitutional right to due process of law through gross prosecutorial misconduct and myriad legal errors at trial. *See Chavis v. State of N.C.*, 637 F.2d 213 (4th Cir. 1980). The principle witnesses for the State later recanted their testimony identifying the Wilmington Ten as the perpetrators.

On 31 December 2012, then-Governor Beverly Perdue issued pardons of innocence for all members of the Wilmington Ten, including posthumous pardons for the deceased Jacobs, Shepard, Tindall, and Wright, for what she deemed to be conduct "utterly incompatible with basic notions of fairness and with every ideal that North Carolina holds dear." The estates of Jacobs, Shepard, Tindall, and Wright ("plaintiffs") and the six living members of the Wilmington Ten all filed petitions with the North Carolina Industrial Commission on 25 February 2013 under Article 8, Chapter 48 of the North Carolina General Statutes (N.C. Gen. Stat. § 148-82 *et seq.*), for compensation due to persons erroneously convicted of felonies.

Although the State fully compensated the six members who were alive when their petitions were filed, it moved to dismiss plaintiffs' claims on the ground that section 148-82 *et seq.* did not authorize estates to bring a statutory cause of action, especially where the decedents did not receive pardons of innocence prior to their deaths.

By order entered 28 October 2013, Deputy Commissioner J. Brad Donovan denied the State's motions to dismiss, concluding that the legislative purpose for the enactment of section 148-82 *et seq.* was to allow remuneration for wrongful imprisonment, regardless of whether a pardon of innocence was issued posthumously.

The State appealed that order to the Full Commission, which reversed and dismissed plaintiffs' claims. Writing for the Full Commission, Commissioner Linda Cheatham concluded that: (1) the language of section 148-82 *et seq.* was clear and unambiguous in its requirements, (2) plaintiffs did not meet the statutory conditions necessary to bring claims under section 148-82 *et seq.*, and (3) because claims under section 148-82 *et seq.* accrue by the issuance of a pardon of innocence, and neither

Jacobs, Shepard, Tindall, nor Wright received a pardon of innocence prior to their respective deaths, no claims for remuneration survived to their personal representatives under N.C. Gen. Stat. § 28A-18-1 (2013). Plaintiffs filed timely notice of appeal from the Full Commission's order.

Plaintiffs' sole argument on appeal is that the Full Commission erred by dismissing their claims for compensation brought pursuant section 148-82 *et seq.* After careful review, we disagree.

I. Standard of Review

"We review an order of the Full Commission only to determine 'whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' " *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) (quoting *Deese v. Champion Int'l. Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000)). Because the facts of this case are not in dispute, they are binding on appeal. *See Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 501, 646 S.E.2d 604, 607 (2007). The Full Commission's conclusions of law, including those related to questions of statutory interpretation, are reviewed *de novo*. *See In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009).

II. Analysis

Plaintiffs have no common law claims against the State arising from the decedents' wrongful convictions. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534-36, 299 S.E.2d 618, 625-26 (1983). Their claims depend upon statutory rights created by section 148-82 *et seq.* Plaintiffs contend these statutes authorize their claims; the State contends that the plain meaning of the language of the statutes excludes plaintiffs' claims.

In matters of statutory construction, our primary task is to ensure that the purpose of the legislature is accomplished. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). Legislative purpose is first ascertained from the words of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute[.]" *In re Hamilton*, 220 N.C. App. 350, 352, 725 S.E.2d 393, 396 (2012). "Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* Finally, "statutes dealing with the same subject matter must be construed *in pari materia* and reconciled,

if possible, so that effect may be given to each." *Media, Inc. v. McDowell County*, 304 N.C. 427, 430–31, 284 S.E.2d 457, 461 (1981). Applying these canons of interpretation, as explained below, we conclude that the relief sought by plaintiffs conflicts with the plain meaning of the applicable statutes.

It is helpful to set out those provisions in full. Pursuant to section 148-82(a):

> Any person who, having been convicted of a felony and having been imprisoned therefor in a State prison of this State, and who was thereafter or who shall hereafter be granted a pardon of innocence by the Governor upon the grounds that the crime with which the person was charged either was not committed at all or was not committed by that person, may as hereinafter provided present by petition a claim against the State for the pecuniary loss sustained by the person through his or her erroneous conviction and imprisonment, provided the petition is presented within five years of the granting of the pardon.

N.C. Gen. Stat. § 148-82(a) (2013).

N.C. Gen. Stat. § 148-83 (2013) then sets out the procedure for filing a petition:

> Such petition shall be addressed to the Industrial Commission, and must include a full statement of the facts upon which the claim is based, verified in the manner provided for verifying complaints in civil actions, and it may be supported by affidavits substantiating such claim. Upon its presentation the Industrial Commission shall fix a time and a place for a hearing, and shall mail notice to the claimant, and shall notify the Attorney General, at least 15 days before the time fixed therefor.

Finally, N.C. Gen. Stat. § 148-84 (2013) describes the evidentiary, award, and compensation procedures:

> (a) At the hearing the claimant may introduce evidence in the form of affidavits or testimony to support the claim, and the Attorney General may introduce counter affidavits or testimony in refutation. If the Industrial Commission finds from the evidence that the claimant received a pardon of innocence for the reason that the crime was not committed at all, received a pardon of innocence for the reason

> that the crime was not committed by the claimant, or that the claimant was determined to be innocent of all charges by a three-judge panel under G.S. 15A-1469 and also finds that the claimant was imprisoned and has been vindicated in connection with the alleged offense for which he or she was imprisoned, the Industrial Commission shall award to the claimant an amount equal to fifty thousand dollars ($50,000) for each year or the pro rata amount for the portion of each year of the imprisonment actually served, including any time spent awaiting trial. However, (i) in no event shall the compensation, including the compensation provided in subsection (c) of this section, exceed a total amount of seven hundred fifty thousand dollars ($750,000), and (ii) a claimant is not entitled to compensation for any portion of a prison sentence during which the claimant was also serving a concurrent sentence for conviction of a crime other than the one for which the pardon of innocence was granted.
>
> . . .
>
> (c) In addition to the compensation provided under subsection (a) of this section, the Industrial Commission shall determine the extent to which incarceration has deprived a claimant of educational or training opportunities and, based upon those findings, may award the following compensation for loss of life opportunities:
>
> > (1) Job skills training for at least one year through an appropriate State program; and
> >
> > (2) Expenses for tuition and fees at any public North Carolina community college or constituent institution of The University of North Carolina for any degree or program of the claimant's choice that is available from one or more of the applicable institutions. . . .

The State contends that because section 148-82(a) explicitly waives the State's sovereign immunity from suit, its provisions must be strictly construed, *Guthrie*, 307 N.C. at 537-38, 299 S.E.2d at 627, and "everything should be excluded from the statute's operation which does not clearly come within the scope of the language used," *Izydore v. City of Durham (Durham Bd. of Adjustment)*, __ N.C. App. __, __,746 S.E.2d 324, 326 (2013). On the other hand, plaintiffs argue that because section

148-82 *et seq.* is remedial in nature, it must be liberally construed "in a manner which assures fulfilment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope." *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

Both contentions have merit. This seems to be the rare case where precedent advises both a liberal and strict construction of the same statutes. But we need not attempt this task, nor must we choose which interpretative method prevails.

Even if we read section 148-82 *et seq.* liberally, as plaintiffs contend we should, we cannot conclude that plaintiffs' claims "fairly fall[] within its intended scope." *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. The best indications of that intended scope "are the language of the statute or ordinance, the spirit of the act[,] and what the act seeks to accomplish." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (quotation marks omitted). These considerations support the Full Commission's conclusion that the General Assembly did not intend for testamentary estates, like plaintiffs, to recover compensation under section 148-82 *et seq.*

First, the language of section 148-82 *et seq.* is plain and unambiguous in its requirements. Section 148-82(a) provides that "any *person*" who is convicted of a felony, imprisoned, and receives a pardon of innocence may "present by petition a claim against the State for the pecuniary loss sustained *by the person through his or her erroneous conviction and imprisonment*[ ]." (Emphasis added.) N.C. Gen. Stat. § 12-3 (2013), titled "Rules for construction of statutes," defines the word "person" as "bodies politic and corporate, as well as . . . individuals, unless the context clearly shows to the contrary." Rather than "clearly show[ing]" that the word "person" in section 148-82(a) is meant to also include a testamentary estate, the statutory requirements that the "person" be convicted of a crime, imprisoned, and granted a pardon of innocence before petitioning the State for the pecuniary loss suffered "through his or her erroneous conviction and imprisonment" significantly bolsters the State's argument that the word "person," in the context of section 148-82(a), means the actual individual who was wrongfully incarcerated.

The legislature's use in context of the word "claimant" in sections 148-83 and -84 further strengthens the State's position. Particularly, the "claimant" is described in section 148-84(a) as having been "determined to be innocent"; "imprisoned"; and "vindicated in connection with the alleged offense for which he or she was imprisoned." None of

these descriptions applies to plaintiffs or could ever apply to a testamentary estate. In addition to pecuniary compensation, the Industrial Commission is required by section 148-84(c) to "determine the extent to which incarceration has deprived a claimant of educational or training opportunities," and based on those findings, may award job skills training or expenses for fees and tuition at any public North Carolina institution of higher learning. Plaintiffs' interpretation of this chapter would render section 148-84(c) either superfluous or nonsensical, as it would be impossible for the Industrial Commission to assess how an unconscious, inanimate legal entity like a testamentary estate was deprived "loss of life opportunities." N.C. Gen. Stat. § 148-84(c).

"[T]he rule of liberal construction cannot be extended beyond the clearly expressed language of the act." *Gilmore v. Hoke Cnty. Bd. of Educ.*, 222 N.C. 358, 366, 23 S.E.2d 292, 297 (1942). Thus, even under a liberal construction, we must give effect to each provision under section 148-82 *et seq.* where possible. Because plaintiffs' interpretation runs counter to the plain and unambiguous language of these statutes, and would render certain portions unneeded, we must reject it. Accordingly, we affirm the Full Commission's legal conclusion that section 148-82 *et seq.* did not authorize plaintiffs, as the testamentary estates of Jacobs, Shepard, Tindall, and Wright, to petition the State for compensation on their behalf.

We also affirm the Full Commission's conclusion that plaintiffs may not avail themselves of N.C. Gen. Stat. § 28A-18-1 to assert claims under section 148-82 *et seq.* Section 28A-18-1 provides:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, *existing in favor of or against such person*, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person's estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> (1) Causes of action for libel and for slander, except slander of title;
>
> (2) Causes of action for false imprisonment;
>
> (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

(Emphasis added.) At oral argument, plaintiffs conceded that any claim under section 148-82 *et seq.* accrues only upon the issuance of a pardon of innocence. Because Jacobs, Shepard, Tindall, and Wright received no pardons of innocence during their lifetimes, no claims under section 148-82 *et seq.* existed to survive to their estates. *See*, *e.g.*, *Carnahan v. Reed*, 53 N.C. App. 589, 592, 281 S.E.2d 408, 410 (1981) (holding that only causes of action which had accrued in favor of the decedent prior to his death could survive his death under section 28A-18-1).

We acknowledge plaintiffs' assertion that "[w]hen an innocent person has had his or her liberty and a portion of his or her life wrongfully taken, . . . [t]hat harm lives on after death – especially in the lives of affected loved ones." However, we are required by law to apply section 148-82 *et seq.* as it is written. *See Gilmore*, 222 N.C. at 366, 23 S.E.2d at 297 ("It is ours to construe the laws, and not to make them[.]"). These policy considerations are more appropriately raised with the legislative branch.

Conclusion

For the foregoing reasons, we affirm the order of the Full Commission dismissing plaintiffs' claims for compensation under section 148-82 *et seq.*

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

STEVE W. FOWLER AND ELIZABETH P. FOWLER, PETITIONERS
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA14-1302

Filed 4 August 2015

1. Taxation—income and gift taxes—law of residency—change of domicile

The trial court did not err by allegedly misapplying the law of residency for tax purposes when it concluded that petitioners satisfied their burden to prove a change of domicile to Florida on 20 January 2006. The Department of Revenue acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes.

2. Attorney Fees—taxation—claim substantially justified

The trial court did not err in a tax case by failing to grant petitioners' motion for attorney fees. The Department of Revenue's decision to pursue its claim against petitioners was substantially justified.

Appeal by respondent and cross-appeal by petitioners from order entered 6 August 2014 by Judge James L. Gale in Wake County Superior Court. Heard in the Court of Appeals 5 May 2015.

Attorney General Roy Cooper, by Assistant Attorney Generals Andrew O. Furuseth and Perry J. Pelaez, for the State.

Robinson Bradshaw & Hinson, P.A., by John R. Wester and Thomas P. Holderness, for petitioner-appellees and cross-appellants.

BRYANT, Judge.

As domicile is a question of fact, our review on appeal in this case concerns whether the trial court's findings of fact are supported by competent evidence, which in turn support the trial court's conclusions of law. Where the trial court's findings of fact were supported by competent evidence and supported its conclusions of law that petitioners had manifested an intent to permanently change their domicile from Raleigh, North Carolina to Naples, Florida on 20 January 2006, we affirm the trial court's order finding and concluding that the Department of Revenue acted beyond its legal authority in imposing 2006 and 2007 income and

gift taxes. Where the trial court found and concluded that the Department of Revenue was, based on the evidence, substantially justified in pursuing its claim against petitioners, we affirm the trial court's subsequent denial of petitioners' motion for attorneys' fees.

On 22 December 2011, petitioners Steve W. Fowler and Elizabeth P. Fowler ("petitioners") filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH) against respondent North Carolina Department of Revenue (DOR). In the petition, petitioners contested the DOR's assessment of individual income tax for calendar years 2006 and 2007 and gift taxes assessed for calendar year 2006 on the grounds that they were not North Carolina residents and were not domiciled in North Carolina on or after 20 January 2006. The matter was heard 13-16 and 27-28 November 2012 before an Administrative Law Judge (the "ALJ").

In a decision entered 31 December 2012, the ALJ concluded that on 20 January 2006, petitioners abandoned their North Carolina residence and established their domicile in Florida. "The time Petitioners spent in North Carolina during the period of January 20, 2006 through the end of 2007 was for a temporary or transitory purpose . . . ." In accordance with its conclusions, the ALJ reversed and vacated the Department of Revenue's tax assessments against petitioners: "Petitioners were not residents of North Carolina after January 19, 2006 through the end of 2007 and therefore not subject to North Carolina income or gift tax for that period . . . ."

Pursuant to North Carolina General Statutes, section 150B-36, the ALJ's decision was reviewed by the DOR, the agency tasked with entering a final decision.[1]

On 17 July 2014, the DOR entered a final agency decision. In pertinent part, the DOR identified the following as an issue:

> [Whether petitioners met] their burden of proving a change in their North Carolina domicile by showing: (1) an actual abandonment of the first domicile, coupled with

1. In 2011, our General Assembly made significant changes to the Administrative Procedure Act codified within Chapter 150B of our General Statutes, including a repeal of N.C. Gen. Stat. § 150B-36. Pursuant to Session Law 2011-398, the repeal of N.C.G.S. § 150B-36 was effective 1 January 2012 and was applicable to contested cases commenced on or after that date. Act of July 25, 2011, Ch. 398, §§ 20, 63, 2011 N.C. Sess. 20. However, as this case was commenced on 22 December 2011, prior to the effective date of these statutory changes, N.C.G.S. § 150B-36 is applicable to this case.

> an intention not to return to it; (2) the acquisition of a new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home?

In its conclusions of law, the DOR concluded that "Petitioners' domicile from January 20, 2006 through the end of 2007 was North Carolina." "[That] [u]nder N.C. Gen. Stat. §105-134.1(12), Petitioners were residents of North Carolina during 2006 and 2007 and were therefore subject to North Carolina income and gift taxes for those years." In accordance with its conclusions, the DOR's decision stated that "the [DOR] rejects the ALJ's Recommended Decision. The Notices of Final Determination dated October 27, 2011 issued to Petitioners by Respondent concerning individual income tax and gift tax assessments are sustained as to the tax, penalties, and interest, plus interest accruing, until paid in full."

Pursuant to General Statutes, sections 105-241.16 and 150B-43, petitioners filed a petition for judicial review of the final agency decision in Wake County Superior Court.

On 6 August 2014, after reviewing the record and hearing oral arguments, the Honorable James L. Gale, Special Superior Court Judge for Complex Business Cases, entered an order on the petition for judicial review of final decision in Wake County Superior Court. Judge Gale acknowledged that the question before the court was "whether Petitioners changed their domicile from North Carolina to Florida on or about January 20, 2006, exempting them from taxes arising from income received and gifts made in connection with the sale of [petitioner Steve] Fowler's majority interest in his company, which closed on February 3, 2006." Furthermore, the court noted respondent DOR's acknowledgement "that Petitioners ultimately intended to change their domicile to Florida at some point in the future, but that they had no intent to and did not abandon their domicile in North Carolina at a time that avoids the taxes in question."

The Superior Court concluded that "[the petitioners] intended to change and did change their domicile from North Carolina to Florida effective as of January 20, 2006, effecting an intent that preceded that date." "Respondent acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes, together with penalties and interest on the Petitioners." In accordance with these conclusions, the court reversed the final agency decision of the DOR. The trial court then denied petitioners' request for attorneys' fees. DOR appeals. Petitioners cross-appeal on the denial of attorneys' fees.

On appeal, DOR argues that (I) the trial court misapplied the law of residency for tax purposes and (II) petitioners failed to present substantial evidence of abandonment of their North Carolina domicile. On cross-appeal, petitioners argue that (III) the record displayed no genuine foundation for the DOR to press its claim against petitioners and (IV) there were no special circumstances making an award of attorneys' fees unjust.

DOR's Appeal

[1] The DOR argues that the trial court erred by misapplying the law of residency for tax purposes. We disagree.

"[General Statutes, Chapter 150B] establishes a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C. Gen. Stat. § 150B-1(a) (2013). "The contested case provisions of [Chapter 150B] apply to all agencies and all proceedings . . . ." *Id.* § 150B-1(e). A "contested case" is "an administrative proceeding pursuant to [Chapter 150B] to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." *Id.* § 150B-2(2).

> [A] final decision in a contested case shall be made by the agency in writing after review of the official record . . . and shall include findings of fact and conclusions of law. The agency shall adopt each finding of fact contained in the administrative law judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. . . .
>
> . . .
>
> (b3) . . . [T]he agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record. If the agency does not adopt the administrative law judge's decision as its final decision, the agency shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency.

N.C. Gen. Stat. § 150B-36(b), (b3) (2011).

If, as here, petitioners seek judicial review of an agency decision that did not adopt the decision of the ALJ, the trial court's standard of review is governed by the parameters set forth in General Statutes, section 150B-51:

> [i]n reviewing a final decision in a contested case in which an administrative law judge made a decision . . . and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

Id. § 150B-51(c) (2011).[2]

Usually,

> [w]hen the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court. It is the traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure, while generally deferring to the latter's unchallenged superiority to act as finders of fact.

N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004) (citations and quotation omitted). However, section 150B-51(c) "requires courts to engage in independent fact-finding

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2. "This subsection requires courts to engage in independent fact-finding but only when the agency rejects the ALJ's decision. It does not redefine the '*de novo*' standard governing judicial review over questions of law." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 663, 599 S.E.2d 888, 897 (2004) (citations omitted).

. . . when the agency rejects the ALJ's decision." *Id.* at 663, 599 S.E.2d at 897 (citation omitted). When a trial court's decision is appealed to this Court, "[t]he scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2011); *see also Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 22, 590 S.E.2d 8, 14 (2004) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if contradictory evidence may exist. The substantial evidence test is a deferential standard of review." (citations and quotations omitted)).

> This Court's scope of appellate review of a superior court order regarding a final agency decision is limited to examination of the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 162 N.C. App. 467, 475-76, 591 S.E.2d 549, 555 (2004) (citations and quotation omitted), *overruled on other grounds by Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004).

The DOR contends the trial court misapplied the law for residency for tax purposes in concluding that petitioners satisfied their burden to prove a change of domicile on 20 January 2006. Specifically, the DOR argues that the question of domicile is a question of law. However, it is well-established by our Courts that domicile is a question of fact. *See State v. Williams*, 224 N.C. 183, 191, 29 S.E.2d 744, 749-50 (1944) ("Domicile is a matter of fact and intention. In ordinary acceptation, it is the place where one lives or has his home. Two circumstances must concur in order to establish a domicile: first, residence, and secondly, the intention to make it a home, or to live there permanently, or, as some of the cases put it, indefinitely. To effect a change of domicile, therefore, the first domicile must be abandoned with no intention of returning to it, and actual residence taken up in another place coupled with the intention to remain there permanently or indefinitely." (citations omitted)); *see also In re Estate of Severt*, 194 N.C. App. 508, 515, 669 S.E.2d 886, 891 (2008) ("Domicile is . . . a question of fact.") (quoting *In re Will of Marks*, 259 N.C. 326, 331, 130 S.E.2d 673, 676 (1963) (discussing in which state a testator's will could be properly probated, noting: "Domicile is, however,

a question of fact. Different courts may reach different conclusions with respect to this factual question.")). As such, we review the trial court's order under the substantial evidence test. *Cape Med. Transp., Inc.*, 162 N.C. App. at 22, 590 S.E.2d at 14 (citation omitted).

"The general purpose of this Part [of our General Statutes designated Individual Income Tax] is to impose a tax for the use of the State government upon the taxable income collectible annually: (1) [o]f every resident of this State." N.C. Gen. Stat. § 105-134(1) (2006). Pursuant to General Statutes, section 105-134.1, a "resident" is defined as

> [a]n individual who is domiciled in this State at any time during the taxable year or who resides in this State during the taxable year for other than a temporary or transitory purpose. . . . A resident who removes from the State during a taxable year is considered a resident until he has both established a definite domicile elsewhere and abandoned any domicile in this State.

Id. § 105-134.1(12). "Although a person may have more than one residence, he can only have one domicile. Domicile is a question of fact to be determined by the finder of fact." *Atassi v. Atassi*, 117 N.C. App. 506, 511, 451 S.E.2d 371, 374 (1995) (citations omitted).

Both petitioners and the DOR refer to *Farnsworth v. Jones*, 114 N.C. App. 182, 441 S.E.2d 597 (1994), as setting forth the general principles for the determination of whether a person has changed domicile. In *Farnsworth*, this Court addressed whether the plaintiff was a resident of a municipality such that the plaintiff was eligible as a candidate for election to a municipal office. In its discussion, the *Farnsworth* Court defined residence, as opposed to domicile, and applied a three-part test to differentiate these terms.

> Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return. . . . [I]t is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave.

> . . . Where someone retains his original home with all its incidental privileges and rights, there is no change in domicile.
>
> Once an individual acquires a domicile, it is presumed to continue until a new domicile is established. [T]he burden of proof rests upon the person who alleges a change. We apply a three-part test to differentiate between a residence and a domicile. To establish a change of domicile, a person must show: (1) an actual abandonment of the first domicile, coupled with an intention not to return to it; (2) the acquisition of new domicile by actual residence at another place; and (3) the intent of making the newer residence a permanent home. Although a person's testimony regarding his or her intent regarding the acquisition of a new domicile is competent evidence, it is not conclusive. We must consider the evidence of all the surrounding circumstances and the conduct of the person in determining whether he or she has effectuated a change in domicile.

Id. at 186-87, 441 S.E.2d at 600-01 (citations and quotation omitted).

We also note that the North Carolina Administrative Procedure Act includes a list of non-exclusive factors to be considered by the agency (here, DOR) in determining the legal residence or domicile of an individual for income tax purposes:

> (1) Place of birth of the taxpayer, the taxpayer's spouse, and the taxpayer's children.
>
> (2) Permanent residence of the taxpayer's parents.
>
> (3) Family connections and close friends.
>
> (4) Address used for federal tax returns, military purposes, passports, driver's license, vehicle registrations, insurance policies, professional licenses or certificates, subscriptions for newspapers, magazines, and other publications, and monthly statements for credit cards, utilities, bank accounts, loans, insurance, or any other bill or item that requires a response.
>
> (5) Civic ties, such as church membership, club membership, or lodge membership.
>
> (6) Professional ties, such as licensure by a licensing agency or membership in a business association.

(7) Payment of state income taxes.

(8) Place of employment or, if self-employed, place where business is conducted.

(9) Location of healthcare providers, such as doctors, dentists, veterinarians, and pharmacists.

(10) Voter registration and ballots cast, whether in person or by absentee ballot.

(11) Occasional visits or spending one's leave "at home" if a member of the armed services.

(12) Ownership of a home, insuring a home as a primary residence, or deferring gain on the sale of a home as a primary residence.

(13) Location of pets.

(14) Attendance of the taxpayer or the taxpayer's children at State supported colleges or universities on a basis of residence—taking advantage of lower tuition fees.

(15) Location of activities for everyday "hometown" living, such as grocery shopping, haircuts, video rentals, dry cleaning, fueling vehicles, and automated banking transactions.

(16) Utility usage, including electricity, gas, telecommunications, and cable television.

17 N.C.A.C. 06B.3901 (2011). These factors were considered by the ALJ as well as the DOR in their respective evaluations of petitioners' case.

Here, the facts underlying the trial court's determination that petitioners changed their domicile from North Carolina to Florida on 20 January 2006 are not substantially disputed. In its order, the trial court made the following findings of fact:

> {25} Petitioners are a married couple who were domiciled in North Carolina at least until January 19, 2006, and for their entire lives before that date. They filed North Carolina tax returns for the 2005 tax year and for each year prior to 2005, but have asserted that they were non-residents during the 2006 and 2007 tax years.
>
> . . .

B. Events prior to January 20, 2006

{27} In 1984, Mr. Fowler founded Commercial Grading, Inc. ("Commercial Grading"), a North Carolina company, which did business as "Fowler Contracting." Mr. Fowler devoted his time and effort to building Commercial Grading into a highly successful enterprise. He held the controlling majority interest in the company. Mrs. Fowler also worked at the company and dedicated substantial effort on its behalf.

{28} Petitioners began considering Florida as a potential retirement location as early as the 1990's.

. . .

{30} Over several years, Petitioners visited numerous cities in Florida in search of real estate. In 2002, they purchased a three-bedroom, 3,400 square-foot house in Naples (the "Tiburon House") for approximately $1.6 million. In 2003, in connection with the move to their new Old Stage Road residence [in Raleigh, NC], Petitioners moved furniture to the Tiburon House, including some family heirlooms and valued furniture. At this time, the Tiburon House was Petitioners' secondary residence, which they did not consider their true, fixed permanent home and principal establishment to which they intended to return when absent.

{31} In 2004, Mr. Fowler was diagnosed with kidney cancer and underwent surgery to remove his kidney. Petitioners accelerated their efforts to sell Commercial Grading and retire to Florida.

{32} In January 2005, Petitioners formed Fowler Aviation, Inc., a Florida company, to sell a new type of private jet. They invested $1.775 million in the venture, but the money was fully refunded in 2006 when the FAA would not certify the jet for production and sale.

{33} In early 2005, Petitioners engaged an investment-banking firm to solicit buyers for Commercial Grading. . . . In October 2005, Mr. Fowler signed a preliminary letter of intent ("Letter of Intent") with a private equity firm, Long Point Capital, to sell a majority of his shares in Commercial Grading. . . . Mr. Fowler was further expected to remain the company's President, and Mrs. Fowler was

also expected to remain with the company for a period after the sale.

{34} After signing the Letter of Intent, Petitioners told various other acquaintances in both Florida and North Carolina of their intent to move to Florida.

(35} Also, shortly after signing this Letter of Intent, Petitioners contracted to buy a four-bedroom, 9,300 square-foot house in Naples, Florida ("the Quail West House"), while retaining the Tiburon House. They closed on their purchase in August 2006, but later sold the Quail West House in April 2009 without having lived in it.

{36} In late 2005, Petitioners consulted their accountant, Graham Clements, to determine how to accomplish a change of domicile to Florida. . . . Mr. Clements advised Petitioners to change their domicile to Florida after January 1, 2006, but before the close of the sale to Long Point, which would be a taxable event. To effect the transfer, Mr. Clements advised Petitioners to own a home in Florida, hire a Florida attorney, file a Declaration of Domicile in Florida, spend at least 183 days in Florida, and take some "official action," such as changing their driver's licenses and registering to vote.

{37} Also in late 2005, Mr. Fowler sought assistance from William Graef, a friend who owned an aviation company, for the purpose of buying, maintaining, and storing a private airplane. Petitioners contracted in early 2006 to purchase a plane from Mr. Graef for approximately $19.2 million. Petitioners and Mr. Graef unsuccessfully attempted to locate suitable hangar space with necessary services in Naples. They continued to charter private planes from Raleigh until the plane was delivered in Raleigh on October 2007, where it was registered and then stored. During this period, the predominant portion of the Fowlers' various travels were on flights originating in and returning to Raleigh.

{38} Lynnwood Mallard was Petitioners' counsel in connection with the sale of Commercial Grading. Mr. Mallard advised Mr. Fowler that Long Point would require Petitioners to continue working for Commercial Grading after the sale. The length and nature of the requirement

became a significant point in negotiations for a sales agreement. Mr. Mallard obtained assurances that Mr. Fowler's work need not necessarily be on-site in North Carolina.

{39} On January 19, 2006, Petitioners signed the binding Securities Purchase Agreement for the sale of the majority interest in Commercial Grading. This event did not trigger taxes arising from the actual sale, which was set to occur in early February.

C. Efforts on January 20, 2006

{40} On January 20, 2006, the Fowlers left for Naples, Florida, on a chartered plane for the purpose of taking "official action" to evidence their change of domicile. They tried but could not complete certain efforts on this trip because they left certain necessary papers in North Carolina. At the driver's license office, Petitioners presented their North Carolina licenses and asked for Florida driver's licenses, but were denied for lack of additional identification. They attempted but were unable to register to vote for the same reason. At this time, Petitioners had one of their several automobiles in Florida. They registered that single car in Florida, but signed the registration form as non-residents, listing their North Carolina address. Petitioners also unsuccessfully attempted to obtain a post office box and register their dog on January 20, 2006.

{41} Petitioners stayed at the Tiburon House on this trip, which they contend had then become their true, fixed permanent home and principal establishment to which they intended to return when absent.

{42} On or about January 22, 2006, Petitioners returned to their Old Stage Road home, which they contend had then become their secondary home where they would reside on a temporary and transitory basis until and for the purpose of completing their ongoing obligations assumed under the sales transaction.

D. Events Following the Sale of Commercial Grading, Including Continuing North Carolina Ties

{43} On February 3, 2006, Petitioners closed the sale of their majority interest in Commercial Grading to Long Point Capital for $106 million. . . .

{44} Mr. Fowler signed an Employment Agreement with Long Point on February 3, 2006, pursuant to which he was employed as President for a term of three years and responsible for managing day-to-day operations of the company. He remained employed until February 3, 2009. Mrs. Fowler also signed a three-year Employment Agreement on February 3, 2006, as Assistant Secretary, and remained employed until February 3, 2009. Efforts to hire a president to replace Mr. Fowler and assume his responsibilities earlier than his contract's expiration were unsuccessful.

. . .

{46} Mrs. Fowler also made significant charitable contributions [to her late father's church] in North Carolina after February 3, 2006. . . .

{47} Petitioners returned to Florida on March 10, 2006, and successfully completed the matters that they were unable to complete on their January 20, 2006, trip. They signed and filed a Declaration of Domicile in Florida. They obtained a Naples post office box and Florida driver's licenses, and they registered to vote. They have since voted in person in Florida elections. In August 2006, Petitioners advised the Wake County Board of Elections to remove them from the voting rolls of Wake County. They have not voted in North Carolina since January 20, 2006.

{48} In spring 2006, Petitioners hired Cooper Pulliam, an investment advisor in Atlanta, Georgia, to buy municipal bonds. Based on his understanding that Petitioners were Florida residents, Mr. Pulliam purchased a portfolio of municipal bonds from across the country. . . .

{49} Petitioners traveled extensively after the sale, often to locations outside of either North Carolina or Florida. They spent substantial time in Myrtle Beach, South Carolina. Counting days, the Fowlers spent the most days in North Carolina in 2006 and 2007. Mr. Fowler testified that they did so because his duties as President required "face-to-face" meetings and "riding the jobs." In 2006, Mr. Fowler spent 162 and 51 days in North Carolina and Florida respectively. In 2007 he spent 168 and 27 days in North Carolina and Florida respectively. In 2006, Mrs. Fowler spent 173

and 47 days in North Carolina and Florida respectively. In 2007, she spent 180 and 27 days in North Carolina and Florida respectively. Neither Mr. Fowler nor Mrs. Fowler spent 183 days in North Carolina in either 2006 or 2007.

{50} When in Raleigh, Petitioners stayed at their Old Stage Road home. They returned to their home in Naples on several occasions throughout 2006 and 2007.

{51} Petitioners did not list their Old Stage Road house for sale in 2006. . . [due to] the declining real estate market. Ultimately, Petitioners listed the house on December 1, 2010, at $7.9 million.

{52} Petitioners used their Florida address on their North Carolina Individual Income Tax Returns filed in April 2006 and thereafter. Mrs. Fowler continued to use her North Carolina address on her Privilege License Tax Returns from 2006 through 2010, although the checks Mrs. Fowler used to pay the taxes due on her Privilege License Tax Returns displayed her Florida address. Mrs. Fowler retained her North Carolina real estate license and received referral fees for properties in South Carolina and Florida, but never for property sold in North Carolina. During 2006 and 2007, Mrs. Fowler completed her continuing education requirements in North Carolina. Mrs. Fowler did not obtain a Florida real estate license.

{53} Throughout 2006, the Fowlers changed their address from North Carolina to Florida with various businesses. However, throughout 2006 and 2007, they also continued to use the Old Stage Road address in Raleigh for certain correspondence and billing, and on K-1s, 1099s, bills, and bank statements.

{54} In 2006 and 2007, Mrs. Fowler went to church in both Naples and Raleigh. While she indicates that she contributed to churches in Naples, the record reflects much more significant giving in North Carolina during this period. . . . During 2006 and 2007, Petitioners further donated to numerous other North Carolina charitable organizations.

{55} In 2006 and 2007, Petitioners were members of the Tiburon Club and the Quail West Club in Florida, but of no club in North Carolina. . . .

{56} In 2006, Mr. Fowler used doctors in North Carolina and Massachusetts. In 2007, he used doctors in North Carolina, Massachusetts, and Florida. The majority of Petitioners' 2006 and 2007 medical expenses were for treatment at a Massachusetts facility associated with the Cleveland Clinic.

{57} In 2006 and 2007, the Fowlers did everyday "hometown" activities wherever they were.

{58} In 2006, the Fowlers hired Florida counsel to create their first estate plan. In 2006 and 2007, Mr. Fowler obtained legal services from at least two North Carolina firms.

{59} In 2006 and 2007, Mr. Fowler served as the registered agent for several North Carolina business entities. . . . Mr. Fowler used his Florida address when organizing these companies.

{60} Petitioners bought a homeowners insurance policy for their home at 7801 Old Stage Road in Raleigh for the period of July 31, 2006, through July 31, 2007. The policy included the stipulation that "The described dwelling is not seasonal or secondary." . . . They did not insure their Florida property.

{61} The Fowlers donated to candidates running for office in North Carolina but did not contribute to Florida candidates. Mr. Fowler testified that each contribution was tied to candidates whose efforts benefitted business holdings.

The trial court then made the following conclusions of law[3]:

{70} Based on the above findings of fact, applying the governing legal principles, the court makes the following conclusions of law:

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3. We note that the trial court mischaracterized some of its conclusions of law as findings of fact. However, this mischaracterization does not affect our review of the trial court's order. *See Hastings v. E. Carolina Pathology Assocs.*, No. COA04-994, 2005 WL 194884, at *3 (N.C. App. August, 16 2005) (unpublished) ("We reject [the] . . . characterization of the findings stated above as 'conclusions of law.' The Commission was not applying any legal standard to the evidence, but rather was evaluating the credibility of each physician's testimony under the circumstances. Accordingly, we now determine whether competent evidence exists to support these challenged findings.").

{71} The Fowlers can have but one domicile. The Fowlers intended to change and did change their domicile from North Carolina to Florida effective as of January 20, 2006, effecting an intent that preceded that date.

{72} The Fowlers took adequate voluntary and positive actions in Florida on January 20, 2006 to establish their new domicile. These intentional, voluntary, and positive actions were adequate, even though the Fowlers did not complete certain activities until the return trip on March 10, 2006.

{73} On January 20, 2006, the Fowlers were present in Florida and intended to return there whenever absent thereafter. They owned and lived in the Tiberon House, a true, fixed permanent home and principal establishment to which they intended to return when absent.

{74} On and after January 20, 2006, the Fowlers were North Carolina non-residents. On that date, they intended their home at Old Stage Road in Raleigh, North Carolina, to be their secondary home that they would no longer maintain as their permanent home. After January 20, 2006, they used this property as a temporary residence for the completion of temporary and transitory contractual obligations undertaken in connection with the sale of the majority interest in Commercial Grading.

{75} On January 20, 2006, the Fowlers intended to abandon and did abandon North Carolina as their domicile.

{76} The Fowlers were not required to remove all of their possessions and sever all ties with North Carolina to effect a change in domicile. *Hall* [*v. Wake Cnty. Bd. of Elections*], 280 N.C. [600,] 610-11, 187 S.E.2d [52,] 58.

{77} The Fowlers' intent to change domicile was not improper or rendered ineffective because the change was timed to maximize tax savings. Additionally, Mr. Fowler's unexpected medical condition accelerated the need to carry out a preexisting future intent for this change in domicile.

{78} Conversely, the Fowlers were not in Florida for a temporary or transitory purpose on and after January 20, 2006.

{79} Continued investments through the North Carolina Wachovia account, charitable and political contributions, maintaining personal property in North Carolina, and various other actions concerning North Carolina do not negate that Petitioners abandoned North Carolina as a domicile.

{80} This case must be considered on its own unique facts. Facts here are distinguishable from cases where activities in the claimed new domicile were temporary or transitory. *See*, *e.g.*, *Farnsworth*, 114 N.C. App. at 188, 441 S.E.2d at 602. The decision in *Mauer v. Commissioner of Revenue*, 829 N.W.2d 59, 75 (Minn. 2013), is unpersuasive because its facts are distinct.

{81} Any attempt to weigh the non-exclusive list of sixteen (16) factors in 17 N.C. Admin. Code 06B.3901(b) does not lead to a necessary finding that the Fowlers failed to abandon their domicile in North Carolina on January 20, 2006. Under the facts of this case, four of the sixteen factors favor a North Carolina domicile (1, 3, 6 & 9), one favors a Florida domicile (10), six are neutral (4, 5, 12, 13, 15 & 16), two are beyond Petitioners' control (2 & 8), and three are inapplicable (7, 11, & 14).

{82} The Fowlers have satisfied the three-part test for change of domicile established in *Farnsworth*.

{83} Petitioners have satisfied their burden to prove a change of domicile to Florida as of January 20, 2006.

Given the advice of their accountant regarding the establishment of a new domicile prior to the sale of Commercial Grading, a binding Securities Purchase Agreement to sell Commercial Grading signed 19 January 2006 scheduling a sale in early February 2006, and petitioners' actions on 20 January 2006 in Naples, Florida (attempting to acquire Florida driver's licenses, attempting to register to vote, attempting to acquire a post-office box, attempting to register their dog, and registering one vehicle, albeit as non-residents), it is clear that petitioners were acting based on their intent to change their domicile to Florida. However, the question before us is whether the trial court erred in ruling that petitioners effected a change of domicile on 20 January 2006. We hold that, based on the substantial evidence before the trial court which supports its findings of fact and subsequent conclusions of law, the court did not err in its ruling.

We emphasize our scope of review is to determine, first, whether the trial court exercised the appropriate scope of review and, secondly, to determine whether it did so properly. Pursuant to N.C.G.S. § 150B-36, the trial court conducted a *de novo* review of the record and made independent findings of fact and conclusions of law. The trial court's findings of fact and, in turn, its conclusions of law, were supported by evidence in the record, even though the record contained evidence that could have led to contrary findings of fact and conclusions of law. Therefore, in accordance with our standard of review, and upon our examination of the order of the trial court, we find no error in the conclusion that on 20 January 2006, petitioners abandoned their domicile in Raleigh with the intention of making the Tiburon House in Naples, Florida, their permanent home, thereby effecting a change in domicile. *See Atassi*, 117 N.C. App. at 511, 451 S.E.2d at 374 ("[A] person may have more than one residence [but] can only have one domicile." (citation omitted)). As there was sufficient evidence to support the trial court's findings of fact and conclusions of law that petitioners effected a change in domicile to Florida, DOR's additional argument that petitioners failed to meet their burden of demonstrating a change in domicile need not be further addressed. Therefore, we affirm the order of the trial court concluding that DOR acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes.

Petitioners' Cross-Appeal

[2] On cross-appeal, petitioners contend the trial court erred in failing to grant their motion for attorneys' fees. We disagree.

Pursuant to North Carolina General Statutes, chapter 6-19.1,

> (a) In any civil action, . . . unless the prevailing party is the State, *the court may, in its discretion*, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> > (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
> >
> > (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C. Gen. Stat. § 6-19.1(a) (2014) (emphasis added). "However, if the trial court determines that the State agency did *not* act 'without substantial justification,' *or* that some special circumstances *do* exist which make an award of attorney's fees unjust, then the trial court lacks discretion, and *cannot* award attorney's fees." *High Rock Lake Partners, LLC v. N.C. DOT*, ___ N.C. App. ___, ___, 760 S.E.2d 750, 753 (2014).

In its conclusions of law, the trial court noted that although DOR "acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes" on petitioners, DOR acted with substantial justification in bringing its claim against petitioners:

> {86} Petitioners are not entitled to attorneys' fees.
>
> {87} The Department correctly recognized that a change of domicile must be determined from the totality of circumstances, and that a taxpayer claiming a change in domicile has the burden of proving such change by demonstrating both intent to establish a new domicile and to abandon the old one. The court, after a thorough and careful review of the record, has accepted and found that the Fowlers' presence in North Carolina after January 20, 2006, was as non-residents for temporary and transitory purposes. However, the record provided the Department with a substantial and reasonable basis to pursue its position that the Fowlers had not actually abandoned their domicile in North Carolina in 2006 or 2007.
>
> {88} The Department had substantial justification in pressing its claim against Petitioners.
>
> {89} The Department did not act without justification by failing to "score" each of the various factors leading to its decision.
>
> {90} An award of attorneys' fees against Respondent on the facts of this case would be unjust.

Petitioners contend the trial court erred as a matter of law in ruling that DOR "was substantially justified and that an award of attorney's fees would be unjust." Petitioners' argument is without merit.

We agree with the trial court's conclusion of law that DOR's decision to pursue its claim against petitioners was substantially justified, as while petitioners presented evidence that they intended to, and eventually did, fully move themselves and their belongings to Florida, there

was also evidence to support DOR's contention that petitioners did not effectuate a change in domicile to Florida until sometime after 2007. Indeed, the trial court's order reflects the often conflicting evidence presented as to whether petitioners had in fact changed their domicile on 20 January 2006, including, *inter alia*, findings of fact that petitioners registered one of their cars in Florida on 20 January 2006 but did so by registering as non-residents; petitioners continued to maintain their Raleigh residence and insured it as a primary, rather than secondary, home; petitioners "made significant financial contributions in North Carolina after February 3, 2006" to churches and political candidates; petitioners continued to maintain North Carolina-based banking accounts; petitioners used their Raleigh residence's address for "certain correspondence and billing"; and Mr. Fowler served as a registered agent for several North Carolina-based businesses in 2007. As this evidence and findings of fact can be said to support DOR's contention that petitioners did not change domicile on 20 January 2006, the trial court's ruling that DOR was substantially justified in pursuing its claim against petitioners and, therefore, petitioners' motion for attorneys' fees should be denied, was proper. *See id.*

Accordingly, we affirm the order of the trial court concluding that DOR acted beyond its legal authority in imposing 2006 and 2007 income and gift taxes against petitioners and denying petitioners' motion for attorneys' fees.

AFFIRMED.

Judges DAVIS and INMAN concur.

LEROY GENTRY, Administrator of the Estate of
CLIFTON NAKAYA LEROY GENTRY, Plaintiff
v.
N.C. DEPARTMENT OF HEALTH & HUMAN SERVICES/
CHERRY HOPSITAL, Defendant

No. COA15-11

Filed 4 August 2015

Civil Procedure—two dismissal rule—same transaction or occurrence against different defendants

The Industrial Commission did not err in a case arising from an incident where decedent used a deputy's gun at a hospital to shoot a hospital employee and himself, by granting defendant North Carolina Department of Health and Human Services' (N.C. DHHS) motion for summary judgment based on the "two dismissal" rule under N.C.G.S. § 1A-1, Rule 41(a)(1). The rule can apply to actions with claims arising from the same transaction or occurrence against different defendants. The three actions, including wrongful death and two state tort claims, alleged damages based on the negligent conduct of numerous employees of N.C. DHHS stemming from the 22 July 2005 incident.

Appeal by plaintiff from order entered 29 August 2014 by Commissioner Tammy Nance in the North Carolina Industrial Commission. Heard in the Court of Appeals 20 May 2015.

NARRON & HOLDFORD, P.A., by Ben L. Eagles, for plaintiff,

Attorney General Roy Cooper, by Assistant Attorney General Alesia M. Balshakova, for the State.

ELMORE, Judge.

Plaintiff appeals from an order entered 29 August 2014 by the North Carolina Industrial Commission (the Full Commission) granting defendant's motion for summary judgment. After careful consideration, we hold the Full Commission's decision was free from error.

I. Background

The unchallenged and binding facts of this case as found by the Full Commission are the following: On 20 July 2007, Leroy Gentry (plaintiff),

administrator of the estate of Clifton Gentry (the decedent), filed a complaint (the first action) in Wayne County Superior Court against defendants "Arturo Pizano, Individually and as Onslow County Deputy Sheriff, North Carolina Department of Health and Human Services, Sheriff Ed Brown, Onslow Co., and Jim Osberg[.]" The first action alleged a cause of action for negligence (wrongful death) against the named defendants arising from an incident on 22 July 2005. On that date, according to the first action, Deputy Sheriff Arturo Pizano transported the decedent to Cherry Hospital for the purpose of having the decedent involuntarily committed. When Deputy Pizano brought the decedent inside the hospital, the decedent grabbed a firearm from Deputy Pizano's person and used the firearm to shoot a hospital employee. The decedent subsequently shot himself with the firearm, resulting in his death. On 25 October 2007, plaintiff filed a notice of voluntary dismissal without prejudice of the first action pursuant to North Carolina Civil Procedure Rule 41(a)(1).

On 20 July 2007, plaintiff also filed a state tort claim (the second action) with the North Carolina Industrial Commission, captioned "Leroy Gentry, Administrator for the Estate of Clifton Nakaya Larone Gentry (Onslow County Estate 07 E 372) v. North Carolina Department of Health and Human Services, Cherry Hospital[.]" Plaintiff alleged that the North Carolina Department of Health and Human Services (NCDHHS), Cherry Hospital (defendant) was liable due to the alleged negligent acts of "Mark Van Sciver and directors and administrators of Cherry Hospital and Dr. Jim Osberg, Hospital Director," based on the same 22 July 2005 incident. Plaintiff filed a voluntary dismissal of the second action without prejudice on 2 July 2010.

Plaintiff filed another state tort claim (the third action) with the North Carolina Industrial Commission on 1 July 2011 alleging that defendant NCDHHS/Cherry Hospital was liable due to the alleged negligent conduct of "William Denning & Director of Cherry Hospital, Jim Osberg"[1] stemming from the same 22 July 2005 incident. Defendant, in relevant part, filed a motion for summary judgment arguing that plaintiff's third action should be dismissed with prejudice in light of the "two dismissal" rule expressed in North Carolina Civil Procedure Rule 41(a)(1).

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1. We note that plaintiff's first affidavit filed with the Industrial Commission refers to "William Denning" and "Jim Osberg" while plaintiff's second affidavit refers to "William Dennings" and "Jim Ogden." It appears to the Court that "William Denning" and "Jim Osberg" are the intended individuals, and all references throughout this opinion are listed as such.

On 17 January 2014, Deputy Commissioner Stephen T. Gheen filed a decision and order granting defendant's motion for summary judgment and dismissing the third action with prejudice. Plaintiff appealed the Deputy Commissioner's order to the Full Commission. In an order entered 29 August 2014, the Full Commission affirmed the Deputy Commissioner's decision, granting defendant's motion for summary judgment based on the "two dismissal" rule and dismissing plaintiff's third action with prejudice.

II. Analysis

a.) Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted). "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citation omitted).

b.) Two Dismissal Rule

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment based on the "two dismissal" rule. We disagree.

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

> (1) By Plaintiff; by Stipulation. – Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, *except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.* If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one

> year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2013) (emphasis added). For the purpose of hearing tort claims against State Agencies, the North Carolina Industrial Commission is "constituted a court" charged with determining:

> whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (2013).

In order for the "two dismissal" rule to apply, "(1) the plaintiff must have filed two notices to dismiss under Rule 41(a)(1) and (2) the second action must have been based on or included the same claim as the first action." *Dunton v. Ayscue*, 203 N.C. App. 356, 358, 690 S.E.2d 752, 753 (2010) (citation omitted). In articulating the second prong of the "two dismissal" rule test, it is clear that the claims in the dismissed actions need not be identical to the claims in the third action: "a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts." *Id.* (citation and quotation marks omitted).

Our determination of whether claims are based upon the same transaction or occurrence require us to assess "(1) whether the issues of fact and law raised by the claim[s] . . . are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims." *Holloway v. Holloway*, 221 N.C. App. 156, 159, 726 S.E.2d 198, 201 (2012) (citations and quotation marks omitted).

Here, it is undisputed that plaintiff filed two notices to dismiss his first and second actions under Rule 41(a)(1) and voluntarily dismissed those actions. Plaintiff only argues that the "two dismissal" rule does not apply because the third action, for the first time, alleged the negligence of hospital employee William Denning by "allowing [decedent] to be free of any restraints" when plaintiff was admitted to the hospital. Thus, plaintiff argues this specific claim has not been previously dismissed twice. Plaintiff's argument is without merit. The case law cited

above makes clear that the "two dismissal" rule can apply to actions with claims arising from the same transaction or occurrence against different defendants.

The first action claimed damages for the wrongful death of the decedent, including: burial expenses, medical expenses, pain and suffering, income of decedent, services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices and advice of the decedent against NCDHHS due to the negligent conduct of its employees, including Jim Osberg, stemming from the 22 July 2005 incident whereby the decedent grabbed a firearm from Deputy Pizano's person and used the firearm to shoot a hospital employee and himself.

The second action claimed damages for the wrongful death of the decedent, burial expenses, medical expenses, pain and suffering, income of decedent, services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices and advice against defendant NCDHHS due to the negligent conduct of its employees, including Mark Van Sciver, directors and administrators of the hospital, and Jim Osberg. Plaintiff alleged the injury occurred in the following manner: "[t]he Plaintiff's decedent, Clifton Gentry, was being involuntarily committed to Cherry Hospital in the custody of Onslow County Deputy Arturo Pizano. Once he was inside of Cherry Hospital with Deputy Pizano, he took the Deputy's gun from him, shooting William Denning before taking his own life with the gun."

The third action claimed damages for medical bills, personal injuries, pain and suffering, and wrongful death of the decedent against NCDHHS based on the negligent conduct of its employees, including William Denning and Jim Osberg. Plaintiff alleged the injury occurred in the following manner:

> The Plaintiff's decedent was being admitted to Cherry Hospital when William Denning took custody of Plaintiff's decedent, allowing him to be free of any restraints. Plaintiff's decedent then took the Sheriff's Deputy's sidearm and committed suicide. The firearm should not have been allowed inside of Cherry Hospital, as there is no therapeutic purpose for a firearm and firearms should not be allowed inside of Cherry Hospital under any circumstances.

Thus, it is clear that all three actions raise essentially the same issues of fact and law, substantially the same evidence bears on all actions, and a logical relationship between each of the actions exist. As such, all

three actions were based upon the same transaction or occurrence, and thus, the "two dismissal" rule applies.

Plaintiff relies on *Wirth v. Bracey* to support his argument that "plaintiff's cause of action in the Industrial Commission as to Employee William Denning['s] negligence is not the same as the cause of action as that filed in Superior Court." We believe plaintiff's reliance on *Wirth* is inapposite. The issue in *Wirth* was whether plaintiffs' claim to recover damages for injuries against the North Carolina Highway Commission, based on the negligent conduct of the defendant-employee, constituted "another action pending between the same parties for the same cause" for abatement purposes when plaintiffs had previously filed a Superior Court action for negligence against the defendant-employee individually. *Wirth v. Bracey*, 258 N.C. 505, 507, 128 S.E.2d 810, 812 (1963). Our Supreme Court held that the two actions were distinct and separate causes of action. *Id.* *Wirth* is clearly distinguishable as that case did not involve the application of the "two dismissal" rule and involved separate causes of actions against a State agency and its employee individually. *Id.* at 507-08, 128 S.E.2d at 812-13. The case at bar, however, involves three actions against NCDHHS, not its employees in their individual capacities.

Instead, we find *Richardson v. McCracken Enterprises*, 126 N.C. App. 506, 507, 485 S.E.2d 844, 845 (1997) to be instructive. In that case, plaintiffs filed a complaint against defendant alleging "that on a number of occasions, beginning on or about 18 August 1989, defendant[] discharged diesel fuel and fuel oil on defendant's property, causing injury to plaintiffs when it ran onto their adjoining property, causing contamination of both water and soil." *Id.* The complaint alleged claims for trespass, strict liability, negligence, and punitive damages. *Id.* Plaintiffs filed a second complaint based on the same facts and alleged a single claim for nuisance. *Id.* Plaintiffs then dismissed the first two actions and filed a third suit, alleging all of the previous claims asserted in the first two actions. *Id.* This Court rejected plaintiffs' argument that a "strict 'same claim' test applies" and held that the first two claims were "based upon the same core of operative facts relating to the contamination of plaintiffs' property, and all of the claims could have been asserted in the same cause of action." *Id.* at 508, 509, 485 S.E.2d at 846-47. Thus, we ruled that the "two dismissal" rule barred plaintiffs' third action. *Id.* at 509, 485 S.E.2d at 847.

Similarly, all three of the actions in this case alleged damages based on the negligent conduct of numerous employees of NCDHHS stemming from the 22 July 2005 incident in which the decedent: was admitted to

the hospital, grabbed Deputy Pizano's gun, and shot a hospital employee and himself. We cannot view the third action so narrowly and rule that it stemmed from a different transaction or occurrence.

III. Conclusion

Accordingly, the Full Commission did not err by dismissing plaintiff's third action based on the "two dismissal" rule and by granting defendant's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and DILLON concur.

IN THE MATTER OF P.S.

No. COA15-18

Filed 4 August 2015

Appeal and Error—interlocutory orders and appeals—child neglect—temporary disposition order—motion to transfer

Respondent mother's appeal in a child neglect case was dismissed as an appeal from an interlocutory order. The trial court entered an order only on adjudication and motion to transfer and not a final disposition order. Appeal from a temporary disposition order is not authorized under N.C.G.S. § 7B-1001(a)(3). Respondent failed to demonstrate that she was entitled to immediate appeal of the trial court's order pursuant to N.C.G.S. § 7B-1001(a).

Appeal by Respondent-Mother from order entered 2 October 2014 by Judge William Brooks in District Court, Alleghany County. Heard in the Court of Appeals 13 July 2015.

James N. Freeman, Jr. for Petitioner-Appellee Alleghany County Department of Social Services.

Robert W. Ewing for Respondent-Appellant Mother.

Kay Linn Miller Hobart, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Mother appeals from the trial court's order adjudicating P.S. ("the child") neglected and transferring the case to Cabarrus County. For the following reasons, we dismiss Respondent-Mother's appeal.

The Alleghany Department of Social Services ("DSS") first became involved with the family after receiving a report on 18 September 2013 alleging that Respondent-Mother was impaired and had overdosed on drugs. The investigating social worker found that Respondent-Mother was unable to supervise the child, so the social worker arranged for the child to stay with a family friend who frequently provided care for the child. Respondent-Mother entered into a service plan with DSS, which required her to attend parenting classes and substance abuse classes.

DSS filed a juvenile petition on 29 May 2014, alleging that the child was neglected in that he did not receive proper care, supervision, or discipline from his parents and lived in an environment injurious to his welfare. DSS filed the petition after having received a second report that Respondent-Mother was impaired while caring for the child. In the petition, DSS requested that "the [trial court] hear the case to determine whether the allegations are true and whether the juvenile is in need of the care, protection, or supervision of the State."

The trial court conducted a hearing on 2 September 2014 ("the hearing") and entered a corresponding order on 2 October 2014. At the outset of the hearing, both parents moved to have the case transferred to Cabarrus County. The trial court denied their motion for immediate transfer, but limited the hearing to adjudication. The trial court concluded that the child was neglected, and "[t]hat continued custody of the minor child in the home of his parents [was] contrary to the safety, health and welfare of the minor child."

Following the adjudication, the trial court transferred the case to Cabarrus County. The trial court found that disposition in Cabarrus County was appropriate because Respondent-Mother, the father, and the child were all residing in Cabarrus County as of the date of the hearing. Respondent-Mother and the father had moved to Cabarrus County after being evicted from their apartment on 7 July 2014. At some point during the pendency of the case, the child was placed with his half-sister, the adult daughter of the child's father, who also resided in Cabarrus County. Due to the transfer of the case, the trial court did not conduct a disposition hearing or enter an order on disposition. However, the trial court gave temporary custody of the child to Alleghany DSS with custody to

Cabarrus DSS; the trial court also ordered that the "[c]urrent placement with [the child's half-sister] is approved." Respondent-Mother appeals.

The guardian *ad litem* ("GAL") has filed a motion to dismiss Respondent-Mother's appeal. The GAL argues that, because the trial court entered an order only on adjudication and motion to transfer and not a final disposition order, the order is interlocutory and not appealable pursuant to N.C. Gen. Stat. § 7B-1001(a) (2013). For the reasons that follow, we agree.

The right to appeal in juvenile actions arising under Chapter 7B is governed by N.C. Gen. Stat. § 7B-1001(a). This statute provides that "[i]n a juvenile matter under this Subchapter, appeal of a *final order* of the court in a juvenile matter shall be made directly to the Court of Appeals." N.C. Gen. Stat. § 7B-1001(a) (2013) (emphasis added). This statute then lists six specific types of orders from which appeal may be taken, including "[a]ny initial order of disposition and the adjudication order upon which it is based." N.C. Gen. Stat. § 7B-1001(a)(3). The GAL argues that Respondent-Mother's appeal is not permitted under this subsection, because the trial court did not enter a final disposition order — it only entered an adjudication order, which included a temporary disposition. We agree.

N.C. Gen. Stat. § 7B-1001(a)(3) specifies that an adjudication order may only be appealed along with a corresponding disposition order, which is lacking in this case. Furthermore, this Court has repeatedly held that appeal from a temporary disposition order is not authorized under N.C. Gen. Stat. § 7B-1001(a)(3). *In re C.M.*, 183 N.C. App. 207, 215-16, 644 S.E.2d 588, 595 (2007); *In re Laney*, 156 N.C. App. 639, 641-42, 577 S.E.2d 377, 378-79 (2003). Therefore, Respondent-Mother's appeal from the adjudication order is not permitted under subsection (a)(3).

Respondent-Mother submits, however, that the order is appealable under N.C. Gen. Stat. § 7B-1001(a)(4), which provides for appeal from "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile." We disagree. First, we note that Section 7B-1001(a) specifies that appeal lies only from "a *final* order" entered by a court in a juvenile matter (emphasis added). An adjudication order – even where it includes a temporary disposition – is not a final order as contemplated by our juvenile code.

> Section 7B–1001 specifically delineates the juvenile orders that may be appealed and does not provide that a party may appeal a temporary dispositional order. N.C.G.S. § 7B–1001(a) (2005); *see In re Laney*, 156 N.C. App. 639,

> 643, 577 S.E.2d 377, 379 (construing a prior version of Section 7B–1001, the *Laney* Court held that a party was not entitled to appeal an adjudication and temporary dispositional order in that it was not a final order). Accordingly, respondent . . . is not entitled to appeal the temporary dispositional order. *See Laney* at 642, 577 S.E.2d at 379 ("The broad reading advocated by respondent would open the door for multiple appeals whenever adjudication orders and temporary dispositions are entered before a final disposition. The statutory language does not show that the General Assembly intended this result."). Therefore, the assignments of error challenging the temporary dispositional order are dismissed.

C.M., 183 N.C. App. at 215-16, 644 S.E.2d at 595.

Furthermore, the trial court granted only *temporary* custody to DSS, pending the initial disposition hearing to be conducted in Cabarrus County and associated order. We find that temporary custody is not akin to the type of custody change contemplated by the General Assembly in enacting N.C. Gen. Stat. § 7B-1001(a)(4). *See*, *e.g.*, *In re J.V. & M.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009) (finding that review of a permanency planning order was appropriate where the order granted guardianship, which modified custody). The temporary custody awarded here by the trial court is analogous to nonsecure custody, which the General Assembly specifically exempted from appeal under subsection (a)(4). We find further support for this position in our treatment of temporary custody orders arising under Chapter 50 of the General Statutes. We have repeatedly held that such orders are interlocutory and not immediately appealable. *See*, *e.g.*, *File v. File*, 195 N.C. App. 562, 569, 673 S.E.2d 405, 410-11 (2009); *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992). Based on the foregoing, we find no support for the position that subsection (a)(4) creates a separate route of appeal from the interlocutory order in this case.

We note that Respondent-Mother will be afforded an opportunity to appeal the 2 October 2014 adjudication order once the disposition hearing is conducted in Cabarrus County – pursuant to her motion to transfer – and the order on disposition is entered. We further note that had Respondent-Mother not attempted appeal from the adjudication order, the dispositional hearing should have been completed by 2 October 2014, and the order on disposition entered within thirty days thereafter. N.C. Gen. Stat. § 7B-901 (2013) ("The dispositional hearing shall take place immediately following the adjudicatory hearing [which occurred

on 2 September 2014] and shall be concluded within 30 days of the conclusion of the adjudicatory hearing."); N.C. Gen. Stat. § 7B-905(a) (2013) ("The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing[.]").

In conclusion, we hold that Respondent-Mother has failed to demonstrate that she is entitled to immediate appeal of the trial court's order pursuant to N.C. Gen. Stat. § 7B-1001(a). We therefore dismiss Respondent-Mother's appeal.

APPEAL DISMISSED.

Judges CALABRIA and HUNTER, JR. concur.

ROBERT A. IZYDORE, PLAINTIFF
v.
ALADE TOKUTA, CAESAR JACKSON, BERNICE D. JOHNSON, NORTH CAROLINA CENTRAL UNIVERSITY, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA14-1220

Filed 4 August 2015

1. Civil Rights—42 U.S.C. § 1983—defamation—emeritus professor status denied

The trial court correctly dismissed plaintiff's 42 U.S.C. § 1983 claim resulting from his failure to achieve professor emeritus status. Plaintiff's § 1983 claim presumes that his interest in professor emeritus status is a protected property interest, but property interests are protected only where one has a legitimate claim of entitlement. Plaintiff failed to present sufficient record support or legal authority underlying his alleged property interest, save for a conclusory allegation, which is not accepted as true when reviewing a complaint dismissed under Rule 12(b)(6).

2. Civil Rights—42 U.S.C. § 1983—stigma plus claim—denial of emeritus professor status

Plaintiff failed to state a claim upon which relief could be granted arising from his failure to achieve professor emeritus status where he claimed that two professors made allegedly defamatory statements intending to have his nomination denied. Plaintiff brought his claim under 42 U.S.C. § 1983, based on the stigma plus

theory. However, as determined above, plaintiff had no legitimate claim to professor emeritus status, and the denial of plaintiff's nomination to the status was not an adverse employment action sufficient to add the "plus" to the reputational stigma of the professors' allegedly defamatory remarks.

3. Civil Rights—42 U.S.C. § 1983 denial of professor emeritus status—entity claim

Plaintiff's entity liability claim arising under 42 U.S.C. § 1983 failed where the action arose from his unsuccessful application for professor emeritus status and plaintiff alleged entity liability against the university and the State. Plaintiff failed to identify a protected property or liberty interest sufficient to state a claim under § 1983, and his entity liability claim arising under § 1983 also failed.

4. Libel and Slander—remarks by professors—denial of emeritus status—pleading fatally deficient

Plaintiff failed to plead a claim for defamation with sufficient particularity, rendering it facially deficient. Plaintiff did not identify with any degree of specificity the remarks made by two professors, which prevents judicial determination of whether the statements were defamatory.

5. Damages and Remedies—punitive—failure of underlying claim

Plaintiff's claim for punitive damages arising from alleged statements made during his unsuccessful nomination for professor emeritus status failed because he did not state an underlying claim upon which relief could be granted.

Appeal by Plaintiff from order entered 22 July 2014 by Judge Orlando F. Hudson, Jr. of Durham County Superior Court. Heard in the Court of Appeals 18 March 2015.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Stephanie A. Brennan, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

Robert A. Izydore ("Plaintiff") appeals from a 22 July 2014 order dismissing his amended complaint asserting seven causes of action and

seeking injunctive relief, compensatory and punitive damages, and a declaration he be entitled to Professor Emeritus status from the North Carolina Central University ("NCCU"). After careful review, we affirm the trial court's order in its entirety.

I. Factual & Procedural History

On 12 February 2014, Plaintiff, a retired university professor, filed an amended complaint against Alade Tokuta ("Professor Tokuta"), in his individual and official capacity; Caesar Jackson ("Professor Jackson"), in his individual and official capacity; Provost Bernice Johnson ("Provost Johnson"), in her individual and official capacity; the State of North Carolina ("State"); and NCCU (collectively, "Defendants"), arising from Defendants' decision to deny Plaintiff's nomination for Professor Emeritus status. Plaintiff's complaint reveals the following facts.

Plaintiff taught chemistry at NCCU for thirty-eight years before retiring in September 2009. In May 2009, Dr. John Meyers and Chair Shawn Sendlinger called a faculty meeting to nominate Plaintiff for Professor Emeritus status and submitted his nomination portfolio. Pursuant to NCCU nomination guidelines, Plaintiff's nomination was forwarded to a committee of eight chairs and directors of NCCU's College of Science and Technology, which approved Plaintiff's nomination in May 2012. Plaintiff's nomination was then forwarded to the NCCU Faculty Senate, where it was unanimously approved in December 2012. These actions were concordant with NCCU's nomination guidelines. Plaintiff alleges his nomination was then "erroneously" forwarded by Provost Johnson to NCCU's Academic Planning Council ("APC") for consideration, "thereby failing to follow the governing procedures in place when Plaintiff's nomination for Professor Emeritus was initiated." At the APC meeting held on 13 February 2013, Plaintiff's nomination was debated and denied.

During the debate, Plaintiff alleges Professor Tokuta made knowingly false and defamatory statements about him to the APC, "with the malicious intent to cause Plaintiff's nomination to be denied, thereby depriving Plaintiff of his good name and reputation in his professional community, as well as Professor Emeritus status." Plaintiff also alleges Professor Jackson "made statements endorsing Tokuta's defamatory statements and [similarly] published other [knowingly] false and defamatory statements" about him to the APC for the purpose of causing his nomination to be denied. Plaintiff complains he was not permitted to be present at the APC meeting and, therefore, he was unable to defend against the professors' allegedly defamatory statements which resulted

in the APC denying his nomination. Plaintiff further complains he was not afforded a "post-deprivation, name-clearing hearing."

Plaintiff alleges he was "entitled to Professor Emeritus status pursuant to the rules governing the conferral of Professor Emeritus status at NCCU." Plaintiff alleges that at NCCU,

> Professor Emeritus status is not merely honorific. Rather, . . . [it] confers . . . an array of tangible benefits, including but not limited to the right to use NCCU facilities, offices, laboratories, equipment, and other valuable resources. Those resources are necessary to enable [Plaintiff] to continue to pursue his professional calling as a research scientist, to continue to publish the results of his research, and to continue to participate in other dimensions of his professional calling.

On 12 February 2014, Plaintiff filed his claims for relief. On 17 July 2014, Plaintiff amended his complaint, asserting seven causes of action: (1) deprivation of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution against all Defendants pursuant to 42 U.S.C. § 1983; (2) stigmatization in violation of the Fourteenth Amendment against Professors Tokuta and Jackson in their individual capacities pursuant to 42 U.S.C. § 1983; (3) entity liability against NCCU and the State pursuant to 42 U.S.C. § 1983; 4) slander *per se* against Professors Tokuta and Jackson in their individual and official capacities, the State, and NCCU; (5) slander *per quod* against Professors Tokuta and Jackson in their individual and official capacities, the State, and NCCU; (6) violations of the North Carolina Constitution against NCCU and the State; and (7) punitive damages. Plaintiff sought (1) a declaratory judgment that he be "entitled to Professor Emeritus status under the governing standards and procedures;" (2) injunctive relief "forbidding NCCU and the State" from denying him Professor Emeritus status and "forbidding Defendants from engaging in the same or similar defamatory conduct concerning the Plaintiff in the future;" (3) compensatory damages; (4) punitive damages; and (5) pre- and post-judgment interest and all costs of the action.

In response, all Defendants filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. This matter was heard on 17 July 2014 at the Durham County Superior Court before the Honorable Orlando F. Hudson. By order filed 22 July 2014, the trial court granted Defendants' motion to dismiss in its entirety and denied all of Plaintiff's claims with prejudice.

II. Analysis

A. Standard of Review

Plaintiff contends the trial court erred in granting Defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted as to all seven of his causes of action.

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wells Fargo Bank, N.A. v. Corneal, __ N.C. App. __, __, 767 S.E.2d 374, 377 (2014) (citation omitted). In reviewing a Rule 12(b)(6) dismissal, this Court "accept[s] all the well-pleaded facts, not conclusions of law, as true[,]" *Privette v. Univ. of N. Carolina at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (citations omitted), and is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (internal quotation marks and citations omitted). This Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (brackets, quotation marks, and citation omitted).

B. Constitutional Claims

Plaintiff advances his first ("Deprivation of Property in Violation of the Fifth and Fourteenth Amendment"), second ("Stigmatization in Violation of the Fourteenth Amendment"), and third ("Entity Liability") claims under the rubric of 42 U.S.C. § 1983, alleging violations of his procedural due process rights.

Section 1983 provides a private right of action for the "deprivation of any rights, privileges, or immunities *secured by the Constitution and*

laws[.]" 42 U.S.C. § 1983 (2014) (emphasis added). Because 42 U.S.C. § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred[,]" *Baker v. McCollan*, 443 U.S. 137, 144, n.3 (1979), "identification of a constitutionally protected right is a prerequisite of plaintiff's right to sue under § 1983." *Clayton v. Branson*, 170 N.C. App. 438, 452, 613 S.E.2d 259, 269 (2005) (citations omitted).

Plaintiff also advances his sixth claim ("Violations of the North Carolina Constitution and Conspiracy") directly under the Constitution of North Carolina, alleging "[t]he same conduct that gives rise to Plaintiff's § 1983 claims for violations of the United States Constitution also violate the parallel provisions of the North Carolina Constitution." Therefore Plaintiff's first, second, third, and sixth claims will be addressed together as a claim for violation of his federal and state procedural due process rights.

The Due Process Clause of "[t]he Fifth Amendment to the Constitution of the United States, applied to the States through the Fourteenth Amendment, provides in pertinent part: 'No person shall . . . be deprived of life, liberty, or property, without due process of law[.]' " *Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 201, 716 S.E.2d 646, 656-57 (2011) (citation and quotation marks omitted). "Both the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the North Carolina Constitution provide protection against deprivation of liberty or property interests secured by the Bill of Rights or created by state law without adequate procedure, such as notice and an opportunity to be heard." *Toomer v. Garrett*, 155 N.C. App. 462, 474, 574 S.E.2d 76, 87 (2002) (citing *Paul v. Davis*, 424 U.S. 693 (1976); *Wuchte v. McNeil*, 130 N.C. App. 738, 505 S.E.2d 142 (1998); *Howell v. Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992)). "Decisions as to the scope of procedural due process provided by the federal constitution are highly persuasive with respect to that afforded under our state constitution." *Id.* (citing *State v. Young*, 140 N.C. App. 1, 535 S.E.2d 380 (2000)). "At the threshold of any procedural due process claim is the question of whether the complainant has a liberty or property interest, determinable with reference to state law, that is protectible under the due process guaranty." *Maines v. City of Greensboro*, 300 N.C. 126, 134, 265 S.E.2d 155, 160 (1980) (citations omitted).

1. Property Deprivation Claim

[1] Plaintiff contends his constitutional rights secured by the Fifth and Fourteenth Amendments to the United States Constitution were violated

and claims the benefit of section 1983 by virtue of his "due process property interest" in Professor Emeritus status, of which he contends NCCU deprived him without due process.

"Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Tripp v. City of Winston-Salem*, 188 N.C. App. 577, 582, 655 S.E.2d 890, 893 (2008) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Therefore, the determination of whether Plaintiff has a claim of entitlement to Professor Emeritus status requires this Court to look to the source which created the alleged property interest. *See id.*

However, Plaintiff does not cite any statute or university regulation which allegedly created the property interest to which Plaintiff claims entitlement. Limited as we are to considering only matters within the pleadings in reviewing a Rule 12(b)(6) motion to dismiss, we cannot discern whether "rules governing the conferral of Professor Emeritus status" secured any cognizable entitlement to this honorary status. As Plaintiff failed to include the rules under which he claims created his alleged entitlement, he has failed to demonstrate the existence of a protected property interest, because he has not shown he had any more than an expectation he would be nominated for the status.

The procedural protection of property provided by due process secures "interests that a person *has already acquired* in specific benefits." *Roth*, 408 U.S. at 576 (emphasis added). However, "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit[.]' " *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (citing *Roth*, 408 U.S. 564). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* (citing *Roth*, 408 U.S. 564). "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Id.* at 756 (citation omitted).

Here, Plaintiff's section 1983 claims presume his interest in Professor Emeritus status is a protected property interest; however, property interests are only protected where one has a legitimate claim of entitlement. Plaintiff identifies no legal basis to support his assertion of a "due process property interest" secured by the United States or North Carolina constitutions, or any federal or state law, in the

conferral of Professor Emeritus status to a retired NCCU professor. While Plaintiff contends he acquired "a legitimate claim of entitlement," he fails to present sufficient record support or legal authority underlying his alleged property interest, save for the conclusory allegation that "[Plaintiff] was entitled to Professor Emeritus status pursuant to the rules governing the conferral of Professor Emeritus status at NCCU." Plaintiff failed to include the "standards and procedures enacted at the time Plaintiff's nomination process began." In reviewing a complaint dismissed under Rule 12(b)(6), this Court treats a plaintiff's factual allegations as true, but it does not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland*, 194 N.C. App. at 20, 669 S.E.2d at 73 (internal quotation marks and citations omitted).

In the instant case, at no point before or after retirement did Plaintiff actually acquire the specific benefit of Professor Emeritus status. He was merely "nominated." No alleged facts, even when taken as true, indicate nomination results in automatic approval. To the contrary, Plaintiff's complaint forecasts that conferral of the status is a discretionary university decision; the nomination must pass several stages of approval by multiple committees. Such a discretionary conferral process cannot give rise to more than a "unilateral expectation" of the status. *See Clayton*, 170 N.C. App. at 454-55, 613 S.E.2d at 271. We find analogous and instructive this Court's discussion of discretionary employment decisions:

> To assess a candidate's accomplishments . . . necessarily involves subjective judgment and the substantial exercise of discretion. The regulations and guidelines [for doing so] in no way create the type of clear, nondiscretionary "entitlement" . . . that the Supreme Court has found to be necessary to establish a constitutionally protected property interest.

Id. at 454, 613 S.E.2d at 271 (quoting *Harel v. Rutgers*, 5 F. Supp.2d 246, 273 (D.C.N.J. 1998)).

Furthermore, the only evidence of Plaintiff's arrangement with NCCU indicates that he was a retired professor who, therefore, had no property interest entitled to due process protection. *See Pressman v. Univ. of N. Carolina at Charlotte*, 78 N.C. App. 296, 302, 337 S.E.2d 644, 648 (1985) (recognizing that "a state employee has no property interest protected by due process where the employee has no specific interest in continued employment, and his employment is essentially terminable at will"). Even when taken as true, the factual allegations

do not support the conclusion NCCU was under any contractual obligation to award Plaintiff Professor Emeritus status, or that Plaintiff had a preexisting contract with NCCU that was terminated due to Defendants' activities. As such, no basis supports a claim that Plaintiff was deprived a protected property interest when NCCU faculty discretionarily denied his nomination.

Moreover, we find instructive this Court's reliance in *Pressman* on *Kilcoyne v. Morgan*, 644 F.2d 940 (4th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982). *See Pressman*, 78 N.C. App. 296, 337 S.E.2d 644. In *Kilcoyne*, a non-tenured state university professor claimed his due process rights were violated because the procedures set forth in East Carolina University's ("ECU") tenure and policy manual were allegedly not followed by the defendants. Finding no valid due process claim, the Fourth Circuit held:

> Far from disclosing a violation of his constitutional rights, [the] complaint reveals that ECU provided procedural safeguards beyond the requirements of the Fourteenth Amendment. Because he lacked a right to further employment at ECU, his denial of tenure and further employment without *any* procedural safeguards would have been permissible under the Fourteenth Amendment. Had ECU *gratuitously* afforded tenure aspirants procedural safeguards not constitutionally mandated, deviations from these procedures would not support a claim under the Fourteenth Amendment and Section 1983.

Kilcoyne, 644 F.2d at 942 (internal citations omitted). This Court in *Pressman* applied the principles promulgated in *Kilcoyne* and held that because non-tenured state professors lacked a right to further employment, there existed no valid due process claim and, therefore, any deviation from procedural safeguards provided by the university also failed to support a due process claim. *Pressman*, 78 N.C. App. at 302, 337 S.E.2d at 648.

The absence of any record or legal support underlying Plaintiff's claim to a "due process property interest" in Professor Emeritus status compels us to conclude his section 1983 causes of action premised solely thereupon must fail. *See State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 678, 446 S.E.2d 332, 344 (1994) ("Where there is no property interest, there is no entitlement to constitutional protection.") (citing *Huang v. Bd. of Governors of Univ. of*

N. Carolina, 902 F.2d 1134 (4th Cir. 1990)). It is therefore unnecessary to address Plaintiff's contention that the change in NCCU's nomination procedure—which appears now to include a faculty deliberation of a nomination outside of a candidate's presence without a "name-clearing" hearing—deprived him of that alleged interest. *See Gonzales*, 545 U.S. at 757.

2. Liberty Deprivation Claim

[2] Plaintiff contends Professors Tokuta and Jackson's allegedly defamatory statements, made individually, deprived him of a constitutionally protected "liberty interest in his reputation and choice of occupation" without due process of law. Plaintiff asserts a "stigma-plus" claim that provides redress for "false statements that cause reputational stigma . . . when they are made in connection with an action that impairs a plaintiff's career options or his ability to pursue his professional calling." We are not persuaded.

" '[I]njury to reputation by itself [is] not a 'liberty' interest protected under the Fourteenth Amendment.' " *Toomer*, 155 N.C. App. at 475, 574 S.E.2d at 87 (quoting *Siegert v. Gilley*, 500 U.S. 226, 233 (1991)). To invoke an employee's liberty interest, the stigmatizing remarks must be "made in the course of a discharge or significant demotion." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 309 (4th Cir. 2006) (quotation marks omitted). "[R]eassignment of an employee to a position outside his field of choice" has been held sufficient. *Id.*

Here, Plaintiff's claim for "stigma-plus" states in pertinent part: "Acting under color of state law, Tokuta and Jackson maliciously made defamatory statements concerning Plaintiff for the purpose of stigmatizing Plaintiff in his professional community and depriving Plaintiff of the Professor Emeritus status to which Plaintiff was entitled." Plaintiff asserts that the professors' allegedly defamatory statements, which inflicted harm to his reputation, were sufficient to support a section 1983 due process claim, because they resulted in deprivation of Professor Emeritus status to which he claims entitlement. As we have already determined Plaintiff had no legitimate claim to Professor Emeritus status, we conclude the denial of Plaintiff's nomination of the status was not an adverse employment action sufficient to add the "plus" to the reputational stigma of Professors Tokuta and Jackson's allegedly defamatory remarks. As Plaintiff has not alleged harm to protected property or liberty interests, we need not discuss his challenge that NCCU's failure to provide a "name-clearing hearing" deprived him of that alleged interest.

Plaintiff failed to state a claim upon which relief can be given under this legal theory and, therefore, we affirm the trial court's dismissal of this cause of action.

3. Entity Liability Claim

[3] Plaintiff relies on *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658 (1977) to support his contention that NCCU and the State are liable under section 1983 due to NCCU's "constitutionally inadequate training and constitutionally inadequate Professor Emeritus status approval procedures."

In *Monell*, a class of female employees under the rubric of section 1983 sued the Department of Social Services and the Board of Education of the city of New York, which "had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons." 436 U.S. at 661. The district court held the acts were unconstitutional but denied petitioners' claims for backpay because the damages would come from the city of New York, which as a municipality was at the time immune from such damages. As a result, "the Supreme Court held for the first time that a local governmental body could be sued under § 1983, but . . . only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]' " *Enoch v. Inman*, 164 N.C. App. 415, 419, 596 S.E.2d 361, 364 (2004) (quoting *Monell*, 436 U.S. at 694).

Here, unlike in *Monell*, where there was a clearly protected interest at stake, we have concluded there were no matured interests sufficient to warrant constitutional protection under section 1983. As Plaintiff has alleged no constitutionally protected interest, no entity liability can attach to NCCU for its allegedly constitutionally inadequate Professor Emeritus status conferral procedures. Because Plaintiff failed to identify a protected property or liberty interest sufficient to state a claim under section 1983, Plaintiff's entity liability claim arising under section 1983 must also fail. *See Ware v. Fort*, 124 N.C. App. 613, 616, 478 S.E.2d 218, 220 (1996) ("To state a claim under 42 U.S.C. § 1983, plaintiff must allege facts demonstrating that some right secured by the federal constitution or federal law has been abridged.") (citing *Corum v. Univ. of N. Carolina*, 330 N.C. 761, 770, 413 S.E.2d 276, 282 (1992)). Therefore, we dismiss Plaintiff's challenge and affirm the trial court's dismissal of this issue.

D. Defamation Claims

[4] Plaintiff advances his fourth ("Slander *Per Se*") and fifth ("Slander *Per Quod*") actions under North Carolina tort law. Plaintiff concedes the trial court properly dismissed these actions against the State, NCCU, and Professors Tokuta and Jackson in their official capacities, based upon the defense of sovereign immunity and, therefore, we need not address these actions. However, Plaintiff asserts these actions against Professors Tokuta and Jackson in their individual capacities were improperly dismissed. We disagree.

Under North Carolina law, slander *per se* and slander *per quod* are the two actionable classes of oral defamation. Slander *per se* relates to false remarks that "in themselves (*per se*) may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed[.]" *Donovan v. Fiumara*, 114 N.C. App. 524, 527, 442 S.E.2d 572, 574 (1994) (quoting *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969)). Specifically, this former class of oral defamation is " 'an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease.' " *Losing v. Food Lion, L.L.C.*, 185 N.C. App. 278, 281, 648 S.E.2d 261, 263 (2007) (quoting *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29-30, 568 S.E.2d 893, 898 (2002)). Our Courts have held that "alleged false statements . . . calling plaintiff 'dishonest' or charging that plaintiff was untruthful and an unreliable employee, are not actionable *per se*." *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 82, 266 S.E.2d 861, 865 (1980) (italics added).

Slander *per quod* relates to false remarks which may "sustain an action only when causing some special damages (*per quod*), in which case both the malice and the special damage must be alleged and proved." *Beane*, 5 N.C. App. at 277, 168 S.E.2d at 237 (emphasis added) (citation omitted). This latter class comprises a remark which is not defamatory on its face but causes injury with "extrinsic, explanatory facts." *Donovan*, 114 N.C. App. at 527, 442 S.E.2d at 574-75 (quoting *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 467 (1955)). To prevail on a slander *per quod* claim, "the injurious character of the words and some special damage must be pleaded and proved." *Beane*, 5 N.C. App. at 278, 168 S.E.2d at 238. Either class of oral defamation requires that the plaintiff plead with some degree of particularity the words attributed to the defendant.

Our Supreme Court has explained allegedly slanderous remarks need not be repeated verbatim, but they must "be alleged 'substantially' in *haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory." *Stutts*, 47 N.C. App. at 83-84, 266 S.E.2d at 866. Furthermore, under Rule 8(a)(1) of the North Carolina Rules of Civil Procedure, the pleading must contain "[a] short and plain statement of the claim *sufficiently particular* to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2014) (emphasis added) (noting in the editorial comments that "[b]y specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules").

Here, Plaintiff's alleges:

> Upon information and belief, at the February 13, 2013 meeting of the APC, immediately before the APC voted on Plaintiffs nomination, Defendant Tokuta made false and defamatory statements concerning Plaintiff to the APC, knowing that his defamatory statements were false, and with the malicious intent to cause Plaintiff's nomination to be denied, thereby depriving Plaintiff of his good name and reputation in his professional community, as well as Professor Emeritus status.

Plaintiff fails to identify with any degree of specificity the allegedly defamatory remarks made by Professors Tokuta or Jackson, either specifically or in substance, which prevents judicial determination of whether the statements were defamatory. Indeed, Plaintiff's amended complaint contains no further detail at all about what was allegedly said. The only basis on which this Court is left to determine the defamatory nature of the alleged statements is Plaintiff's conclusory allegation that the statements were "false and defamatory." Under a Rule 12(b)(6) analysis, this Court does not "accept as true allegations that are merely conclusory[.]" *Strickland*, 194 N.C. App. at 20, 669 S.E.2d at 73 (quotation marks and citations omitted).

While the Court cannot say whether the alleged statements were defamatory, it can say conclusively that Plaintiff has failed to plead a claim for defamation with sufficient particularity, rendering it facially deficient. As Plaintiff failed to identify with any degree of specificity the

allegedly slanderous statements, his causes of action for defamation do not state a claim and must fail.

D. Punitive Damages

[5] Because Plaintiff has failed to state any claim upon which relief may be granted, his claim for punitive damages necessarily fails. *See Oestreicher v. Amer. Nat'l Stores, Inc.*, 290 N.C. 118, 134, 225 S.E.2d 797, 807-08 (1976) ("If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award.") (citations omitted).

III. Conclusion

Based on the foregoing and our review of the record, we affirm the trial court.

AFFIRMED.

Judges Stephens and Tyson concur.

BRUCE FLETCHER NELSON AND JAN NELSON MACINNIS, PLAINTIFFS
v.
STATE EMPLOYEES' CREDIT UNION AND GWYN R. PARSONS, DEFENDANTS

No. COA14-1393

Filed 4 August 2015

1. Trusts—two summary judgment proceedings—different issues—statutory trust—common law trust

Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the trial court (Judge Baddour) did not impermissibly overrule an earlier summary judgment ruling by Judge Blount. Judge Baddour did not rule that Judge Blount's summary judgment order—which only considered whether the credit union had violated N.C.G.S. § 54-109.57—was erroneous. Rather, Judge Baddour ruled that, notwithstanding the statutory violation found by Judge Blount, the credit union should prevail under the common law.

2. Trusts—statutory Payable on Death account—did not supplant common law Totten Trust

Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the statutory Payable on Death account is the sole means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. The General Assembly expressed a clear intent for the Payable on Death statute (N.C.G.S. § 54-109.57) to *supplement*, not to supplant, the existing common law of trust formation.

3. Trusts—Totten Trust—summary judgment

Where plaintiffs sued a credit union for alleged improper creation of a Payable on Death account for their father for the benefit of plaintiffs' sister, the Court of Appeals rejected plaintiffs' argument that the credit union had failed to show that a common law Totten trust had been created. The credit union presented undisputed evidence that the grantor created a common law Totten trust as a matter of law: the grantor expressed his intent to create a trust, identified the specific sum of money to be placed into the trust account, and identified the beneficiary of the trust.

Appeal by plaintiffs from judgment entered 27 August 2015 by Judge Allen Baddour in Orange County Superior Court and by defendant State Employees' Credit Union from order entered 28 October 2010 by Judge Marvin K. Blount, III. Heard in the Court of Appeals 19 May 2015.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips, III and Thomas P. Holderness, for defendant-appellee.

DIETZ, Judge.

Shortly before he died, James Nelson called his account representative at the State Employees' Credit Union ("SECU") and told her he wanted to move $85,000 from his revocable living trust to a new account with only one of his three children as the beneficiary. The credit union prepared the paperwork for a statutory "Payable on Death" account to achieve Mr. Nelson's wishes. After his death, the credit union transferred

the funds to Mr. Nelson's daughter, whom he had identified as the beneficiary of the Payable on Death account.

Mr. Nelson's other two children then sued, arguing, among other things, that Mr. Nelson and SECU had failed to comply with the statutory requirements for creating a Payable on Death account. The trial court agreed and entered partial summary judgment in Plaintiffs' favor on that issue. But the trial court later entered summary judgment in SECU's favor, and dismissed all of Plaintiffs' claims, on the ground that Mr. Nelson, while not complying with the Payable on Death statutory requirements, had nevertheless created a valid common law tentative or "Totten" trust that had the same effect.

Plaintiffs argue on appeal that the Payable on Death statute supplanted and eliminated the common law of tentative or Totten trusts and that, in any event, Mr. Nelson's actions were insufficient to establish a common law tentative trust.

As explained below, we reject these arguments. As we have previously held, a grantor who sought to create a statutory Payable on Death account but failed to satisfy the statutory criteria may rely on the common law to demonstrate the existence of a valid tentative or Totten trust as an alternative. The General Assembly expressly envisioned this outcome when it provided that the statute was not exclusive and that common law remedies were preserved.

Here, undisputed evidence in the record shows that Mr. Nelson expressed his intent to place $85,000 in a tentative trust with his daughter as the beneficiary. Although the document Mr. Nelson signed described itself as a "Payable on Death" account and not a trust, this Court has held that an instrument need not contain the word "trust" in order to create a valid trust. Because Mr. Nelson satisfied the legal requirements for creation of a tentative trust, we affirm the trial court's judgment.

Facts and Procedural History

On 3 October 2008, James Nelson, father of Plaintiffs Bruce Nelson and Jan MacInnis, telephoned his local State Employees' Credit Union branch in Boone and requested to move $85,000 out of his accounts within his revocable living trust and place the funds in a new account with his other daughter, Martha Brown, as beneficiary. Mr. Nelson spoke with Ellen Shook, a financial services officer at the Boone branch. Ms. Shook previously had done business with Mr. Nelson over the phone and recognized his voice. She collected the necessary information to open a statutory "Payable on Death" account and filled out the required account

processing form. The form identified the new account as a "Payable on Death" account and stated that Martha Brown was the "beneficiary."

Ms. Shook informed Mr. Nelson that his signature was required on the account form and that she would mail him the form to sign. The signature line on the form indicated that Mr. Nelson had received and read a copy of the Rules and Regulations governing the account, but Ms. Shook admitted she did not mail Mr. Nelson a copy of the Rules and Regulations. Nevertheless, Nelson signed the form and mailed it back within a few days.

After Mr. Nelson passed away, SECU informed Martha Brown that the account had transferred to her, and Ms. Brown withdrew the $85,000.

Plaintiffs, who are Ms. Brown's brother and sister, then sued her, alleging that she breached her fiduciary duties to her father and his estate. Plaintiffs later filed an amended complaint adding SECU as a party and alleging negligence and wanton disregard of the rights of the deceased and his rightful heirs, fraud, constructive fraud, unfair and deceptive trade practices, and conversion.

On 28 October 2010, the trial court, the Honorable Marvin K. Blount, III, presiding, granted partial summary judgment for Plaintiffs, ruling "that SECU violated N.C. Gen. Stat. § 54-109.57 and failed to create a right of survivorship in defendant Martha Nelson Brown to the proceeds of the 'payable on death' account." SECU appealed this ruling, but this Court dismissed the appeal as interlocutory. *Nelson v. Brown*, 217 N.C. App. 400, 720 S.E.2d 30 (2011). The case continued in the trial court.

On 4 August 2014, SECU filed a motion for summary judgment arguing that, despite the trial court's ruling that it failed to comply with the Payable on Death statute, SECU was entitled to judgment because Mr. Nelson's actions created a common law tentative or Totten trust. On 27 August 2014, the trial court, the Honorable Allen Baddour, presiding, granted summary judgment in favor of SECU. Plaintiffs timely appealed this second summary judgment order, and SECU cross-appealed the first summary judgment order.

Analysis

The trial court entered summary judgment for SECU on the ground that Mr. Nelson placed his SECU deposit account in a common law tentative or "Totten" trust with his daughter Martha Brown as beneficiary. Thus, the court found that Plaintiffs could not prevail on their tort claims because SECU properly transferred the assets in the deposit account to Ms. Brown upon Mr. Nelson's death.

Plaintiffs challenge the trial court's holding on three grounds. First, Plaintiffs argue that the court's second summary judgment ruling impermissibly overturned its first summary judgment ruling in favor of Plaintiffs. Second, Plaintiffs argue that the statutory Payable on Death account is the exclusive means to form a tentative trust in North Carolina, supplanting the common law. Finally, Plaintiffs argue that SECU failed to show that Mr. Nelson created a common law tentative trust as a matter of law. For the reasons discussed below, we reject each of these arguments.

I. One Superior Court Judge Overruling Another

[1] Plaintiffs first argue that Judge Baddour's summary judgment ruling impermissibly overruled an earlier summary judgment ruling by Judge Blount. We disagree.

It is well-settled that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)).

Judge Blount's 28 October 2010 partial summary judgment order concerned only one issue: whether SECU "violated N.C. Gen. Stat. § 54-109.57 and failed to create a right of survivorship in defendant [Ms.] Brown." Judge Blount held that, based upon the evidence before him and the arguments of counsel, SECU had indeed violated N.C. Gen. Stat. § 54-109.57.

Later, in its 4 August 2014 motion for summary judgment, SECU argued that, notwithstanding Judge Blount's statutory ruling, SECU was entitled to summary judgment on its common law theory:

> Regardless of the answer to [the] question [of whether SECU violated N.C. Gen. Stat. § 54-109.57], summary judgment is appropriate for SECU because (i) N.C. Gen. Stat. § 54-109.57 is not the sole legal way to convey a future interest in a share term certificate; and (ii) James Nelson gave a valid contingent future interest in the share term certificate at issue to Martha Brown.

During the hearing on SECU's motion for summary judgment, Judge Baddour discussed Judge Blount's partial summary judgment order:

> I don't hear an argument from [SECU] that, in fact, I should find that it did comply with the statute. I think they accept . . . that that is the law in this case. I think the argument is that – their argument is that let's draw two circles and that – what they did does not fit in the circle that is the statute, but is in a broader circle that would allow it to be legal for other reasons. So, I appreciate that Judge Blount's ruling is the law of the case, and I'm not going to find that [SECU] complied with the statute by having the language in there and all those things; that's not the question before me. . . . I am bound by Judge Blount's ruling. I'm convinced I am.

In sum, SECU did not argue that Judge Blount's partial summary judgment order was erroneous, and Judge Baddour did not find that it was, nor did he overrule that earlier order. Instead, SECU argued that, notwithstanding its violation of N.C. Gen. Stat. § 54-109.57, it could still prevail on its common law theory. Judge Baddour's summary judgment ruling was based on that argument, not the statutory argument previously considered by Judge Blount. Accordingly, we reject Plaintiffs' argument that one superior court judge improperly overruled another in this case.

II. Statutory Preemption of the Common Law of Tentative Trusts

[2] Plaintiffs next argue that the statutory Payable on Death account is the sole means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. Plaintiffs contend that the statute effectively superseded the common law of tentative or Totten trusts. We disagree.

Ordinarily, when the General Assembly "legislates with respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the law of the State." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 473, 515 S.E.2d 675, 691 (1999). Here, the Payable on Death statute creates a statutory vehicle to create the same beneficiary rights in a deposit account that can be created through a common law tentative or Totten trust. Indeed, this Court has referred to the statutory Payable on Death accounts as a statutory "Totten" trust. *See Estate of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 119, 632 S.E.2d 794, 799 (2006).

But the General Assembly can choose *not* to supplant the common law when it legislates, *see, e.g.*, *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 601, 513 S.E.2d 812, 821 (1999), and that is precisely what it

did here. The Payable on Death statute provides as follows: "This section shall not be deemed exclusive. Deposit accounts not conforming to this section shall be governed by other applicable provisions of the General Statutes or the common law, as appropriate." N.C. Gen. Stat. § 54-109.57(a1) (2013).[1] Thus, the General Assembly expressed a clear intent for the Payable on Death statute to *supplement*, not to supplant, the existing common law of trust formation.

In an analogous context, we have previously addressed this issue and held that the Payable on Death statute exists as an alternative to the common law. *See Bland v. Branch Banking & Trust Co.*, 143 N.C. App. 282, 285, 547 S.E.2d 62, 65 (2001). In *Bland*, the Court addressed whether the Payable on Death statute applicable to savings and loan associations supplanted the common law. That statute is substantively identical to the Payable on Death statute governing credit unions, which is at issue in this case. *Compare* N.C. Gen. Stat. § 54B-130 *with* N.C. Gen. Stat. N.C. Gen. Stat. § 54-109.57.[2] Both statues have the identical language providing that the statute "shall not be deemed exclusive" and that nonconforming accounts are governed by "the common law, as appropriate." N.C. Gen. Stat. § 54B-130(a)(1); N.C. Gen. Stat. § 54-109.57(a)(1).

The grantor in *Bland* failed to sign a statement containing the necessary statutory language—the same statutory error that Plaintiffs alleged in this case—and failed to comply with the statute in several other ways. This Court acknowledged that "the purported trust agreement does not comply with G.S. § 54B-130" but held that, because of the non-exclusive language in the statute, "the issue is whether the trust agreement created a valid trust pursuant to the common law." *Bland*, 143 N.C. App. at 286, 547 S.E.2d at 65. In other words, this Court held that the common law is available as an alternative to the Payable on Death statute.

In sum, the Payable on Death statute is not the exclusive means by which a grantor can create an account that will pass to a named beneficiary upon the death of the grantor. To be sure, the statutory method will be preferable in nearly every instance, because it lists specific steps that ensure creation of the Totten trust and thus provides certainty to all parties involved. *See* N.C. Gen. Stat. § 54-109.57A (the Payable on Death

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1. Although this case involves now-repealed N.C. Gen. Stat. § 54-109.57, the same language is found in the current version of the Payable on Death statute at N.C. Gen. Stat. § 54-109.57A(b).

2. Again, these statutes have since been repealed and re-enacted as N.C. Gen. Stat. § 54B-130.1 and N.C. Gen. Stat. § 54-109.57A, respectively. The relevant statutory language remains the same.

statute for credit unions). But as this Court held in *Bland*, the General Assembly chose not to supplant the existing common law trust options when it enacted the statute. As a result, a grantor who sought to create a statutory Payable on Death account but failed to satisfy the statutory criteria may rely on the common law to demonstrate the existence of a valid tentative or Totten trust as an alternative. Accordingly, we reject Plaintiffs' argument.

III. Creation of a Tentative or Totten Trust

[3] Finally, Plaintiffs argue that SECU failed to show that Mr. Nelson established a common law tentative trust for his deposit account.

To create a tentative or Totten trust, the grantor must satisfy the same criteria necessary to establish any other valid trust: "(1) sufficient words to show intention to create the trust; (2) a definite subject; and (3) an ascertained object." *Bland*, 143 N.C. App. at 288-89, 547 S.E.2d at 67. The distinguishing feature of a tentative trust is that "the depositor retains complete control over the funds until his death, the trust is fully revocable, and is revoked in part each time the settlor withdraws funds from the account." *Jimenez v. Brow*n, 131 N.C. App. 818, 824-25, 509 S.E.2d 241, 246 (1998); *see also Bland*, 143 N.C. App. at 285, 547 S.E.2d at 65.

We hold that SECU presented undisputed evidence demonstrating that Mr. Nelson created a common law tentative trust as a matter of law. Mr. Nelson signed a bank form indicating that he was creating a "Payable on Death" account in which his daughter Martha Brown was the beneficiary. Ellen Shook, the SECU employee who handled Mr. Nelson's Payable on Death account request, testified that Mr. Nelson called her and told her that he wanted to create a new account "with his daughter [Martha Brown] as beneficiary." Mr. Nelson's assets with SECU were all within a revocable living trust, and he explained to Ms. Shook that he wanted to move $85,000 from that trust into a separate one with Ms. Brown as the beneficiary. Thus, Mr. Nelson expressed his intent to create a trust, identified the specific sum of money to be placed into the trust account, and identified the beneficiary of the trust.

To be sure, the document that Mr. Nelson signed did not use the word "trust" because that form was intended to be used to create a statutory Payable on Death account, not a common law one. But this Court has held that it is not necessary to use the word "trust" in order to satisfy the three elements of a valid trust. *See Carver v. Carver*, 188 N.C. App. 164, 654 S.E.2d 833 (2008). The text of the form, together with

Mr. Nelson's instructions to SECU concerning his intent, are sufficient to satisfy the requirements for creation of a valid tentative trust account.

Plaintiffs also argue that Mr. Nelson's actions were testamentary and that he never passed a present beneficial interest to his daughter as required for formation of a valid trust. This argument is precluded by *Bland*. In *Bland*, the plaintiff argued that the transfer of funds would occur only upon the grantor's death, and therefore the trust agreement "failed to transfer a present beneficial interest." 143 N.C. App. at 288, 547 S.E.2d at 66. This Court rejected that argument, holding that an instrument that transfers a "non-possessory interest" can still satisfy the requirement of transferring a "present beneficial interest." *Id.* "[A] trust may provide that the grantor will be entitled to possession of the property for life, or that the grantor shall be a life beneficiary of the trust" and "neither the reservation of a power to revoke the trust and take back the property, nor the retention of a power to modify the trust and change the beneficiaries, makes the instrument testamentary." *Id.*

Here, as in *Bland*, Mr. Nelson transferred a non-possessory interest to his daughter, the beneficiary of the tentative trust. Mr. Nelson retained "complete control over the funds until his death," but that is the nature of a tentative trust and it does not change the fact that the grantor of such a trust transfers a non-possessory beneficial interest upon creation of the trust. *Jimenez*, 131 N.C. App. at 824-25, 509 S.E.2d at 246; *see also Bland*, 143 N.C. App. at 288, 547 S.E.2d at 66-67.

In sum, the undisputed record evidence established that Mr. Nelson placed $85,000 in a valid tentative trust with his daughter, Martha Brown, as beneficiary. As a result, SECU properly transferred those funds to Ms. Brown upon Mr. Nelson's death, and Plaintiffs' tort claims—which all depended on SECU wrongfully transferring those funds—fail as a matter of law. The trial court thus correctly entered summary judgment in SECU's favor on those claims. Because we affirm the trial court's final judgment on this basis, we need not address SECU's alternative arguments in its cross-appeal.

Conclusion

The judgment of the trial court is affirmed.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

SHERIF A. PHILIPS, M.D., PLAINTIFF
v.
PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED, PAUL BOLIN, M.D., RALPH WHATLEY, M.D., SANJAY PATEL, M.D., AND CYNTHIA BROWN, M.D., DEFENDANTS

No. COA14-1372

Filed 4 August 2015

1. Attorney Fees—sufficiency of evidence—frivolous or malicious claims

The trial court did not err by awarding defendants attorneys' fees where there was competent evidence to support the court's findings that plaintiff's claims were frivolous or malicious.

2. Attorney Fees—punitive damages—other claims—common nucleus—apportionment not necessary

Attorneys' fees awarded by the trial court not were excessive where plaintiff argued that the claim for punitive damages was factually and legally distinct from other claims. Apportionment of fees between the punitive damages claim and the underlying claims was unnecessary; the trial court found that plaintiff's claims arose from a common legal and factual nucleus, that the allegations in support of plaintiff's claim for punitive damages were central to defendants' liability for all the claims, and that apportionment of legal fees between the claims was impractical.

Appeal by Plaintiff from order entered 17 July 2014 by Judge Richard L. Doughton in Pitt County Superior Court. Heard in the Court of Appeals 7 May 2015.

Mark Hayes for the Plaintiff-Appellant.

Harris, Creech, Ward & Blackerby, P.A., by Jay C. Salsman and C. David Creech, for the Defendant-Appellee.

DILLON, Judge.

Sherif A. Philips ("Plaintiff") appeals from an order awarding attorneys' fees to Pitt County Memorial Hospital, Inc., Paul Bolin, Ralph Whatley, Sanjay Patel, and Cynthia Brown ("Defendants"). For the following reasons, we affirm.

I. Background

Plaintiff commenced this action against Pitt County Memorial Hospital and four physicians in connection with the hospital's decisions to suspend and subsequently revoke Plaintiff's admitting and staff privileges. Plaintiff asserted a number of claims including that for punitive damages. This appeal is the second that has been brought to this Court in this action. In the first appeal, we affirmed the trial court's grant of summary judgment in favor of Defendants. A fuller recitation of the facts and procedural history giving rise to this litigation is available for reference in that opinion, *Philips v. Pitt Cnty. Mem'l Hosp. Inc.*, 222 N.C. App. 511, 731 S.E.2d 462 (2012).

On remand from the first appeal, the trial court awarded attorneys' fees to Defendants in the amount of $444,554.45. Plaintiff entered written notice of appeal from that award.[1]

II. Analysis

Plaintiff makes essentially two arguments on appeal, which we address in turn.

A. Frivolous or Malicious

[1] In his first argument, Plaintiff contends that the trial court erred in awarding Defendants attorneys' fees because there was no competent evidence to support the court's findings that his claims were frivolous or malicious. We disagree.

In North Carolina, awards of attorneys' fees are only allowed where specifically authorized by statute. *See*, *e.g.*, *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972). In the present case, the trial court awarded attorneys' fees pursuant to N.C. Gen. Stat. § 1D-45, which authorizes awards based on frivolous or malicious claims for punitive damages. *See* N.C. Gen. Stat. § 1D-45 (2014). Specifically, the trial court determined that Plaintiff's claim for punitive damages against Defendants was frivolous or malicious.

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1. Defendants have moved to dismiss this appeal based on Plaintiff's failure to include a filed and signed copy of the order appealed from in the record on appeal. Plaintiff's counsel appears to have inadvertently included a non-file stamped copy of the order in the record on appeal and has moved to amend the record to include a file stamped, signed copy of the order, or, in the alternative, petitioned for *certiorari*. We hereby deny Defendants' motion to dismiss, grant Plaintiff's motion to amend the record to include the appropriately signed and stamped copy of the order, and deny the petition for *certiorari*. We note that this formal defect, while serious, has not impaired our task of review.

We review awards of attorneys' fees, including awards pursuant to N.C. Gen. Stat. § 1D-45, for an abuse of discretion. *GE Betz, Inc. v. Conrad*, ___ N.C. App. ___, ___, 752 S.E.2d 634, 654 (2013). However, in evaluating whether the court abused its discretion, we consider the court's findings in support of its award. *Brown's Builders Supply, Inc. v. Johnson*, ___ N.C. App. ___, ___, 769 S.E.2d 653, 657-58 (2015). We review these findings to determine whether competent evidence supports them and whether they, in turn, support the court's conclusions. *GE Betz*, ___ N.C. App. at ___, 752 S.E.2d at 654.

Under N.C. Gen. Stat. § 1D-45, a claim for punitive damages is "frivolous" where its "proponent can present no rational argument based upon the evidence or law in support of it." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002) (internal marks omitted), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004). Furthermore, a claim is "malicious" where it is "wrongful and done intentionally without just cause or excuse or as a result of ill will." *Id.*

In the present case, the trial court made a number of findings, including that Plaintiff had admitted to unprofessional conduct and that this was a valid basis for the initiation of corrective action under hospital bylaws; that Plaintiff misrepresented the true nature of his medical practice and never would have received admitting privileges were it not for this misrepresentation; that Plaintiff failed to comply with conditions of his reappointment and the requirements of hospital bylaws after corrective action was initiated against him; that Plaintiff had knowledge of his lack of compliance and continued to violate flagrantly the bylaws after being notified of his non-compliance; and that despite this knowledge, Plaintiff "persisted in his allegations that [his hospital privileges were suspended and then revoked] without any valid factual or legal support."

We believe that there is competent evidence supporting all of the challenged findings, that the findings as a whole support the court's ultimate findings that Plaintiff's claims were frivolous and malicious, and that the court's award of attorneys' fees reflected a reasoned judgment. Therefore, we hold that the trial court did not abuse its discretion. Accordingly, this argument is overruled.

B. Apportionment of Fees

[2] Plaintiff next argues that the attorneys' fees awarded by the trial court were excessive because the claim for punitive damages was factually and legally distinct from the other claims and recovery of attorneys'

fees was only authorized for the punitive damages claim, not the other claims. We disagree.

As stated above, there is a statutory basis for an award of attorneys' fees to Defendants in their defense of the punitive damages claim asserted by Plaintiff. It is true, as Plaintiff contends, that there is no statutory basis to award attorneys' fees to Defendants for their defense of other claims asserted by Plaintiff. However, we have held that where attorneys' fees are not recoverable for defending certain claims in an action but are recoverable for other claims in that action, fees incurred in defending both types of claims are recoverable where the time expended on defending the non-recoverable and the recoverable claims overlap and the claims arise "from a common nucleus of law or fact." *Okwara v. Dillard Dep't. Stores, Inc.*, 136 N.C. App. 587, 595, 525 S.E.2d 481, 486-87 (2000). Therefore, as we have held, apportionment of fees is unnecessary when all the claims in an action arise from the same nucleus of operative fact such that "each claim [is] 'inextricably interwoven' with the other claims[.]" *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 467, 553 S.E.2d 431, 443 (2001).

In the present case, the trial court found that Plaintiff's claims arise from a common legal and factual nucleus; that the allegations in support of Plaintiff's claim for punitive damages were central to Defendants' liability for all the claims; and that apportionment of legal fees between the claims was impractical. Plaintiff focuses on the element of frivolousness or maliciousness, which the punitive damages claim did not share with the underlying claims, in arguing that the factual and legal nucleus of the claims differed. We are not persuaded.

We need only look to the allegations in Plaintiff's complaint to see that Plaintiff alleged and incorporated by reference all the allegations of conduct comprising the substance of his other claims in support of his claim for punitive damages, adding only that in addition to all his other allegations, the injuries inflicted against him were done with malice, conscious disregard, intent, design, and purpose. We do not believe that the trial court erred in determining that both the recoverable punitive damages claim and the non-recoverable claims arose from a common nucleus of law and fact and were "inextricably interwoven" with one another. Therefore, we hold that apportionment of fees between the punitive damages claim and the underlying claims was unnecessary. Accordingly, this argument is overruled.

III. Conclusion

For the reasons stated herein, the trial court's award of attorneys' fees is affirmed.

AFFIRMED.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA
v.
HOWARD JUNIOR EDGERTON, DEFENDANT

No. COA13-1235-2

Filed 4 August 2015

1. Sentencing—aggravating factor—DVPO—position of trust or confidence

The trial court did not err when sentencing defendant for feloniously violating a Domestic Violence Protective Order (DVPO) against his former girlfriend by finding as an aggravating factor that he took advantage of a position of trust or confidence. Defendant's argument to the contrary assumes that "trust and confidence" automatically exists in all of the "personal relationships" provided by the DVPO statute, but the definition of personal relationship under N.C.G.S. § 50B-1(B) does not include any element which would require proof of a position of trust or confidence or the abuse of that position any evidence offered by the State to show that defendant took advantage of a position of trust or confidence may be used to establish a statutory aggravating factor.

2. Constitutional Law—effective assistance of counsel—insufficient evidence

In a case involving a Domestic Violence Protective Order, a claim for ineffective assistance of counsel was dismissed (with defendant having the choice of filing a motion for appropriate relief) where the record lacked sufficient evidence to make a determination.

Appeal by Defendant from judgment entered 21 March 2013 by Judge Gary M. Gavenus in the Rutherford County Superior Court. Originally heard in the Court of Appeals 20 March 2014. By published opinion

entered 17 June 2014, a divided panel of this Court found existence of plain error and remanded for a new trial. *State v. Edgerton*, __ N.C. App. __, __, 759 S.E.2d 669, 675 (2014). By order entered 10 April 2015, the Supreme Court reversed the decision of this Court based on "the reasons stated in the dissenting opinion" and "remanded to the Court of Appeals for consideration of defendant's remaining issues on appeal." *State v. Edgerton*, __ N.C. __, 769 S.E.2d 837 (2015).

Attorney General Roy A. Cooper, III, by Assistant Attorney General Teresa M. Postell, for the State.

Michael E. Casterline for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

This case comes to us on remand from the Supreme Court of North Carolina, reversing this Court's prior decision, for the purpose of considering the issues raised in Defendant's original appeal but not decided. On remand, after reviewing the opinion from the Supreme Court and the arguments advanced by the parties, we find Defendant received a trial free of error.

I. Procedure

Defendant originally argued before this Court that (1) the trial court committed plain error by failing to instruct the jury on the lesser-included misdemeanor offense of violation of a domestic violence protective order ("DVPO"); (2) Defendant was denied effective assistance of counsel when his trial attorney failed to request instruction on the lesser-included misdemeanor offense; (3) the trial court erred in sentencing Defendant within the aggravated range based in part on the aggravating factor of abuse of a position of trust or confidence; and (4) Defendant's habitual felon status was void because the underlying conviction was in error. *See State v. Edgerton*, __ N.C. App. __, __, 759 S.E.2d 669 (2014), *rev'd* __ N.C. __, 769 S.E.2d 837 (2015). By a 2-1 vote, this Court found the trial court's failure to instruct the jury on a lesser-included misdemeanor offense rose to the level of plain error. *Id.* at 674-75. The North Carolina Supreme Court reversed this Court's decision based on the dissenting opinion, which stated the failure of the trial court to instruct the jury on the lesser-included misdemeanor DVPO violation did not rise to the level of plain error. *See State v. Edgerton*, __ N.C. __, 769 S.E.2d 837 (2015).

This case comes back to this Court on remand for the purpose of deciding Defendant's remaining three issues not addressed by our first

opinion: (1) whether the trial court erred in sentencing Defendant within the aggravated range; (2) whether Defendant received ineffective assistance of counsel; and (3) whether or not Defendant's habitual felon status pleading is void. This Court's prior opinion deciding whether Defendant feloniously violated a DVPO against his former girlfriend, Ms. King, presented a summation of the facts and procedural history of this case, which are incorporated herein. *See Edgerton*, __ N.C. App. at __, 759 S.E.2d at 671-72.

II. Defendant's Sentence Aggravation Claim

[1] Defendant argues the trial court erred in sentencing him within the aggravated range based in part on the statutory aggravating factor that "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense." *See* N.C. Gen. Stat. § 15A-1340.16(d)(15) (2013). In his brief, Defendant asserts "[s]ince a personal relationship between the parties is a necessary prerequisite to obtaining a [DVPO] under Chapter 50B, the existence of a position of trust between the parties is assumed." Therefore, according to Defendant, "that trust cannot be used to aggravate the sentence of a criminal defendant who violates the protective order." We disagree.

To issue a DVPO, the court must "find[] that an act of domestic violence has occurred[.]" N.C. Gen. Stat. § 50B-3(a) (2013). Domestic violence is "the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a *personal relationship*[.]" N.C. Gen. Stat. § 50B-1(a) (2013) (emphasis added). Therefore, a past or current personal relationship is a prerequisite to obtaining a DVPO. N.C. Gen. Stat. § 50B-1 provides examples of "personal relationships" encompassed by the statute, including, among others, "current or former spouses; persons of opposite sex who live together or have lived together; [and] . . . persons of the opposite sex who are in a dating relationship or have been in a dating relationship." N.C. Gen. Stat. § 50B-1(b) (2013).

Our General Statutes provide "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" N.C. Gen. Stat. § 15A-1340.16(d) (2013). Furthermore, "[a] sentence may not be aggravated by evidence supporting an element of the same offense." *State v. Wilson*, 354 N.C. 493, 522, 556 S.E.2d 272, 291 (2001), *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002). To feloniously violate a DVPO with a deadly weapon, a defendant must: (1) be in possession of a deadly weapon on or about his person or have the weapon in close proximity to his person;

and (2) knowingly violate a valid protective order. *See* N.C. Gen. Stat. § 50B-4.1(g) (2013).

Here, Defendant's argument assumes that "trust and confidence" automatically exists in all of the "personal relationships" provided by the statute, and ascribes to N.C. Gen. Stat. § 50B-1 provisions which it does not include. The definition of a "personal relationship" under N.C. Gen. Stat. § 50B-1(b) does not include any element whatsoever which would require proof of either a position of trust or confidence or the abuse of that position. Thus, any evidence offered by the State to show that Defendant took advantage of a position of trust or confidence may be used to establish a statutory aggravating factor. Accordingly, we hold the trial court did not err in finding this as an aggravating factor, nor did it err in sentencing Defendant to a sentence within the aggravated range.

III. Defendant's Ineffective Assistance of Counsel Claim

[2] The second issue for our consideration is whether Defendant was denied effective assistance of counsel when his trial attorney failed to request a jury instruction on the lesser-included misdemeanor offense of violation of a DVPO. There is a two-prong test for ineffective assistance of counsel claims. For Defendant to show ineffective assistance of counsel, "[he] must show both that 'counsel's performance was deficient' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *State v. Gillespie*, __ N.C. App. __, __, 771 S.E.2d 785, 788 (2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

Here, the record lacks sufficient evidence to make a determination on Defendant's ineffective assistance of counsel claim. Additional fact-finding is necessary to determine if Defendant's attorney's conduct fell below the objective standard of reasonableness. Therefore, we dismiss this claim, allowing Defendant to seek a motion for appropriate relief if he so chooses.

IV. Defendant's Habitual Felon Status Claim

[3] As a result of our Supreme Court finding no plain error as to the jury instruction of violation of a DVPO with a deadly weapon, Defendant's habitual felon status is not void because Defendant was validly convicted of felony violation of a DVPO.

NO ERROR.

Judges Stroud and Dillon concur.

STATE OF NORTH CAROLINA
v.
JESSICA RASHEEDA JORDAN, DEFENDANT

No. COA14-1070

Filed 4 August 2015

Search and Seizure—warrantless entry—broken apartment window—broad daylight and heavy traffic

The trial court erred by denying defendant's motion to suppress evidence obtained as a result of a warrantless entry into her apartment. The officers' testimony—that they observed a broken window, found the apartment door unlocked, and received no response from inside the apartment—was insufficient to support the conclusion that the officers had a reasonably objective belief that a breaking and entering was in progress or had been recently committed. These events took place in the middle of the day, in a heavy-traffic area of an apartment complex, and in view of many common areas of the complex. The Court of Appeals reversed the suppression order and vacated the judgment entered on defendant's guilty plea.

Appeal by defendant from judgment entered 25 February 2014 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 4 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alesia Balshakova, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

GEER, Judge.

Defendant Jessica Rasheeda Jordan appeals from a judgment entered on her plea of guilty to misdemeanor child abuse and from a conditional discharge entered on her plea of guilty to possession of a schedule I controlled substance. On appeal, defendant argues that the trial court erred in denying her motion to suppress evidence obtained as a result of a warrantless search of her residence. Defendant contends that the trial court's findings are insufficient to support its conclusion that the officers had an objectively reasonable belief that a breaking and entering was in progress or had recently been committed and that, therefore, the search

was justified under the exigent circumstances exception to the warrant requirement. We agree.

The trial court's findings that the officers observed a broken window, that the front door was unlocked, and that no one responded when the officers knocked on the door are insufficient to show that they had an objectively reasonable belief that a breaking and entering had *recently* taken place or *was still in progress*, such that there existed an urgent need to enter the property. Accordingly, we hold that the trial court erred in denying the motion to suppress and vacate the judgment.

Facts

At the suppression hearing, the State presented evidence tending to show the following facts. On 15 April 2011 at around 11:40 a.m., Officer Adam Wolf of the Garner Police Department ("GPD") was driving through the Bryan Woods apartment complex in Garner, North Carolina, when he saw a dog roaming around with no owner in sight. When he stopped his patrol car and attempted to catch the dog, he noticed what he testified he believed to be curtains waving through an open window on the first floor of one of the apartment buildings. He approached the window, and from 10 to 15 feet away from the window he observed that the window was broken, there were glass shards on the ground, and a screen was propped up against the side of the apartment building. He believed that a breaking and entering could be in progress and called for back-up.

Shortly thereafter, Officer Doak of the GPD arrived and proceeded to the door of the apartment. Officer Doak told Officer Wolf that the door was unlocked. The officers knocked on the door and announced their presence as police officers. The fact that the door was unlocked increased their suspicions that something was "not right" and that a potential breaking and entering could be in progress. The officers were concerned that a suspect could still be inside the apartment. The officers opened the door slightly, again announced their presence, and waited for approximately one minute. When there was still no response, the officers, who by that time were joined by Detective Moore of the GPD, entered the apartment to do a protective sweep.

The purpose of the sweep was to determine whether someone was hiding in the apartment and whether they had interrupted a crime in progress. The officers completed an initial sweep of the apartment from the front to the back, and then a secondary sweep of the apartment from the back of the apartment to the front. At one point during the sweep, the officers came to a room where the door leading to the room was blocked

by a heavy object. The officers pushed the door open and knocked over a dresser that was blocking their entry. Once inside the room, the officers saw narcotics and other drug paraphernalia in plain view.

After the officers completed the protective sweep and exited the apartment, defendant pulled up to the apartment with her boyfriend James Chance. Defendant and Mr. Chance told the officers that they lived in the apartment. The officers explained that they believed that a break-in could be in progress or that someone had broken in and asked defendant and Mr. Chance to check and see if anything was missing or out of place. Defendant and Mr. Chance went into their living room and said that everything was fine without checking any other room. Based on the officers' observations of drug paraphernalia and narcotics in the apartment, the officers then proceeded to obtain a search warrant for the apartment.

Detective Moore returned with a search warrant several hours later. Pursuant to the search warrant, the officers found what they believed to be 3, 4-methylenedioxymethamphetamine ("MDMA") inside a vase in the common area of the apartment. They also found marijuana, digital scales, and a marijuana blunt. Defendant and Mr. Chance were arrested following the search.

On 9 August 2011, in case file number 11 CRS 208687, defendant was indicted on charges of trafficking in MDMA by possession, possession with intent to sell and deliver marijuana, and maintaining a dwelling used for keeping and selling a controlled substance. On 29 November 2011, in case file number 11 CRS 208689, defendant was indicted on charges of misdemeanor possession of marijuana, possession of drug paraphernalia and misdemeanor child abuse.

Defendant moved to suppress the evidence obtained as a result of the search of her residence. A hearing on defendant's motion was held on 4 June 2013 before Judge Howard E. Manning, Jr. At the hearing, defendant submitted into evidence a map of the layout of Bryan Woods Apartments. The map showed that directly across the street from defendant's apartment are tennis courts and diagonally across the street from the apartment is a swimming pool, clubhouse, and the apartment complex office. On cross-examination, Officer Wolf admitted that he had not heard any screams or cries for help coming from the apartment and that there were no reports of any burglaries in the area. Officer Wolf also admitted that he did not take any steps to further investigate the broken window or contact the apartment manager prior to entering defendant's apartment.

Bernard Clark, an investigator with the Wake County Public Defender's Office who was previously employed by the New York City Police Department for 29 years, testified for the defense. Mr. Clark testified that he went to the apartment complex and spoke to the property manager, who told him that the window had been broken by defendant's boyfriend after he and defendant had locked themselves out of the apartment. The window had not yet been fixed because the apartment complex wanted Mr. Chance to pay for it. Mr. Clark further testified that in his opinion, defendant's apartment was an odd location for a break-in because it was located in a heavy traffic area and was in plain view of the office, pool, tennis courts, and main road of the complex.

At the close of the hearing, Judge Manning orally rendered his ruling. He rejected the State's contention that exigent circumstances existed based on the possibility that a person within the house could be in need of immediate aid. He stated: "I don't view this situation as falling under the helping somebody in the house, somebody might be hurt, somebody might be beat up. There's nothing here that causes me to think somebody was dead, tied up, stuffed in the closet or anything else."

However, Judge Manning concluded that exigent circumstances existed based upon the officer's reasonable belief that there was a breaking and entering in progress. Judge Manning explained:

> In this case, what is important to me, looking at it objectively, is that the officer saw the window open, the screen on the ground, called for backup. The door was open. The door was not locked.
>
> At that point, you got two things that tell me that something's going on -- could be going on inside. And then when you ask if anybody is in there and didn't hear anything, I think they had a right to go in and make a sweep.

Accordingly, Judge Manning denied the motion to suppress.

After the suppression hearing, the substance originally thought by the officers to be MDMA was subsequently identified as N-Benzylpiperazine ("BZP") by the laboratory. On 3 December 2013, a superseding indictment was issued in 11 CRS 208687 that charged defendant with possession with intent to sell and deliver BZP, possession with intent to sell or deliver marijuana, and maintaining a dwelling used for keeping or selling controlled substances.

At a hearing held before Judge Carl R. Fox on 25 February 2014, defendant entered a negotiated plea of guilty to one count of felony

possession of a schedule I controlled substance in 11 CRS 208687 and one count of misdemeanor child abuse in 11 CRS 208689. The remaining charges were dismissed.

In 11 CRS 208689, the trial court entered judgment on defendant's guilty plea to misdemeanor child abuse, sentenced defendant to 75 days of imprisonment, suspended the sentence, and placed defendant on supervised probation for 12 months. In 11 CRS 208687, the trial court entered a conditional discharge of the possession of a controlled substance offense pursuant to N.C. Gen. Stat. § 90-96(a), deferred further proceedings in the matter, and placed defendant on supervised probation for 12 months. Defendant gave oral notice of appeal. On 18 April 2014, Judge Manning entered a written order denying defendant's motion to suppress.

Discussion

Initially, we note that although the written order denying defendant's motion to suppress was entered after defendant orally appealed the denial of her motion to suppress, the trial court had jurisdiction to enter the written order, and it is properly before this Court. As explained by this Court in *State v. Price*, ___ N.C. App. ___, ___, 757 S.E.2d 309, 312, *disc. review denied*, 367 N.C. 508, 759 S.E.2d 90 (2014):

> N.C. Gen. Stat. § 15A-1448(a) sets forth the guidelines for time for entry of an appeal and jurisdiction over a case. Under N.C. Gen. Stat. § 15A-1448(a)(3), "[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given and the period described in [N.C.G.S. § 15A1448(a)(1)-(2) [sic]] . . . has expired." Subsection (1) of N.C. Gen. Stat. § 15A-1448(a) provides that "[a] case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal." *Id.* § 15A-1448(a)(1).

Rule 4 of the Rules of Appellate Procedure, in turn, provides for two modes of appeal in a criminal case: (1) A party may give oral notice of appeal at the time of trial or of the pretrial hearing, or (2) "notice of appeal may be in writing and 'filed with the clerk of court . . . at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order.' " *Price*, ___ N.C. App. at ___, 757 S.E.2d at 312 (quoting *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012)). Consequently, the period for giving notice of

appeal expires -- and the trial court's jurisdiction over the case divests -- 14 days after entry of a written order.

With respect to the denial of a motion to suppress, N.C. Gen. Stat. § 15A-979(b) (2013) provides that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." Pursuant to this statute, " 'a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.' " *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001) (quoting *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996)). In this case, defendant notified the State of her intention to appeal the denial of her suppression motion and then orally appealed the judgment entered upon her plea of guilty.

Although defendant properly appealed the denial of her suppression motion, the trial court retained jurisdiction to enter a written order. Accordingly, we hold that the written suppression order is properly before this Court. *See Price*, ___ N.C. App. at ___, 757 S.E.2d at 315 (holding trial court had jurisdiction to enter written suppression order after the State gave oral notice of appeal from trial court's ruling stated in open court, and reviewing written suppression order). *Cf. Oates*, 366 N.C. at 268, 732 S.E.2d at 575 (holding timely State's written notice of appeal filed after oral rendition of ruling even though State did not file additional written notice of appeal after entry of written order).

Motion to Suppress

On appeal, defendant argues that the trial court erred in denying her motion to suppress the evidence obtained as a result of the warrantless search of her residence. Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Defendant contends that the trial court erred in concluding that the warrantless entry into her apartment was justified by exigent circumstances. "In order to justify a warrantless entry of a residence, there

must be probable cause and exigent circumstances which would warrant an exception to the warrant requirement." *State v. Wallace*, 111 N.C. App. 581, 586, 433 S.E.2d 238, 241 (1993).

With respect to exigent circumstances, this Court has explained:

> Exigent circumstances exist when there is "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures[.]" *Black's Law Dictionary* 236 (7th ed. 1999); *see also* Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* 49 (2d ed. 1992) (stating that exigent circumstances exist when immediate action is necessary). "If the circumstances of a particular case render impracticable a delay to obtain a warrant, a warrantless search on probable cause is permissible . . . ." *State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979). The United States Supreme Court has approved the following exigent circumstances justifying warrantless searches and seizures: (1) where law enforcement officers are in "hot pursuit" of a suspect, *see, e.g.*, *State v. Santana*, 427 U.S. 38, 42-43, 49 L. Ed. 2d 300, 305[, 96 S. Ct. 2406, 2409-10] (1976); (2) where there is immediate and present danger to the public or to law enforcement officers, *see, e.g.*, *Warden v. Hayden*, 387 U.S. 294, 298-99, 18 L. Ed. 2d 782, 787[, 87 S. Ct. 1642, 1645-46] (1967); (3) where destruction of evidence is imminent, *see, e.g.*, *Santana*, 427 U.S. at 43, 49 L. Ed. 2d at 305[, 96 S. Ct. at 2410]; and (4) where the gravity of the offense for which the suspect is arrested is high, *see, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 753, 80 L. Ed. 2d 732, 745[, 104 S. Ct. 2091, 2099] (1984). These cases suggest that exigent circumstances exist where the need for immediate action is so great as to outweigh the potential infringement of a defendant's rights under the Fourth Amendment, thereby justifying the officers' failure to obtain a warrant.

State v. Nance, 149 N.C. App. 734, 743-44, 562 S.E.2d 557, 563-64 (2002).

In *State v. Woods*, 136 N.C. App. 386, 391, 524 S.E.2d 363, 366 (2000), this Court recognized that "State and federal courts in other jurisdictions generally agree that where an officer reasonably believes that a burglary is in progress or has been recently committed, a warrantless entry of a private residence to ascertain whether the intruder is within or there are people in need of assistance does not offend the Fourth

Amendment." In *Woods*, an officer was dispatched to the defendant's mobile home to investigate an alarm that was going off. *Id.* at 388, 524 S.E.2d at 364. When the officer arrived, he heard the alarm and observed that the rear door of the mobile home was ajar. *Id.* He announced his presence, identified himself as a police officer, and requested that anyone inside exit the residence. *Id.* When he heard no response, he entered the mobile home to search for potential victims or perpetrators. *Id.* A cursory search of the home revealed that a window had been broken. *Id.* Under these circumstances, the Court held that the entry into the defendant's home was supported by both probable cause and exigent circumstances, as "[i]t was clear an uninvited entry had been made at the residence and the officers had reason to believe that intruders or victims could still be on the premises." *Id.* at 392, 524 S.E.2d at 366.

Similarly, in *State v. Miller*, ___ N.C. App. ___, ___, 746 S.E.2d 421, 425 (2013), *rev'd on other grounds*, 367 N.C. 702, 766 S.E.2d 289 (2014), this Court held that the officers' warrantless entry into the defendant's home was justified based on the exigent circumstances exception because the officers "had an objective reasonable belief that a burglary or breaking and entering was in process and that a suspect or suspects may still be in defendant's home." In that case, the officer had received a burglar alarm report concerning a suspected breaking and entering at the defendant's home, and when the officer arrived, he noticed a back window was broken. *Id.* at ___, 746 S.E.2d at 425. This Court noted that "because all the doors remained locked, [the officer] reasonably believed that the intruder could have still been in the home." *Id.* at ___, 746 S.E.2d at 425.

In this case, the trial court found that "Officer Wolfe [sic] observed a broken window, the window's screen leaning up against the apartment building, glass on the ground directly below the window, an unlocked front door of the apartment and no response from inside the apartment when officers knocked and announced their presence." Defendant does not dispute these findings and, therefore, they are binding on appeal. *State v. Ballance*, 218 N.C. App. 202, 214, 720 S.E.2d 856, 865 (2012). The dispositive issue, therefore, is whether these findings are sufficient to support a conclusion that the officers had an objectively reasonable belief that a breaking and entering was in progress or had been recently committed.

Defendant argues, and we agree, that the facts of this case are distinguishable from the facts in *Woods* and *Miller*. In each of those cases, the officers were specifically dispatched to investigate reports of an alarm sounding at the defendants' residences. The officers' subsequent discovery of a broken window and door left ajar in those cases confirmed what

the officers had already suspected -- that a burglary had recently taken place. Here, in contrast, there was no alarm, and the officers were not called to the location to investigate a suspected burglary. Rather, Officer Wolf just happened upon the broken window of the apartment while he was on patrol in the middle of the day. Absent an alarm or additional information provided in a dispatch, there is no indication of how or when the window was broken.

In *State v. Morgavi*, 58 Wash. App. 733, 794 P.2d 1289 (1990), the Washington Court of Appeals drew a similar distinction. In that case, the court held that entry into the defendant's residence was not justified under the exigent circumstances exception where "[t]he facts that led the officers to believe that a burglary was in progress or had recently taken place consisted of the presence of a car in front of the garage, opened and partially broken doors to the garage, an open back door to the house and an open side door to the garage." *Id.* at 739, 794 P.2d at 1292. The court explained:

> These observations, while perhaps enough to raise suspicions, were not enough to support a reasonable belief that a crime had occurred or was occurring on the premises. Indeed, these observations were consistent with any number of innocent explanations. These facts are distinguishable from those in [*State v.*] *Campbell*[, 15 Wash. App. 98, 547 P.2d 295 (1976)] and [*State v.*] *Bakke*[, 44 Wash. App. 830, 723 P.2d 534 (1986)] in a significant aspect. In each of those cases, the police were summoned to the premises by concerned neighbors who had witnessed the burglaries and the flight of suspects. In both of those cases the police officers were not following their own hunch that a crime had occurred, but rather, were responding to the report of a third party who had actually witnessed the crime.

Id., 794 P.2d at 1292-93. The court acknowledged that when officers are dispatched to a location based upon a report of a crime taking place, "the police clearly ha[ve] a reason to investigate what ha[s] been described as an emergency." *Id.* at 740, 794 P.2d at 1293. In contrast, where the officers merely had a "hunch" that a crime had occurred, "the emergency was not apparent." *Id.* at 739, 740, 794 P.2d at 1293.

In this case, even assuming that the broken window gave the officers probable cause to believe that a burglary had been committed, there is no evidence that the burglary had been committed recently or that it was on-going. Indeed, in *Miller*, the Court recognized that the locked door

suggested that the perpetrator was still inside. It stands to reason that the unlocked door in this case suggests that any perpetrator who may have gained entry to defendant's apartment through the broken window had already left through the front door.

Officer Wolf acknowledged at the hearing that he did not know when the window was broken, and there is no evidence suggesting that it had been broken recently. Aside from the broken window, the officers had no reason to believe that there was an urgent need to enter the property. *See State v. Simmons*, 158 S.W.3d 901, 907 (Mo. Ct. App. 2005) (holding that although it may have been reasonable for officer to suspect that a burglary had occurred "at some point," there was nothing to indicate that exigent circumstances existed where officer "neither saw nor heard anyone in or about the building before his entry" and there was no evidence presented "regarding how long the open door and broken window conditions had existed").

The State also argues that exigent circumstances existed based upon the possibility that a victim could have been inside and in need of aid. The trial court, however, orally rejected that contention and did not include that justification in its findings of fact or conclusions of law, and the State does not specifically contend in its brief that the trial court deprived it of an alternative basis to uphold the order. *See* N.C.R. App. P. 28(c) ("Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."). In any event, none of the trial court's findings supports a conclusion that it was reasonable for the officers to believe that there was someone inside the apartment in need of immediate assistance. As stated by the Tenth Circuit, "[t]he sanctity of the home is too important to be violated by the mere possibility that someone inside is in need of aid -- such a 'possibility' is ever-present." *United States v. Martinez*, 643 F.3d 1292, 1299-300 (10th Cir. 2011).

Morgavi, *Simmons*, and *Martinez* are consistent with this Court's recognition that "exigent circumstances exist where the need for immediate action is so great as to outweigh the potential infringement of a defendant's rights under the Fourth Amendment, thereby justifying the officers' failure to obtain a warrant." *Nance*, 149 N.C. App. at 743-44, 562 S.E.2d at 564. In this case, the only circumstances justifying the officers' entry into defendant's residence were a broken window, an unlocked door, and the lack of response to the officers' knock at the door. We

hold that although these findings may be sufficient to give the officers a reasonable belief that an illegal entry had occurred *at some point*, they are insufficient to give the officers an objectively reasonable belief that a breaking and entering was in progress or had occurred recently.

Additionally, we note that the evidence is undisputed that (1) Officer Wolf discovered the broken window in the middle of the day in broad daylight, (2) defendant's apartment is located in a heavy traffic area of the apartment complex, and (3) the broken window was plainly visible from the tennis courts, pool, club house, and main road of the complex. The time of day, the location of the broken window, and the visibility of the supposed entrance point for any break-in are all circumstances relevant to the question whether it was reasonable for the officers to believe that a break in had recently taken place or was ongoing. However, we need not remand for further findings of fact in light of our holding that the trial court's findings are insufficient to support its conclusion of law that the officers' initial entry into defendant's apartment was justified under the exigent circumstances exception to the warrant requirement.

In sum, we hold that the trial court erred by denying defendant's motion to suppress. "When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). Since the police obtained a warrant to search the apartment based upon evidence discovered during the illegal warrantless search, any evidence obtained pursuant to the search warrant is the fruit of the illegal search and should be suppressed. Accordingly, we reverse the suppression order and vacate the judgment entered on defendant's guilty plea.

We note that defendant's brief originally presented a second issue as an alternative basis for relief. In the second issue presented on appeal, defendant argued that the trial court lacked jurisdiction to indict defendant for possession of BZP because on 15 April 2011, the alleged date of offense, BZP was not included in the list of schedule I controlled substances contained in N.C. Gen. Stat. § 90-89 (2013). BZP was not added to the list as a controlled substance until 27 June 2011. *See* 2011 N.C. Sess. Law 326 § 14.(b). Therefore, defendant argued, defendant's plea agreement should be vacated.

We need not address this issue. On 23 February 2015, while this appeal was pending before this Court, the felony possession of a schedule I controlled substance charge in 11 CRS 208687 was dismissed pursuant to defendant's successful completion of the terms of her conditional

discharge. Subsequently, defendant moved to amend her brief to withdraw her challenge to the indictment in 11 CRS 208687 as a basis for relief. We have decided in our discretion to grant defendant's motion.

REVERSED.

Judges ELMORE and INMAN concur.

STATE OF NORTH CAROLINA
v.
ZACHARY DAVID THOMSEN

No. COA14-1235

Filed 4 August 2015

1. Appeal and Error—jurisdiction—writ of certiorari—sua sponte order granting motion for appropriate relief—bound by petition panel

The Court of Appeals had jurisdiction to review the trial court's sua sponte order granting defendant appropriate relief via writ of certiorari. The motion for appropriate relief statute addressed by the Supreme Court in *Stubbs*, ___ N.C. ___ (2015), was not instructive and absent direction otherwise the Court of Appeals was bound by the decision of the petition panel in this case.

2. Evidence—findings of fact—abuse of discretion—not considered in analysis

The trial court abused its discretion in a first-degree rape and first-degree sexual offense case by its findings of fact # 21 and # 23 discussing the victim's prior abuse, finding of fact # 77 discussing the victim's lack of "adult supervision," statutory mitigating factor 8(b) indicating the relationship between defendant and the victim was otherwise extenuating; and non-statutory mitigating factor 21(b) discussing the victim's lack of "adult supervision." These findings of fact were not considered in the Court of Appeals' analysis of defendant's Eighth Amendment claim.

3. Sentencing—300-months—not grossly disproportionate to crimes pled guilty—no 8th Amendment violation

The Court of Appeals followed its precedent in a first-degree rape and first-degree sexual offense case and held that the original

300-month sentence imposed by the trial court did not violate the Eighth Amendment. A 300-month sentence was not grossly disproportionate to the two crimes to which defendant pled guilty. Furthermore, Defendant's 300-month sentence was less than or equal to the sentences of many other offenders of the same crime in this jurisdiction.

McGEE, Chief Judge, dissenting.

Appeal by the State from an Order Granting Appropriate Relief entered on 13 December 2013 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 6 April 2015.

Attorney General Roy Cooper, by Anne M. Middleton, Assistant Attorney General, for the State.

The Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr., for the Defendant.

HUNTER, JR., Robert N., Judge.

The State appeals from a *sua sponte* order of the trial court granting Zachary David Thomsen ("Defendant") appropriate relief pursuant to N.C. Gen. Stat. § 15A-1420(d). The State argues the trial court erred in allowing its own motion for appropriate relief on Eighth Amendment grounds. Defendant argues this Court lacks jurisdiction to hear the case via a writ of *certiorari*, and even if this Court does have jurisdiction, the trial court did not abuse its discretion in granting Defendant appropriate relief.

For the following reasons, we vacate the trial court's order granting appropriate relief and the corresponding judgments and commitments, and remand for a new sentencing hearing.

I. Factual & Procedural History

On 11 June 2012, Defendant was indicted for statutory rape of a child less than thirteen years old, statutory sexual offense with a child less than thirteen years old, two counts of taking indecent liberties with a child, and two counts of sexual battery. At the time of the crimes for which Defendant was indicted, he was eighteen years old.

On 3 June 2013, pursuant to a plea agreement, Defendant entered a plea of guilty to first degree rape and first degree sexual offense. Under the terms of the plea agreement, the sentences for those two offenses

were to be consolidated into one active sentence of 300 months minimum and 372 months maximum. In accordance with the plea agreement, the State agreed to dismiss the two indecent liberties charges and two sexual battery charges. The trial court administered the plea colloquy, and the State presented the factual basis for the plea. The evidence presented to the trial court tended to show the following facts:

At the time of the charged offenses, Defendant was working at Chick-fil-a and living in the home of his father, Brian Thomsen, and his father's fiancé, Violet James ("Ms. James").[1] The victim, Natalie James,[2] is Ms. James' eight-year-old daughter. On 31 May 2012, Ms. James was out of town, so Defendant picked up Natalie from school. Defendant took Natalie to the Chick-fil-a where he worked, then he took her to their shared home. Defendant and Natalie were at home by themselves. They played outside with a water gun and Defendant began tickling Natalie. He then brought Natalie into her bedroom and raped her vaginally and anally. Natalie told Defendant to stop, but he was too strong and overpowered her. The next day, on 1 June 2012, when Ms. James returned home, Natalie told her mother what happened. Natalie disclosed to Ms. James, and later to police, that Defendant raped her both anally and vaginally on several occasions. Ms. James immediately reported the incident to the Whispering Pines Police Department. Later, during her interview with police, Ms. James recalled that Natalie had some bleeding in her stool since December of 2011, and had several urinary tract infections during the same time period. Defendant was arrested on 1 June 2012. He admitted to the events of 31 May 2012 while he was in custody.

After the State presented the factual basis for the plea, the trial judge James M. Webb questioned Ms. James about Natalie's medical treatment before and after the 31 May 2012 rape, particularly regarding the treatment Ms. James sought for Natalie's prior urinary tract infections. Judge Webb then announced his belief that the proposed 300-month sentence was in the aggravated sentencing range. He identified the 300-month sentence as "the most that [Defendant] could receive" and refused to accept the agreed-upon sentence. Both the prosecutor and the Defendant's attorney disagreed with Judge Webb, stating in fact the first-degree rape charge to which Defendant pled guilty carried a 300-month mandatory minimum sentence. Judge Webb held the matter open to study the sentencing statutes.

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1. Violet James is a pseudonym used to protect the identity of Ms. James' minor daughter.

2. Natalie James is a pseudonym used to protect the identity of the minor child.

Three days later, on 6 June 2013, the trial court reconvened Defendant's plea hearing. Judge Webb ordered a presentence study of Defendant by the Department of Corrections, to gauge Defendant's mental, emotional, and physical health, and to determine whether Defendant is a sexually violent predator. The plea hearing resumed on 17 October 2013. The hearing began with further *sua sponte* questioning of Ms. James by Judge Webb. Ms. James testified that Defendant was the oldest child living in the home, and supervising the younger children was an "assumed task" for Defendant. Judge Webb then shifted his questioning of Ms. James to an incident approximately five years prior, when Natalie was three years old and was allegedly inappropriately touched by a thirteen-year-old boy who was the son of Natalie's caregiver. Judge Webb asked Ms. James about the extent of the prior abuse, and Ms. James responded adversely to this questioning, asking: "Why [do] we have to bring this up?" and "Why do we have to talk about this, sir?" and "Why is this important, sir?" Eventually, Ms. James testified that the prior abuse of Natalie was "some touching . . . on the outside of her clothing" which Natalie reported to Ms. James immediately and Ms. James reported to the alleged perpetrator's parent and to the Fayetteville Police Department.

After Judge Webb finished questioning Ms. James, the State called Dr. Molly Berkoff, the pediatrician who examined Natalie after the 31 May 2012 rape. Dr. Berkoff testified that she examined Natalie on 22 June 2012. She stated "[t]here was nothing remarkable" about Natalie's examination, which she testified "is not unusual in cases of non-acute sexual abuse[.]" By "non-acute sexual abuse," Dr. Berkoff meant sexual abuse occurring more than 96 hours before the time of examination. She testified that, although Natalie's hymen was intact at the time of her examination, "children can have completely unremarkable exams despite having significant penetration or repeated episodes of trauma."

When the State finished presenting its evidence, Judge Webb further questioned both Dr. Berkoff and the investigating officer, Lieutenant Rodney Dozier, of the Whispering Pines Police Department. After hearing their testimony, Judge Webb decided to continue the matter until 11 December 2013.

On 13 December 2013, the case was recalled in front of Judge Webb. Judge Webb made the following relevant findings of mitigating factors, corresponding with the numbering on the felony judgment worksheet:

> 4(a), The defendant['s] age, or immaturity, at the time of the commission of the offense significantly reduced the defendant's culpability for the offense.

8(b), The relationship between the defendant and the victim was otherwise extenuating.

. . . .

And 21, additional written findings of factors in mitigation:

a. That in August, 2010 Brian Lawrence Thomsen, father of the defendant, and [Ms. James] commenced cohabitation at [Ms. James'] Whispering Pines, NC, residence along with [Ms. James'] two minor children and Mr. Thomsen's three minor children, including the defendant and the victim.

b. That on May 31st, 2012 [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged defendant without responsible adult supervision.

c. That Dr. Molly Berkoff, a pediatrician and the medical director for the Child Evaluation Clinic of the UNC Hospitals reviewed the victim's June 2nd, 2012 physical examination at the UNC Hospitals emergency room conducted by a sexual assault nurse examiner within 48 hours of the incident, and conducted her own physical examination of the victim on June 22nd, 2012 and concluded that neither examination either proved nor disproved the reported misconduct.

d. That Dr. Berkoff noted the emergency department documented redness and a deep V shape to the victim's hymen which the medical field does not characterize as being definitive evidence of penetration trauma, but rather simply a description of the way the victim's hymen looks and does not prove or disprove the allegations of sexual abuse.

e. That the victim's hymen was present.

f. That the victim's anal exam showed "no lesions, no discharge, no scarring".

g. That the Static 99-R places the defendant in the moderate-low risk category for being charged or convicted of another sexual offense.

h. That the unanimous opinion of the board of experts of the sexually violent predator panel is that the defendant does not meet the criteria to be designated a sexually violent predator pursuant to North Carolina law.

i. That the defendant participated in Junior Reserve Officer Training Corps (JROTC) while attending high school.

After announcing the findings in mitigation, Judge Webb accepted the sentence agreed upon by the State and Defendant, stating "[i]t's the judgment of the Court that the defendant is to be confined for a minimum of 300 months and a maximum of 420 months in the State Department of Adult Correction." Judge Webb then stated in open court, "[t]he Court sua sponte enters an order granting appropriate relief," and proceeded to read aloud a written order, which included the following relevant findings of fact:

1. That on June 3rd, 2013 the Defendant, while represented by Moore County Attorney Bruce Cunningham, pled guilty to Rape of a Child, a B1 felony, and Sexual Offense of a Child, also a B1 felony, in violation of G.S. 14-27.2A and G.S. 14-27.4A respectively;

. . . .

4. That pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), the statutory mandatory minimum sentence for the offenses for which the Defendant pled guilty to is confinement for a minimum of 300 months (25 years) and a maximum of 420 months (35 years);

. . . .

21. That when the victim was 3 years of age she immediately reported to her mother that she was touched inappropriately by the 13 year old son of the owner/operator of an in home licensed day care located in Fayetteville, N.C.;

22. That while [Ms. James] reported this incident to the Fayetteville Police Department, no one was ever prosecuted;

23. That despite this unfortunate incident, referenced in the Child Medical Evaluation of the UNC School of Medicine conducted on June 22, 2012, [Ms. James] and

Brian Thomsen allowed the minor child to be in the custody of the teenaged Defendant without responsible adult supervision;

. . . .

77. That the Defendant's paternal grandfather in his returned questionnaire correctly and accurately attributes the Defendant's criminal behavior to being left alone in the home with a child without adult supervision;

78. That the following two cases are instructive and insightful;

79. That on June 8th, 2009 the Moore County Grand Jury returned a true bill of indictment in case # 09 CRS 52230 indicting Randy Martin Baughn with the first degree murder of his wife, Abigail Baughn;

80. That on November 7th, 2012 the Moore County District Attorney and Defendant Baughn . . . entered into a plea arrangement wherein Defendant Baughn was to plead guilty to second degree murder, a B2 Felony and receive an active sentence from the mitigated range of punishments of 94 months (7.83 years) minimum to 122 months (10.16 years) maximum;

. . . .

86. That on February 2nd, 2012 the Guilford County Grand Jury in Guilford County case numbered 11 CRS 94622, indicted 32 year old Fernando Santana for the First Degree Murder of Daniel Corey Jones on November 28th, 2011;

. . . .

88. That Defendant Santana pled guilty to Second Degree Murder and pursuant to the plea arrangement was sentenced to an active sentence from the aggravated range of punishments to a minimum of 292 months (24.3 years) and a maximum of 360 months (30 years) as a prior record level 4;

. . . .

91. That it is unconsciousable [sic] that teenaged Defendant Thomsen under the facts and circumstances of this case

> should be required to serve a mandatory active sentence in the North Carolina Department of Adult Correction of a minimum of 25 years and a maximum of 35 years.

In accordance with the findings of fact, Judge Webb made the following conclusions of law:

> 1. That the Defendant's sentence pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), of confinement for a minimum of 300 months (25 years) and a maximum of 420 months (35 years) is grossly disproportionate when compared with the mitigating factors found at sentencing and the facts and unusual circumstances surrounding the crimes committed;
>
> 2. That the mandatory sentencing provisions of G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f), as applied to the facts and circumstances of this case are in violation of the Defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and constitute cruel and unusual punishment and a denial of due process of law; and
>
> 3. That the Defendant's sentence imposed this date pursuant to the plea arrangement and pursuant to G.S. 14-27.2A, G.S. 14-27.4A and G.S. 15A-1340.17(f) should be vacated.

After reading the order aloud, and vacating the previously imposed sentence, Judge Webb ordered: "It's the judgment of the Court he's to be confined for a minimum of 144 months," and a maximum of 233 months in the State Department of Adult Correction. Judge Webb signed a new judgment to that effect. The State noted its objection to the court's *sua sponte* motion for appropriate relief.

On 21 March 2014, the State filed a petition for writ of *certiorari* with this Court to review Judge Webb's 13 December 2013 order granting Defendant appropriate relief. On 3 April 2014, Defendant filed a response opposing the State's petition for writ of *certiorari*, arguing this Court lacks jurisdiction to hear the case via writ of *certiorari*. On 10 April 2014 a panel of this Court granted the State's petition for writ of *certiorari*. The State filed its Record on Appeal on 17 November 2014, and both parties submitted their briefs to this Court. In his brief, Defendant restated his argument that this Court lacks jurisdiction to hear this case. The case was set to be heard on 6 April 2015.

On 24 February 2015, Defendant submitted to this Court a Motion to Hold Appeal in Abeyance Pending Determination of *State v. Stubbs* by the North Carolina Supreme Court. *Stubbs* was heard in the North Carolina Supreme Court on 13 January 2015. In his motion, Defendant contended *Stubbs* will resolve the issue of whether the Court of Appeals has jurisdiction to review an order of the trial court granting appropriate relief via writ of *certiorari*. On 9 March 2015, the State filed a response, opposing Defendant's motion to hold the appeal in abeyance. On 16 March 2015, we granted Defendant's motion, and ordered the appeal held in abeyance pending the resolution of *State v. Stubbs*.

On 10 April 2015, the Supreme Court issued its opinion in *State v. Stubbs*, 568A03-02. Following this decision we reviewed this case without further briefing from the parties.

II. Jurisdiction

[1] The first issue is whether this Court has jurisdiction to review the trial court's *sua sponte* order granting Defendant appropriate relief via writ of *certiorari*. Because the State did not appeal the trial court's order in this case, the writ of *certiorari* is the only mechanism by which this Court could have jurisdiction.

As an initial matter, we must address whether the issue of jurisdiction is appropriate for this panel's review, given that a prior panel of this Court—the petition panel—allowed the State's petition for writ of *certiorari* on 8 April 2014. The well-settled and often-cited rule of this Court is one panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. *See N. Carolina Nat. Bank v. Virginia Carolina Builders*, 307 N.C. 563, 563, 299 S.E.2d 629, 630 (1983). However, that rule was recently called into question by this Court in *State v. Stubbs*. In *Stubbs*, two judges stated where subject matter jurisdiction is at issue, the panel should not be compelled to follow the holding of a prior panel. *See State v. Stubbs*, ___ N.C. App. ___, ___, 754 S.E.2d 174, 183, 185 (2014) (Dillon, J., concurring in separate opinion; Stephens, J., dissenting). In her dissent, Judge Stephens pointed out "[i]f a court finds *at any stage of the proceedings* that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *Id.* at ___, 754 S.E.2d at 185 (quoting *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988) (emphasis added)).

Our decision in *State v. Stubbs* was reviewed by the North Carolina Supreme Court based on the dissenting opinion regarding jurisdiction. In

its opinion, the Supreme Court declined to address the issue of whether this Court is bound by a prior panel where subject matter jurisdiction is in question. Instead, the Supreme Court decided the case on other grounds, and held only

> [a]s for whether a second panel of the Court of Appeals can revisit a determination of subject matter jurisdiction after a previous panel has already done so, we simply note that here, both panels did have subject matter jurisdiction.

State v. Stubbs, ___ N.C. ___, ___, 770 S.E.2d 74, 76 (2015).

Although *Stubbs* also dealt with this Court's subject matter jurisdiction to hear the State's appeal of an order granting a defendant's motion for appropriate relief ("MAR") via writ of *certiorari*, the substantive law addressed in *Stubbs* is not relevant to this case. In *Stubbs*, the defendant filed an MAR pursuant to N.C. Gen. Stat. § 15A-1415, alleging his sentence violated the Eighth Amendment of the United States Constitution.[3] *Id.* at ___, 770 S.E.2d at 76. The trial court granted the defendant's motion and the State appealed to this Court via writ of *certiorari*. *Id.* at ___, 770 S.E.2d at 75. The Supreme Court held that the "denying" language of Rule 21 of Appellate Procedure[4] does not divest the Court of Appeals of jurisdiction to review an order of the trial court *granting* an MAR filed pursuant to N.C. Gen. Stat. § 15A-1415 via writ of *certiorari*. *Id.* at ___, 770 S.E.2d at 76. The Court of Appeals has jurisdiction to review the MAR order via writ of *certiorari*, the Supreme Court said, because such jurisdiction is specifically provided for by the legislature in N.C. Gen. Stat. § 15A-1422(c)(3). *Id.*

The rule stated in *Stubbs* is not applicable here because N.C. Gen. Stat. § 15A-1420(d) is benefitted by no similar legislative grant of appellate jurisdiction in this Court. The statute is silent as to either the State's or the defendant's ability to seek appellate review of *sua sponte* MAR orders. Had the Supreme Court in *Stubbs* decided the issue of whether

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3. N.C. Gen. Stat. § 15A-1415 allows a noncapital defendant to move for appropriate relief from the judgment against him on a number of enumerated grounds, including an alleged violation of the United States Constitution or the Constitution of North Carolina. *See* N.C. Gen. Stat. § 15A-1415 (2014).

4. Rule 21 of the North Carolina Rules of Appellate Procedure dictates the circumstances under which the appellate courts may review an order of the trial court via writ of *certiorari*. Prior to the Supreme Court's decision in *Stubbs*, the rule stated in pertinent part "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court . . . for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2014) (emphasis added).

we are bound by a prior panel of this Court on jurisdictional issues, *Stubbs* would have controlled our decision in this case. Because the MAR statute addressed by the Supreme Court in *Stubbs* is not instructive here, and because—absent direction otherwise—we are bound by the decision of the petition panel in this case, we have jurisdiction to hear this case by the extraordinary writ of *certiorari*.

III. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). The trial court's findings of fact "are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

IV. Analysis

A. Findings of Fact

[2] "Abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Rollins*, ___ N.C. App. ___, ___, 734 S.E.2d 634 (2012) (citation and quotation marks omitted). In this case, the trial court abused its discretion in making the following findings: (1) findings of fact # 21 and # 23 (discussing Natalie's prior abuse); (2) finding of fact # 77 (discussing Natalie's lack of "adult supervision"); (3) statutory mitigating factor 8(b) ("The relationship between the defendant and the victim was otherwise extenuating."); and (4) nonstatutory mitigating factor 21 (b) (discussing Natalie's lack of "adult supervision").

Findings of fact # 21 and # 23 state:

> 21. That when the victim was 3 years of age she immediately reported to her mother that she was touched inappropriately by the 13 year old son of the owner/operator of an in home licensed day care located in Fayetteville, N.C.;
>
> . . . .

> 23. That despite this unfortunate incident . . . [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged Defendant without responsible adult supervision[.]

Natalie's prior abuse is irrelevant to Defendant's sentencing in this case. Furthermore, the finding that Natalie was "without adult supervision" is wholly unsupported by the facts in the record. The record shows that Defendant *was* the adult in charge of supervising Natalie on the day of the crime. The evidence is uncontroverted that: Defendant was eighteen years old—a legal adult—on the day of the crime; Defendant was gainfully employed at Chick-Fil-A; Defendant had "no prior involvement with the law[;]" Defendant supervised the younger children in the past; Ms. James was out of town on the day of the crime and Defendant was in charge of picking Natalie up from school and bringing her home.

Similarly, finding of fact # 77 states:

> 77. That the Defendant's paternal grandfather in his returned questionnaire correctly and accurately attributes the Defendant's criminal behavior to being left alone in the home with a child without adult supervision[.]

For the reasons stated above, this finding is manifestly unsupported by reason. Defendant was an eighteen year old *adult* at the time of the crime. Defendant had no prior criminal record and nothing in this record indicates Defendant was prone to this type of criminal behavior when he was left alone with Natalie.

We also find the trial court abused its discretion in two of its findings of mitigating factors, one statutory and one non-statutory. Although "the trial judge has wide latitude in determining the existence of aggravating and mitigating factors," *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988), findings of mitigating factors may be stricken for abuse of discretion. *See State v. Spears*, 314 N.C. 319, 322–23, 333 S.E.2d 242, 244 (1985).

Judge Webb found statutory mitigating factor 8(b): "[t]he relationship between the defendant and the victim was otherwise extenuating." "An extenuating relationship should be found if circumstances show that part of the fault for a crime can be 'morally shifted' from defendant to the victim." *State v. Mixion*, 110 N.C. App. 138, 151, 429 S.E.2d 363, 371 (1993) (citation omitted). Here, it was a manifest abuse of discretion to regard Defendant's role as Natalie's caretaker as an extenuating circumstance warranting sentence mitigation. There is no competent evidence

in this record tending to show any facts which could reasonably support a finding of an extenuating relationship between Natalie and Defendant.

Finally, Judge Webb found non-statutory mitigating factor 21(b):

> b. That on May 31st, 2012 [Ms. James] and Brian Thomsen allowed the minor child to be in the custody of the teenaged defendant without responsible adult supervision.

For the reasons stated above, this non-statutory mitigating factor constitutes a manifest abuse of discretion. We therefore will not consider the aforementioned findings of fact in our analysis of Defendant's Eighth Amendment claim.

B. Conclusions of Law: Eighth Amendment

[3] The trial court's conclusions of law are fully reviewable on appeal. *See Lutz*, 177 N.C. App. at 142, 628 S.E.2d at 35. We now review the trial court's conclusion that Defendant's 300-month minimum and 420-month maximum sentence violated his rights under the Eighth and Fourteenth Amendments.

The Eighth Amendment applies to the states by virtue of the Fourteenth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991). The Eighth Amendment prohibits cruel and unusual punishment; specifically, it forbids "extreme sentences that are grossly disproportionate to the crime." *Id.* at 1001 (internal quotation marks omitted). To determine whether a sentence for a term of years is grossly disproportionate to a particular crime, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham v. Florida*, 560 U.S. 48, 60 (2010). "[I]n the rare case in which [this] threshold comparison . . leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* Our Supreme Court has held "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment[.]" *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983).

In this case, Defendant pled guilty to rape of a child, in violation of N.C. Gen. Stat. § 14-27.2A, and sexual offense with a child, in violation of N.C. Gen. Stat. § 14-27.4A. Each of those crimes carry a mandatory minimum sentence of 300 months imprisonment. *See* N.C. Gen. Stat. § 14-27.2A(b) ("[I]n no case shall the person receive an active punishment of less than 300 months[.]"); N.C. Gen. Stat. § 14-27.4A(b) (same). The

State and Defendant agreed to a consolidated minimum sentence of 300 months' imprisonment. A 300-month sentence is not grossly disproportionate to the two crimes to which Defendant pled guilty. Furthermore, Defendant's 300-month sentence in this case is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction. *See State v. Agustin*, ___ N.C. App. ___, 747 S.E.2d 316 (2013) (holding sentence of 300 to 369 months' imprisonment was appropriate for rape of a child); *State v. Bailey*, 163 N.C. App. 84, 592 S.E.2d 738 (2004) (holding consecutive prison terms of 300 to 369 months for first-degree rape was not unconstitutional); *State v. Stallings*, 107 N.C. App. 241, 419 S.E.2d 586 (1992) (holding life sentence for first-degree sexual offense was not cruel and unusual punishment); *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585 (1990) (holding sentence of life imprisonment for first-degree rape was not unconstitutional).

We are unpersuaded by the trial court's comparison of the sentence imposed in this case with the sentences imposed in other, unrelated, second-degree murder cases. We follow our precedent, holding the original 300-month sentence imposed by the trial court does not violate the Eighth Amendment.

V. Conclusion

For the foregoing reasons, we vacate the 13 December 2013 order of the trial court granting Defendant appropriate relief and the corresponding judgments and commitments. We remand for a new sentencing hearing.

VACATED AND REMANDED.

Judge Dietz concurs.

Chief Judge McGee dissents in a separate opinion.

McGEE, Chief Judge, dissenting.

Because I do not believe the State had authority to seek review of the trial court's *sua sponte* grant of its MAR, I dissent.

I. In re Civil Penalty

The majority opinion holds that we are bound by this Court's prior ruling granting the State's petition for writ of *certiorari*, pursuant to *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). I disagree.

This Court has held:

> A judgment or order that is void, as opposed to voidable, is subject to collateral attack. *See Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 24 (1925) (holding that void judgments "yield to collateral attack, but [voidable judgments] never yield to a collateral attack . . ."). A lack of subject matter jurisdiction renders the judgment or order void. *See Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 425, 557 S.E.2d 104, 108 (2001) ("'A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea.'"

In re Webber, 201 N.C. App. 212, 220, 689 S.E.2d 468, 474-75 (2009) (citation omitted). I do not believe *In re Civil Penalty* serves to prevent this panel from addressing the issue of subject matter jurisdiction. I concur with the analyses of Judge Stephens and Judge Dillon concerning this issue in *State v. Stubbs. State v. Stubbs*, __ N.C. App. __, __, and__, 754 S.E.2d 174, 182 and 184-85 (2014) ("*Stubbs I*").

Two of the three judges in *Stubbs I* agreed that this Court is not bound by the prior rulings of this Court when the issue is lack of subject matter jurisdiction. *Stubbs I*, __ N.C. App. at __ and __, 754 S.E.2d at 182 and 185; *see also State v. Stubbs*, __ N.C. __, __, 770 S.E.2d 74, 75 (2015) ("*Stubbs II*") ("The concurring and dissenting opinions disagreed with the lead opinion on that point, believing that each panel of the Court of Appeals has the authority and ability to address subject matter jurisdiction anew."). Because our Supreme Court did not rule on the jurisdictional issue raised in *Stubbs II* related to *In re Civil Penalty* – whether this Court can address lack of subject matter jurisdiction if a prior panel of this Court has already purported to grant *certiorari* in the same matter – the majority decision of this Court in *Stubbs I*, as related to jurisdiction, has not been overruled and informs my position on this issue. I do not believe we are bound by the actions of the prior panel granting *certiorari* in this matter, as I find that the prior panel lacked jurisdiction to enter that order, and it is therefore a nullity, of no effect, and subject to collateral attack at any time. *Webber*, 201 N.C. App. at 220, 689 S.E.2d at 474-75.

II. N.C. Gen. Stat. § 15A-1422 and the State's Right to Certiorari

A.

The trial court *sua sponte* granted its own MAR in this matter. Trial courts have this authority pursuant to N.C. Gen. Stat. § 15A-1420(d), which states: "**Action on Court's Own Motion**. – At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion." N.C. Gen. Stat. § 15A-1420(d) (2013). This Court possesses only that authority granted it by statute to review actions of the trial court.

> The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: "The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A–32(c) (2014). *More specifically, and also relevant here, the General Assembly has specified when appeals relating to MARs may be taken[.]*

Stubbs II, __ N.C. at __, 770 S.E.2d at 75-76 (emphasis added).

N.C. Gen. Stat. § 15A-1422 provides the authorization for review of the grant or denial of an MAR. Review of a ruling on an MAR is limited by N.C. Gen. Stat. § 15A-1422 to two instances: (1) where the relief was sought pursuant to N.C. Gen. Stat. § 15A-1414 and (2) where the relief was sought pursuant to N.C. Gen. Stat. § 15A-1415. N.C. Gen. Stat. § 15A-1422(b) and (c) (2013). There is no provision in N.C. Gen. Stat. § 15A-1422 for review of an MAR granted pursuant to N.C. Gen. Stat. § 15A-1420(d) – the statute allowing the trial court to move for appropriate relief on its own motion. Similarly, there is no provision for a defendant to seek review of an MAR granted upon the request of the State pursuant to N.C. Gen. Stat. § 15A-1416:

> First, we note that defendant does not have a right to appeal from the order of the superior court to this Court. Article 91 of the North Carolina General Statutes, entitled "Appeal to Appellate Division," indicates when a defendant in a criminal action may appeal to the appellate division.

> It provides that "[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A–1422." N.C. Gen. Stat. § 15A–1444(f) (1997). While N.C. Gen. Stat. § 15A–1422 (1997) indicates that a defendant, in certain instances, may appeal the denial of his own motion for appropriate relief, *it gives no indication that a defendant may appeal the granting of the State's motion for appropriate relief as is the case here.*

State v. Linemann, 135 N.C. App. 734, 735, 522 S.E.2d 781, 782 (1999) (emphasis added). I see no reason why a defendant can be denied the right to appeal an MAR granted to the State pursuant to N.C. Gen. Stat. § 15A-1416, but the State could not be denied the right to appeal an MAR granted to the defendant pursuant to § 15A-1420(d). In addition, N.C. Gen. Stat. § 15A-1444 – "When defendant may appeal; certiorari," specifically provides that for a defendant, "[t]he ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422." N.C. Gen. Stat. § 15A-1444(f) (2013). The corresponding statute related to the State's right to appeal, N.C. Gen. Stat. § 15A-1445 – "Appeal by the State," contains no provision related to appeal or petition for writ of *certiorari* following the grant of an MAR in Defendant's favor, and contains no provision at all providing the State authority to seek review by writ of *certiorari*. N.C. Gen. Stat. § 15A-1445 (2013). I do not believe the State had any statutory authority to petition this court for review of the trial court's *sua sponte* grant of the MAR.

B.

The State argued in its petition that this Court has subject matter jurisdiction based upon the North Carolina Constitution and N.C. Gen. Stat. § 7A-32(c), which provides that this Court may issue writs of *certiorari* "as provided by statute or rule of the Supreme Court," or "according to the practice and procedure of the common law." The State's argument is apparently that N.C. Gen. Stat. § 7A-32(c) provides this Court with jurisdiction to issue a writ of *certiorari* in any instance in which to do so would be "in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts[.]" N.C. Gen. Stat. § 7A-32(c) (2013). The State ignores the portion of N.C. Gen. Stat. § 7A-32(c) limiting issue of writs of *certiorari* by this Court to what is "provided by statute or rule of the Supreme Court[.]" N.C. Gen. Stat. § 7A-32(c). Because the General Assembly has provided for instances in

which this Court may issue a writ of *certiorari* to review the grant of an MAR in N.C. Gen. Stat. § 15A-1422, we are bound by and limited to the authority granted therein. The State did not reference N.C. Gen. Stat. § 15A-1422 in its petition, nor did it ask this Court to issue a writ of *certiorari* pursuant to Rule 21 of the Rules of Appellate Procedure based upon failure to timely appeal, as required by N.C. Gen. Stat. § 15A-1422.[1]

In reviewing N.C. Gen. Stat. § 15A-1422, we must follow the established rules of statutory interpretation.

> "In resolving issues of statutory construction, we look first to the language of the statute itself." It is a well-established rule of statutory construction that " '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' "

Walker v. Bd. of Trustees of the N.C. Local Gov't. Emp. Ret. Sys., 348 N.C. 63, 65-66, 499 S.E.2d 429, 430-31 (1998) (citations omitted). Furthermore, " 'Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.' " *Patmore v. Town of Chapel Hill N.C.*, __ N.C. App. __, __, 757 S.E.2d 302, 307, *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014) (citation omitted).

I believe the language of the statute is clear and requires no interpretation. Furthermore, because N.C. Gen. Stat. § 15A-1422 includes provisions for review of MARs granted pursuant to N.C. Gen. Stat. §§ 15A-1414 and 1415, but not pursuant to N.C. Gen. Stat. § 15A-1420(d), if statutory construction is required, I believe we are constrained to find that N.C. Gen. Stat. § 15A-1422 provides no basis for review pursuant to N.C. Gen. Stat. § 15A-1420(d). *See Linemann*, 135 N.C. App. at 735, 522 S.E.2d at 782 (because N.C. Gen. Stat. § 15A-1422 includes no right of review from the grant of an MAR pursuant to N.C. Gen. Stat. § 15A-1416, no such right exists). Although the omission of an avenue for review of

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1. We note that prior opinions of this Court have held that when, as in the present case, the State has no right to appeal the underlying judgment (because there was no alleged error in the underlying judgment), the State cannot appeal a subsequent grant of an MAR in the defendant's favor. *See State v. Starkey*, 177 N.C. App. 264, 266-67, 628 S.E.2d 424, 425-26 (2006); *State v. Griffin*, 215 N.C. App. 391, 716 S.E.2d 87 (2011) (unpublished opinion). It is my belief that *Stubbs II* implicitly overrules those portions of the opinions of this Court limiting review in this manner.

an MAR granted pursuant to N.C. Gen. Stat. § 15A-1420(d) – and pursuant to § 15A-1416 – perhaps constitutes an oversight, it is the province of the General Assembly, and not this Court, to rectify any deficiency in the statute, assuming one exists.

III. The Effect of Stubbs II

In *Stubbs II*, our Supreme Court stated the following:

> The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: "The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A–32(c) (2014). More specifically, and also relevant here, *the General Assembly has specified when appeals relating to MARs may be taken*:
>
> > (c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A–1415 is subject to review:
> >
> > > (1) If the time for appeal from the conviction has not expired, by appeal.
> > >
> > > (2) If an appeal is pending when the ruling is entered, in that appeal.
> > >
> > > (3) *If the time for appeal has expired and no appeal is pending, by writ of certiorari.*
>
> *Id.* § 15A–1422(c) (2014). Here, *given the timing*, appeal of the MAR *would fall under subdivision (c)(3): by writ of certiorari.* Notably, subsection 15A–1422(c) does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails. Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id.* § 7A–32(c), and given that the

> General Assembly has placed no limiting language in subsection 15A–1422(c) regarding which party may appeal a ruling on an MAR, we hold that *the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.*

Stubbs II, __ N.C.at __, 770 S.E.2d at 75-76 (emphasis added). I believe that N.C. Gen. Stat. § 15A-1422, as interpreted by our Supreme Court, provides the State with the statutory authority required for direct appeal of an MAR *when requested by a defendant pursuant to N.C. Gen. Stat. §§ 15A-1414 or 15A-1415*. In my opinion, the language in *Stubbs II* clearly implies that, when a defendant moves for appropriate relief, any of the enumerated avenues of appeal are available to the State, depending on when the MAR is ruled upon. *Certiorari* was the only avenue available in *Stubbs* because "*given the timing*, appeal of the MAR would fall under subdivision (c)(3): by writ of certiorari." *Id.* at __, 770 S.E.2d at 76 (emphasis added). In the present case, because the trial court granted the MAR immediately following sentencing, the State, assuming *arguendo* Defendant had moved for the MAR, would have been required to directly appeal the order granting the MAR. Pursuant to N.C. Gen. Stat. §§ 15A-1422(b) and (c)(1), there was no authority granting jurisdiction to this Court to proceed pursuant to writ of *certiorari*. As stated above, I do not believe there is any right of review in the General Statutes for an MAR granted pursuant to N.C. Gen. Stat. § 1420(d). However, even assuming *arguendo* there is such a right of review, the State would have been required by N.C. Gen. Stat. § 15A-1422 (b) or (c) to directly appeal the MAR, which it failed to do. *Certiorari*, pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) is only available if the trial court grants or denies an MAR *after the time for appeal of the underlying judgment has expired and no appeal is pending. Id.* There was no avenue that was available to the State to challenge the trial court's *sua sponte* granting of the MAR in favor of Defendant over three months after the MAR was granted. N.C. Gen. Stat. § 15A-1422; N.C.R. App. P. 4 (2015).

Assuming, *arguendo*, this Court could appropriately review the State's petition as if the trial court proceeded pursuant to N.C. Gen. Stat. § 15A-1415, because the trial court ruled on the MAR before "the time for appeal from the conviction [had] expired," the State was still required to challenge the trial court's ruling "by appeal." N.C. Gen. Stat. § 15A-1422(c)(1). Even assuming *arguendo* that N.C. Gen. Stat. § 15A-1422(c)(3) could provide an avenue for review by *certiorari* in this instance, I do not believe N.C. Gen. Stat. § 15A-1422(c)(3) allows a petitioner – in this case the State – to sit on its right to seek review indefinitely. N.C. Gen. Stat.

§ 15A-1422(c)(3) states: "The court's *ruling* on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:" "If the *time for appeal has expired* and no appeal is pending, by writ of certiorari." N.C. Gen. Stat. § 15A-1422(c)(3) (emphasis added). Rule 21 of the North Carolina Rules of Appellate Procedure, entitled "Certiorari," states in relevant part:

> (c) *Same; Filing and service; Content.* The petition [for writ of *certiorari*] *shall* be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties.
>
> . . . .
>
> (e) *Petition for Writ in Postconviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. *In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court.*

N.C.R. App. P. 21 (2015) (some emphasis added). Review by *certiorari* is not available in the present case because "the time for appeal [had *not*] expired" when the ruling on the MAR was made, *and* the State failed to timely appeal or petition for writ of *certiorari* within a reasonable time following the ruling granting the MAR. N.C. Gen. Stat. § 15A-1422(c)(3) (emphasis added); N.C.R. App. P. 21; *see also State v. Foreman*, 364 N.C. 328, 701 S.E.2d 669 (2010) (unreasonable delay in petitioning for writ of certiorari will result in denial of the petition); *In re L.R.*, 207 N.C. App. 264, 699 S.E.2d 479 (2010) (unpublished opinion) ("The 'Rules of Appellate Procedure do not set forth a specific time period in which a [petitioner] must file a petition for *writ of certiorari*,' but the court must in its discretion determine what constitutes an unreasonable delay in relation to the circumstances in each case. In our discretion, we decline to review the adjudication order of 7 July 2009 because [the petitioner] has not shown any reason for her delay in appealing that order and

her failure to timely assert her right of appeal. [The petitioner] waited ten months after the 7 July 2009 adjudication order before filing a petition for writ of *certiorari*. [The petitioner] gives no reason for this long delay. Therefore, the 7 July 2009 order remains valid and final, and we do not address [the petitioner's] arguments regarding that order.") (citation omitted).

I would therefore hold: (1) This Court is not bound by the order of the prior panel of this Court granting *certiorari* because the prior panel lacked subject matter jurisdiction and, therefore, its order is a nullity; (2) this Court has not been granted jurisdiction by the General Assembly to review the grant or denial of an MAR pursuant to N.C. Gen. Stat. § 15A-1420(d); and (3) even assuming, *arguendo*, this Court could have jurisdiction pursuant to N.C. Gen. Stat. §§ 15A-1422 (b) or (c), the State has failed to act in a timely manner in either appealing or petitioning for review and has not shown any reason for the delay. The State's petition for writ of *certiorari* and appeal should be dismissed.

STATE OF NORTH CAROLINA
v.
CHARLES DIONE WARREN, DEFENDANT

No. COA14-1359

Filed 4 August 2015

Search and Seizure—traffic stop—extended for drug dog—reasonable suspicion

The trial court did not err in partially denying defendant's motion to suppress evidence seized during a traffic stop in a prosecution for possession of cocaine and drug paraphernalia where a drug dog was called in. Defendant was observed and stopped in a high crime area, the officer saw that defendant had something in his mouth which he was not chewing and which affected his speech, the officer observed individuals attempt to hide drugs in their mouths, and defendant denied being involved in drug activity "any longer." Based on the totality of the facts, the trial court's unchallenged findings established a minimal level of objective justification for reasonable suspicion of criminal activity and the extension of the traffic stop.

Judge ELMORE dissenting.

Appeal by Defendant from judgment entered 3 July 2014 and order entered 3 September 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General James A. Wellons, for the State.

Bryan Gates for Defendant-appellant.

DILLON, Judge.

Charles Dione Warren ("Defendant") appeals from the trial court's order denying in part his motion to suppress and from a conviction for felony possession of cocaine and attaining the status of habitual felon. For the following reasons, we affirm the trial court's order.

I. Background

Defendant was indicted for various drug offenses in connection with the discovery of illegal drugs and drug paraphernalia in his car during a traffic stop and for attaining the status of habitual felon. Defendant filed motions to suppress certain evidence collected during warrantless searches by the police.

Prior to trial on the matter, the trial court conducted an evidentiary hearing on Defendant's motions. After the hearing, the trial court entered an order granting Defendant's motion to suppress information retrieved from cell phones seized from Defendant's car but denied his motion as to anything else seized by police.

The case was tried before a jury, and Defendant was found guilty of felonious possession of cocaine and possession of drug paraphernalia. Defendant pleaded guilty to attaining the status of habitual felon. The trial court arrested judgment on the possession of drug paraphernalia conviction and sentenced Defendant as an habitual felon to 38 to 58 months of imprisonment for the felony possession of cocaine conviction. Defendant gave notice of appeal in open court.

II. Analysis

On appeal, Defendant challenges the trial court's partial denial of his motion to suppress certain evidence found during a routine traffic stop. Defendant does not contest the validity of the stop itself. Rather, Defendant contends that the court erred in concluding that the officer had reasonable suspicion *to extend* the scope and length of time of a routine traffic stop to allow a police dog to perform a drug sniff outside

his vehicle, which led to the discovery of contraband in Defendant's vehicle. Specifically, Defendant challenges the trial court's conclusion "[t]hat [the officer] had reasonable articulable suspicion to extend the scope of the initial stop and subject the Defendant's vehicle to the canine search and that the Defendant was not unreasonably detained nor the scope of the initial stop unreasonably extended for the purpose of that canine sniff search."

This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (marks omitted).

We believe that based on the trial court's unchallenged findings, the officer had reasonable suspicion to extend the routine traffic stop to perform a dog stiff; and, accordingly, we hold that the trial court did not err in partially denying Defendant's motion to suppress.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008). "[A]n officer may stop a vehicle on the basis of a reasonable, articulable suspicion that criminal activity is afoot." *State v. Styles*, 362 N.C. 412, 427, 665 S.E.2d 438, 447 (2008).

As the United States Supreme Court recently explained, during the course of a stop for a traffic violation, an officer may – in addition to writing out a traffic citation - perform checks which "serve the same objective as enforcement of the traffic code[.]" *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L.Ed. 2d 492, 499 (2015). These checks typically include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* The Court further held that under the Fourth Amendment an officer "may conduct certain unrelated checks during an otherwise lawful traffic stop, [but] . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion

ordinarily demanded" to justify detaining an individual. *Id.* The Court specifically held that the performance of a dog sniff is *not* a type of check which is related to an officer's traffic mission. *Id.* Therefore, under *Rodriguez*, an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop.

We note that prior to *Rodriguez*, many jurisdictions – including North Carolina – applied a *de minimis* rule, which allowed police officers to prolong a traffic stop "for a very short period of time" to investigate for other criminal activity unrelated to the traffic stop – for example, to execute a dog sniff – though the officer has no reasonable suspicion of other criminal activity. *State v. Sellars*, 222 N.C. App. 245, 249-50, 730 S.E.2d 208, 211 (2012). *See also State v. Brimmer*, 187 N.C. App. 451, 455, 653 S.E.2d 196, 198 (2007). However, the holdings in these cases to the extent that they apply the *de minimis* rule have been overruled by *Rodriguez*.

In the present case, it is unclear from the trial court's findings whether the execution of the dog sniff prolonged the traffic stop. Specifically, the trial court found that the officer stopped Defendant for a traffic offense; that the officer called for backup during the stop; that the backup arrived; that the officer performed the dog sniff while his backup completed writing out Defendant's traffic citation; and that the entire stop lasted less than ten minutes. What is unclear is whether the officer's call for backup or waiting for backup to arrive prolonged the stop beyond that which was necessary to complete the traffic stop.

Notwithstanding, unlike in *Rodriguez*, the trial court's findings support the conclusion that the officer had developed *reasonable suspicion* of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. We note that the State does not need to show that the officer had "probable cause" of illegal drug activity but that he merely had "reasonable suspicion" to extend the stop. *See Rodriguez v. United States*, ___ U.S. at ___, 191 L.Ed. 2d at 499. And as our Supreme Court has pointed out "[r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (marks omitted). In determining whether an officer had a reasonable suspicion of criminal activity, the court must examine both the facts known to the

officer at the time he decided to approach the defendant and the rational inferences that may be drawn from those facts. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979). Also, "the reviewing court must take into account an officer's training and experience." *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997). In making this determination, "the court must view the totality of the circumstances through the eyes of a reasonable and cautious police officer at the scene." *State v. Battle*, 109 N.C. App. 367, 370, 427 S.E.2d 156, 158 (1993).

In the context of a traffic stop, a Defendant's proximity to a high crime area alone does not constitute reasonable suspicion; however, a defendant's presence in such area coupled with some sort of evasive behavior may constitute reasonable suspicion. *See, e.g.*, *State v. Jackson*, ___ N.C. ___, ___ S.E.2d ___ 2015 N.C. LEXIS 446 (N.C., June 11, 2015) (holding that officer had reasonable suspicion where the defendant was in a high crime area and took evasive action in the presence of the officer); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (stating that "when an individual's presence at a suspected drug area is *coupled* with evasive action, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop").

In the context of the present case, we note that this Court has held that an officer had reasonable suspicion to detain an individual based on facts similar to those here. Specifically, in *In re I.R.T.*, officers approached a group of individuals, including a juvenile, in an area known for drug activity. 184 N.C. App. 579, 581, 647 S.E.2d 129, 132 (2007). When one officer approached the juvenile, he looked at the officer and quickly turned his head; it appeared to the officer that the juvenile had something in his mouth. *Id.* The officer explained "that he had previously encountered individuals acting evasive and hiding crack-cocaine in their mouths, and those experiences made him suspect [the juvenile] might be hiding drugs in his mouth." *Id.* The officer detained the juvenile which eventually led to the discovery of a crack-cocaine rock that was in the juvenile's mouth. *Id.* On appeal from his adjudication and the denial of his motion to suppress, this Court held that "the juvenile's conduct, his presence in a high crime area, and the police officer's knowledge, experience, and training [was] sufficient to establish" that the officer had a reasonable suspicion to justify an investigatory seizure of the juvenile. *Id.* at 581-82, 585, 647 S.E.2d at 132-33, 135.

Likewise, here, in support of its conclusion that reasonable suspicion to extend the scope of the stop, the trial court found that Defendant was observed and stopped "in an area [the officer] knew to be a high crime/high drug activity area[;]" that while writing the warning citation,

the officer observed that Defendant "appeared to have something in his mouth which he was not chewing and which affected his speech[;]" that "during his six years of experience [the officer] who has specific training in narcotics detection, has made numerous 'drug stops' and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]" and that during their conversation Defendant denied being involved in drug activity "any longer." We hold that based on the totality of the facts the trial court's unchallenged findings establish the "minimal level of objective justification" to show that the officer had reasonable suspicion to believe that criminal activity was occurring to justify the extension of the traffic stop.[1]

Accordingly, we hold that the trial court did not err in concluding the same and in denying Defendant's motion to suppress.

AFFIRMED.

Judge GEER concurs.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusions that the trial court did not err in denying defendant's motion to suppress. As a result, I would reverse the trial court's order denying defendant's motion to suppress, vacate the judgment, and remand to the trial court.

The majority concludes that the facts in defendant's case support the trial court's finding that the officer had a reasonable articulable suspicion to extend the scope of the initial stop to allow a canine search of defendant's vehicle. I disagree. The majority recognizes that when an individual's presence in a suspected high crime area is coupled with evasive action, law enforcement may form reasonable suspicion from the evasive actions. *Willis*, *supra*. As such, the majority concludes that

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1. The dissenting Judge argues that the officer's reasonable suspicion to justify prolonging the traffic stop cannot be based in this case on the officer's observance of an object in Defendant's mouth. Specifically, the dissenting Judge points out that the present case differs from *I.R.T.* in that in the present case the officer never asked Defendant about the object in his mouth nor asked Defendant for consent to search his mouth. We recognize that the lack of any evidence that the officer specifically inquired about the object makes the question of whether the officer had reasonable suspicion closer. However, notwithstanding a lack of evidence that the officer inquired about the object in Defendant's mouth, we believe that Defendant's act of speaking with the officer for a period of time without removing or chewing on an object which was affecting his speech – when coupled with the other factors cited above – is sufficient to establish reasonable suspicion.

the facts in *In re I.R.T.*, are analogous to those facts in the case at hand. *In re I.R.T*, 184 N.C. App. 579, 581-83, 647 S.E.2d 129, 132-33 (2007). I disagree.

In *I.R.T.*, the officer testified that when he approached the juvenile in a high crime area, he witnessed the juvenile "quickly turned his head away" from him. *Id.* at 585, 647 S.E.2d at 135. Further, the officer testified that the juvenile "kept his head turned away from [him] and . . . [the officer] could tell that he was not moving his mouth [while responding to the officer's questions] as though he had something inside of his mouth." *Id.* at 585-86, 647 S.E.2d at 135. The officer alleged that "individuals that have exhibited those characteristics have generally kept crack-cocaine in their mouths." *Id.* at 586, 647 S.E.2d at 135. Importantly, suspecting the juvenile of hiding drugs in his mouth, the officer requested that the juvenile spit out what was in his mouth. *Id.* at 581, 647 S.E.2d 132. The juvenile spit out crack cocaine wrapped in cellophane. *Id.* This Court discerned that the juvenile's "turning away from the officer and not opening his mouth while speaking constituted evasive actions", and we accordingly held that the juvenile's evasive conduct, presence in a high crime area, and the officer's training was sufficient to establish reasonable suspicion. *Id.* at 586, 647 S.E.2d at 135.

The *I.R.T.* Court relied, in part, on *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995). In *Watson*, this Court found reasonable suspicion to justify an investigatory seizure when police approached a convenience store located in a high crime area and witnessed the defendant make "evasive maneuvers to avoid detection, i.e., putting the drugs in his mouth, attempting to swallow the drugs by drinking Coca-Cola and attempting to go into the store." *Id.* at 398, 458 S.E.2d at 522. The defendant "was ordered to spit out the objects in his mouth[.]" *Id.* at 396-97, 458 S.E.2d at 521. When the defendant refused, the officer applied pressure to the defendant's throat and he spit out three baggies of crack cocaine. *Id* at 397, 458 S.E.2d at 519.

I agree with this Court's holdings in both *I.R.T.* and *Watson*. Not only were the defendants present in high crime areas, each acted evasively when confronted by law enforcement. However, the facts in *I.R.T.* and *Watson* are markedly different from the facts in the case before us.

Here, there is no question that the officer stopped defendant in a high crime area for a traffic violation. Upon finding defendant's license and registration to be valid and that the car was registered to defendant, the officer issued defendant a warning ticket. The officer began writing the warning ticket while standing at defendant's driver side door.

The officer talked to defendant when he wrote the ticket. In speaking with defendant, the officer alleged that he thought defendant had something in his mouth. The following colloquy occurred at trial:

> DEFENSE COUNSEL: You said [defendant] had something in his mouth and he wasn't chewing on it?
>
> OFFICER: Correct.
>
> DEFENSE COUNSEL: Was it peppermint?
>
> OFFICER: I don't know.
>
> DEFENSE COUNSEL: Well, was there some other type of hard candy?
>
> OFFICER: I don't know.
>
> DEFENSE COUSEL: Did you see any type of plastic or anything coming out the corner of [defendant's] mouth that would indicate that it was some type of packaging[?]
>
> OFFICER: No. . . . Just something in his mouth. I couldn't tell.
>
> DEFENSE COUNSEL: Okay. And that caused you concern?
>
> OFFICER: I notated.

Defense counsel asked the officer, "[w]hile you're writing the warning ticket, you are engaged in conversation with [defendant]?" The officer replied, "[y]es, sir." Defense Counsel asked, "[h]e engages in conversation back with you?" The officer replied, "[h]e does." The record shows that during their conversation, the officer informed defendant that he was stopped in a high crime area and pointed out to defendant that the Berkshire Apartments were known for their drug activity. The officer asked defendant if he was on probation, and defendant answered that he was not. The officer asked if defendant had any prior drug offenses, and defendant said "he wasn't involved in that type of stuff anymore." Defendant informed the officer that he was self-employed in landscaping. Defense counsel asked the officer whether the object remained in defendant's mouth during the conversation, and the officer answered in the affirmative. Defense counsel questioned, "[y]ou don't ask him about [the object]?" The officer replied, "[t]hat's correct."

The officer admitted that the traffic stop turned into a drug investigation solely because defendant was in a known drug area and because defendant had an unidentified object in his mouth. Defense counsel

questioned, "the only thing that concerned you was some object that was in [defendant's] mouth that you were unable to identify?" The officer replied, "[a]lso, the area that he was coming from of course." While the officer was writing the warning citation, he asked defendant if there was anything illegal in his vehicle. The officer asked defendant if he could check his vehicle for narcotics, and defendant said no. The officer then asked defendant to step out of his vehicle so he could search defendant's person for "guns, drugs, or other weapons." The officer testified that defendant consented to the search—he "didn't . . . resist the search at all." Further, the search yielded nothing illegal or suspicious.

Notably, defense counsel asked, "[y]ou have consent to search his entire person, do you believe that?" The officer replied, "[y]es, I do." Defense counsel questioned, "[b]ut you do not search his mouth?" The officer admitted, "[t]hat's correct." After finding no evidence of contraband on defendant's person, and not searching defendant's mouth, the officer continued to detain defendant as he called for backup. When a second officer arrived, he was instructed to finish writing the warning citation while the first officer conducted the canine sniff of defendant's vehicle. It was not until after the canine sniff test was completed that the officer searched defendant's mouth. The officer alleged that defendant appeared to swallow something.

These facts, taken in totality and viewed through the eyes of a reasonable, cautious officer, do not support the trial court's finding that the officer had reasonable suspicion to justify extending the traffic stop. Unlike in *I.R.T.* and *Watson*, where the defendants took evasive actions to avoid law enforcement, the record here shows that defendant did not act evasively. Specifically, defendant engaged in a conversation with the officer during which he was able to speak clearly enough to inform the officer that he was not on probation and worked in landscaping. Additionally, defendant "didn't . . . resist the search [of his person] at all." Further, defendant allowed the officer to check his license and registration, which were in good standing. In doing so, the officer returned to his patrol vehicle, and defendant would have had an opportunity to spit out what was allegedly in his mouth. Finally, the officer testified that defendant was "polite" and there were no "issues" with the traffic stop.

Of upmost importance in this case, the officer *did not* search defendant's mouth during the search of his person. Moreover, the officer admittedly never questioned defendant about the alleged unknown item in his mouth until after the canine sniff. Nonetheless, the majority points to the officer's six years of experience in narcotics detection as well as his belief that defendant was concealing something in his mouth to

support a finding of reasonable suspicion. Arguably, an experienced officer would take steps to determine what, if anything, was in a person's mouth at the outset of a stop when such a suspicion was the basis for the search of that person.

Because the officer neither questioned defendant about having an item in his mouth nor did he search defendant's mouth, I find it highly objectionable that the purported evasive conduct that essentially tipped the scale in favor of finding reasonable suspicion was the officer's mere alleged suspicion that defendant had an unknown object in his mouth. Had the officer taken any steps to confirm his suspicion, a canine search of defendant's vehicle would debatably have been permissible based upon reasonable suspicion. Egregiously, the officer neglected to investigate his suspicion, yet still felt justified in prolonging the stop to conduct a canine sniff of the outside of defendant's vehicle. Notably, the officers in *I.R.T.* and *Watson* both demanded that the defendants spit out what was hidden in their mouths as part of the investigatory stop.

To me, these facts suggest that the officer was acting on no more than an "unparticularized suspicion or hunch" that defendant's vehicle contained contraband based on defendant's presence in a high crime area. *State v. Brown*, 217 N.C. App. 566, 572, 720 S.E.2d 446, 450 (2011) *writ denied*, *review denied*, 365 N.C. 541, 742 S.E.2d 187 (2012) (citation and quotation omitted). It is well established that a suspicion or hunch is insufficient to form the basis of reasonable suspicion. *Id.* Because the facts of this case do not support a finding that the officer had reasonable suspicion to believe that criminal activity was afoot to justify the extension of the traffic stop, I respectfully disagree with the majority's opinion.

Because the officer lacked reasonable suspicion, under *Rodriguez*, the question for this Court becomes whether the officer unlawfully prolonged an otherwise completed traffic stop in order to conduct a canine sniff outside of defendant's vehicle. Again, an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, so long as he does so in a way that does not prolong the stop. *Rodriguez v. United States*, ___ U.S. ___, ___, 191 L.Ed. 2d 492, 499 (2015). The unrelated checks include: checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. *Id.* "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* However, "[l]acking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." *Id.*

In *Rodriguez*, the Supreme Court framed the "critical" question as "not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop" *Id.* at ___, 191 L.Ed. 2d at 496. As the Supreme Court opined, "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete [the stop's] mission." *Id.* at ___, 191 L.Ed. 2d at 499 (citation and quotation omitted) (alteration in original). A traffic stop prolonged beyond that point is unlawful. *Id.*

The majority contends that "it is unclear from the trial court's findings whether the execution of the dog sniff prolonged the traffic stop." I disagree. In the instant case, the officer's actions inevitably prolonged the traffic stop beyond the amount of time reasonably required to complete the stop's mission. After checking defendant's license and registration and confirming that the vehicle was registered to defendant, the officer stood by defendant's door and began issuing him a warning ticket. The officer could have reasonably completed writing the citation in a matter of one to two minutes. However, the officer struck up a conversation with defendant, which led to the officer having defendant exit the vehicle, searching defendant's pockets, calling a backup officer, explaining the situation to the new officer, requesting that the new officer complete the warning ticket, and finally getting the canine from the patrol vehicle and conducting the sniff test. While this string of events may have only extended the stop for minutes, the stop was nonetheless extended beyond the amount of time required to reasonably complete the stop's mission. I am of the impression that the time it took for the officer to complete the traffic-based inquiries of checking defendant's license and registration constituted the reasonable amount of time for the stop—any holdover thereafter was unreasonable because the officer lacked reasonable suspicion. I recognize that past precedent has held that any delay in this case was *de minimis*. However, in light of the Supreme Court's holding in *Rodriguez*, we are no longer bound to follow the *de minimis* rule.

Because the officer had (1) finished completing the traffic-based inquiries of checking defendant's license and registration, (2) was in in the middle of issuing the warning ticket, and (3) the additional time defendant was detained was used to conduct a check that was unrelated to the officer's otherwise lawful traffic stop, I am of the opinion that the officer unreasonably extend the duration of the stop in order to conduct a canine sniff of the outside of defendant's vehicle. Further, by prolonging the traffic stop, defendant's Fourth Amendment rights were violated. Therefore, I conclude that the trial court erred in denying defendant's motion to suppress evidence.

STIKELEATHER REALTY & INVESTMENTS CO., PLAINTIFF-APPELLANT
v.
ELISHA BROADWAY, DEFENDANT-APPELLEE

No. COA14-1136-2

Filed 4 August 2015

Landlord and Tenant—eviction action—rent abatement—smoke alarm not operable

The findings fact did not support the trial court's conclusion that defendant-tenant was entitled to rent abatement under the Residential Rental Agreements Act (RRAA) on a counterclaim to an eviction action. While N.C.G.S. § 42-42(a)(5) and (7) impose upon landlords the duty to provide operable smoke and carbon monoxide alarms, the duty is triggered only if a landlord is notified of the needed repair or replacement, or if it is the beginning of a tenancy. As to the award of rent abatement, the trial court did not articulate its rationale with any specificity.

Appeal by plaintiff from judgment entered 18 July 2014 by Judge Matt Osman in Mecklenburg County District Court. Heard in the Court of Appeals 18 March 2015.

The Law Firm of Ross S. Sohm, PLLC, by Ross S. Sohm, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HUNTER, JR., Robert N., Judge.

Stikeleather Realty & Investments Co. ("Plaintiff-Landlord") appeals from a bench trial judgment awarding trebled rent abatement and attorney's fees to Elisha Broadway ("Defendant-Tenant") on claims of breach of the implied warranty of habitability and unfair and deceptive trade practices. We reverse.

I. Factual & Procedural History

On 19 March 2014, Plaintiff-Landlord initiated a summary ejectment action against Defendant-Tenant for breach of a residential lease agreement for failure to pay rent for the month of March. On 31 March 2014, Defendant-Tenant filed an answer and asserted the defense of retaliatory eviction pursuant to N.C. Gen. Stat. § 42-37.1, as well as counterclaims

for (1) breach of the implied warranty of habitability pursuant to N.C. Gen. Stat. § 42-42, (2) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.*, (3) unfair debt collection practices pursuant to N.C. Gen. Stat. § 75-50 *et seq.*, (4) negligence, and (5) negligence per se.

On 22 April 2014, Plaintiff-Landlord filed an amended complaint, alleging Defendant-Tenant also breached the lease by keeping an unauthorized pet. On 2 May 2014, Defendant-Tenant filed an amended answer and counterclaim, which contained no substantive changes pertinent to this appeal. On 8 May 2014, the magistrate entered judgment in favor of Plaintiff-Landlord on the primary claim of possession and in favor of Defendant-Tenant on his counterclaim of breach of the implied warranty of habitability only, awarding him $1,000.00 in damages. Plaintiff appealed to the district court.

On 30 June 2014, the case was heard in Mecklenburg County District Court before the Honorable Matt Osman. At that time, Defendant-Tenant had already surrendered possession of the property. Therefore, the sole issue before the trial judge was Defendant-Tenant's counterclaim for breach of the implied warranty of habitability. The transcript of this bench trial, as well as the record on appeal, reveals the following pertinent facts.

In May 2010, Defendant-Tenant entered into a residential lease to rent a home located at 2600 Catalina Avenue in Charlotte ("the property") for $500 per month. At this time, the property was neither owned nor managed by Plaintiff-Landlord. The lease contained a page signed by Defendant-Tenant stating that a "Carbon/Smoke Detector"[1] existed in the home and that it was in good working condition when Defendant-Tenant took possession of the property. The lease also provided that Defendant-Tenant shall make requests for repairs in writing. On 4 June 2013, Mr. Kluth, a real estate broker, visited the property to obtain general information to list the house. On 10 June 2013, Mr. Kluth returned to the property for another inspection, this time bringing an interested buyer, Mr. Stikeleather, managing partner of Plaintiff-Landlord, a limited liability corporation in the business of buying and selling residential properties.

During this second pre-sale inspection, Mr. Stikeleather asked Defendant-Tenant if the property had a smoke alarm and carbon

1. While the word "detector" appears throughout the record on appeal, this Court uses "alarm" synonymously, in order to reflect amendments by the N.C. General Assembly to this same effect. *See* 2012 N.C. Sess. Laws 350, 350-52, ch. 92, § 1-4 (replacing the word "detector" with "alarm" throughout provisions of the Residential Rental Agreements Act).

monoxide alarm. Defendant-Tenant responded that it did not. Mr. Kluth then went to his truck and returned with a smoke alarm and carbon monoxide alarm for Defendant-Tenant to put in the property.

On or around 26 June 2013, Plaintiff-Landlord purchased the property and sent a letter to Defendant-Tenant notifying him that Plaintiff-Landlord was the new owner and property manager. The letter also directed Defendant-Tenant to call Plaintiff-Landlord to set up an inspection of the property and to put any requests for repairs in writing.

On or around 24 September 2013, Mr. Stikeleather went by the house to do an inspection, but it had to be "quick" because of the presence of an unauthorized pet on the premises. During this inspection, Mr. Stikeleather testified that he observed an alarm in the living room, plugged into an electrical outlet in the wall, but he admitted he did not verify whether it was working properly.

Near the middle of March 2014, Defendant-Tenant called Mr. Stikeleather and told him he would be late with March's rent; Mr. Stikeleather responded that he would file eviction papers, which he did on 19 March 2014. Two days after the parties appeared in small claims court near the end of March 2014, Plaintiff-Landlord sent his repairman to install a smoke alarm and carbon monoxide alarm in the premises. Defendant-Tenant felt it was unfair to be evicted for being only a few days late on rent, so he went to City Code Enforcement, which issued an inspection report that does not mention any issue with the property's smoke alarm and carbon monoxide alarm. Defendant-Tenant did not pay rent for the months of March, April, or May 2014.

The day after the bench trial, on 1 July 2014, the trial judge entered a judgment containing the following pertinent findings of fact, whose order has been reorganized by this Court in an effort to improve clarity:

> 3. [Defendant-Tenant] lived at 2600 Catalina, Charlotte, NC ("the property"), for four years and three months.
>
> . . . .
>
> 43. [Defendant-Tenant's] son, Ronald Broadway (RB), lived with his father at the property.
>
> . . . .
>
> 4. At the time [Defendant-Tenant] took possession of the property in 2010 it was owned and managed by a different landlord than the Plaintiff in this action.

. . . .

65. [Mr.] Stikeleather is the managing partner of the LLC that is [Plaintiff-Landlord].

. . . .

76. [Plaintiff-Landlord's] LLC owns approximately 200 properties and manages another 300 properties.

. . . .

55. Mike Kluth is a real estate broker in Charlotte and he sold the property to [Plaintiff-Landlord].

56. Prior to selling the house, Mr. Kluth visited the property in June 2013 to obtain general information to list the house.

. . . .

58. During a second pre-sale inspection of the property in June 2013, [Defendant-Tenant] told Mr. Kluth and [Mr. Stikeleather] about the flooding in the basement. The basement was dry when Mr. Kluth and [Mr. Stikeleather] saw it.

59. During the second inspection [Mr. Stikeleather] asked [Defendant-Tenant] about a Smoke/Carbon detector. [Defendant-Tenant] said there was not one present in the property.

60. Mr. Kluth then went to his car and got a Smoke/Carbon detector to place in the house.

61. Mr. Kluth does not know whether the detector, which was not new, was operational. The detector could be plugged into the wall and could also be run on batteries.

62. [Defendant-Tenant] testified that the detector provided by Mr. Kluth did not work.

. . . .

38. In June 2013, [Plaintiff-Landlord] notified [Defendant-Tenant] in writing that the property had been sold and that [Plaintiff-Landlord] was the new owner and property manager. Plaintiff[-Landlord] admitted Plaintiff's Exhibit 2, a letter dated June 26, 2013, detailing the change in ownership.

39. In addition to telling [Defendant-Tenant] about the new management company, Plaintiff[-Landlord's] Exhibit 2 also directed [Defendant-Tenant] to put any requests for repair in writing and asked [Defendant-Tenant] to call [Plaintiff-Landlord] to set up an inspection.

. . . .

66. The only potential repair issue that [Plaintiff-Landlord] was aware of at the time of the purchase was the basement and the flooding.

. . . .

2. The parties have also stipulated to the existence of a lease between [Defendant-Tenant] and Plaintiff[-] Landlord. . . .

. . . .

21. The lease contains a page signed by [Defendant-Tenant] stating that the property had a "Carbon/Smoke Detector" in the unit and that it was in good working condition when [Defendant-Tenant] took possession in 2010.

. . . .

29. Paragraph 17 of the lease states that [Defendant-Tenant] shall make a request for repair in writing.

. . . .

70. After taking ownership of the property, [Mr. Stikeleather] went by the house in the fall of 2013 to do a quick inspection. It was a quick inspection due to the presence of [Defendant-Tenant's] dog.

71. [Mr. Stikeleather] testified that the dog was not permitted at the property[.]

72. [Mr. Stikeleather] did observe a detector that was plugged in during [the] fall 2013 inspection but did not verify whether it was working properly.

. . . .

32. [Defendant-Tenant] called [Mr. Stikeleather] to tell him that he would be late with the March [2014] rent and [Mr. Stikeleather] said that he would file eviction papers.

. . . .

75. [Plaintiff-Landlord] sent his repairman to install a detector after the first hearing in small claims court in late March 2014.

. . . .

22. [Defendant-Tenant] and [Defendant-Tenant's] son[, RB,] were present when a new detector was installed by [Plaintiff-Landlord's] employee in 2014.

. . . .

47. RB testified that the property did not have a Smoke/Carbon detector upon initial[] occupancy. There [was] a blank spot where it appeared one had previously been with a painted[-]over bracket.

48. RB was present when [Plaintiff-Landlord's] staff came out and installed a Smoke/Carbon detector, a few days after the first court appearance in 2014. RB watched the installation and [Plaintiff-Landlord's] staff did not remove an old detector prior to installing a new one.

. . . .

33. [Defendant-Tenant] did not think it was fair to be evicted for being seventeen days late on the rent so he went to City Code Enforcement.

. . . .

40. The city inspected the property and issued a list of code violations. Plaintiff[-Landlord] admitted the Code Enforcement report as Plaintiff's Exhibit 3.

41. The Code Enforcement report does not list the carbon/smoke detector.

. . . .

68. [Mr. Stikeleather] told [Defendant-Tenant] several times to put repair requests in writing, as required by the lease.

69. [Mr. Stikeleather] testified that he never received any written or verbal repair requests from [Defendant-Tenant].

. . . .

> 78. [Mr. Stikeleather] testified that he has made numerous requests for access and for a key to the Property, including by certified mail, so that he could do an inspection and make repairs to the property. [Defendant-Tenant] never responded to those requests.
>
> 79. [Defendant-Tenant] did not introduce any portion of the Charlotte City Housing Code.
>
> . . . .
>
> 1. [Defendant-Tenant] did not pay rent for March, April or May 2014, and that the monthly rent was $500.

Based upon these findings, the trial judge concluded the following as a matter of law:

> 2. [Defendant-Tenant] has failed that [sic] show that [Plaintiff-Landlord] breached the implied warranty of habitability for the issues related to the flooded basement, broken step, inoperable and broken windows and faulty electrical system because [Defendant-Tenant] failed to provide proper written notice of these issues and also failed to provide reasonable access to [Plaintiff-Landlord] to permit an inspection to determine if there were any structural or electrical issues;
>
> 3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide detector. [Defendant-Tenant] is therefore entitled to rent abatement;
>
> . . . .
>
> 6. [Defendant-Tenant] is entitled to rent abatement of $150 per month;
>
> 7. [Plaintiff-Landlord's] continued collection of rent without verifying that [Defendant-Tenant] had been provided an operable smoke alarm and carbon monoxide detector constituted an Unfair and Deceptive Trade Practice;

> 8. Because [Plaintiff-Landlord] has committed an Unfair and Deceptive Trade Practice, [Defendant-Tenant's] damages shall be trebled;
>
> 9. [Defendant-Tenant's] damages shall be offset by an abatement credit of $350 for March 2014 where [Defendant-]Tenant did not pay rent but before the new detector was installed and $500 per month for April and May 2014 where [Defendant-]Tenant did not pay rent but after the new detector was installed for a total abatement credit of $1350.

Based upon the foregoing, the trial judge entered the following judgment:

> 1. Defendant[-]Tenant's claim for rent abatement and Unfair and Deceptive Trade Practices is granted;
>
> 2. Defendant[-]Tenant is awarded damages in the amount of $2250 ($1200 in rent abatement, trebled to $3600 pursuant to Chapter 75 minus tenant's abatement credit of $1350);
>
> 3. Defendant-[Tenant] is entitled to reasonable attorney fees, pursuant to Chapter 75. [Defendant-Tenant] shall submit an affidavit for attorney fees and [Plaintiff-Landlord] shall have an opportunity to respond;
>
> 4. All other counterclaims filed by [Defendant-Tenant] are denied.

Plaintiff-Landlord appeals.

II. Analysis

Plaintiff-Landlord contends the trial court erred by (1) granting Defendant-Tenant's counterclaim for rent abatement under the Residential Rental Agreements Act ("RRAA"), (2) improperly calculating the damage award under the RRAA, (3) concluding the alleged RRAA violation constituted a breach of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTP"), and (4) awarding Defendant-Tenant reasonable attorney's fees under UDTP. Because we agree the trial court erred in concluding Plaintiff-Landlord violated the RRAA, the damages awarded for rent abatement, which were trebled under UDTP, as well as the attorney's fees awarded under UDTP, must be reversed.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (internal quotation marks and citation omitted). "In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith." *Cardwell v. Henry*, 145 N.C. App. 194, 195, 549 S.E.2d 587, 588 (2001) (internal quotation marks and citations omitted). The trial court's findings of fact must include "specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). Put another way, the trial court must make "specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). The trial court's conclusions of law are reviewed *de novo*, wherein this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

B. Violation of the RRAA

Plaintiff-Landlord first contends the trial court erred in granting Defendant-Tenant's claim for rent abatement in violation of the RRAA. We agree.

Specifically, Plaintiff-Landlord challenges the trial court's conclusion of law No. 3, which states:

> 3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide

> detector. [Defendant-Tenant] is therefore entitled to rent abatement[.]

This singly-enumerated conclusion actually contains two legal conclusions: first, that Plaintiff-Landlord violated the RRAA; second, that Defendant-Tenant is entitled to rent abatement. We therefore discuss each conclusion separately.

Pursuant to the RRAA, codified at N.C. Gen. Stat. §§ 42-38 to -49 (2013), "a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provisions of the Act." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d 189, 192 (1987) (citation omitted). The RRAA requires landlords to provide fit premises and imposes upon them the following duties:

> (a) The landlord shall:
>
> (1) Comply with the current applicable building and housing codes[] . . . to the extent required by the operation of such codes[.]
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> (3) Keep all common areas of the premises in safe condition.
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

N.C. Gen. Stat. § 42-42(a)(1)-(4) (2013). The RRAA provides an affirmative cause of action to a tenant for recovery of rent due to a landlord's breach of the implied warranty of habitability. *See, e.g.*, *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694 (1987) ("Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with [N.C. Gen. Stat.] § 42-42(a)" (citation omitted)); *see also Allen v. Simmons*, 99 N.C. App. 636, 644, 394 S.E.2d 478, 482 (1990) ("Tenants may bring an action seeking damages for breach of the implied warranty

of habitability and may also seek rent abatement for their landlord's breach of the statute.").

The restitutionary remedy of rent abatement compensates tenants for defective conditions of a premises which render it unfit for human habitation. *See Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193 (noting that rent abatement is "in the nature of a restitutionary remedy[]"). This Court has held:

> [A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with [N.C. Gen. Stat. §] 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

Id. at 371, 355 S.E.2d at 194 (citations omitted). However, N.C. Gen. Stat. § 42-42(a) also imposes affirmative duties upon landlords to ensure premises are fit for human habitation. Pertinent to the instant case, the RRAA requires landlords:

> (5) *Provide operable smoke alarms*[] . . . and install the smoke alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke alarm is operable and in good repair at the beginning of each tenancy. . . .
>
> . . . .
>
> (7) *Provide a minimum of one operable carbon monoxide alarm per rental unit per level*[] . . . and install the carbon monoxide alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. A landlord that installs one carbon monoxide alarm per rental unit per level shall be deemed

> to be in compliance with standards under this subdivision covering the location and number of alarms. The landlord shall replace or repair the carbon monoxide alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a carbon monoxide alarm is operable and in good repair at the beginning of each tenancy. . . .

N.C. Gen. Stat. § 42-42(a)(5), (7) (2013) (emphasis added). Breaches of provisions of the RRAA such as these, included within the implied warranty of habitability, can be remedied by retroactive rent abatement. However, the quantity of damages must be appropriate. We recognize the importance of ensuring operable smoke alarms and carbon monoxide alarms in rental units. Yet the amount a landlord is liable for a violation of N.C. Gen. Stat. § 42-42(a)(5) or (7) requires an evaluation of fair market value determined with more specificity than was calculated by the trial judge.

In the instant case, in reviewing the trial court's decision de novo, we hold its findings of fact do not support its conclusion that Defendant-Tenant is entitled to rent abatement. Therefore we reverse.

While N.C. Gen. Stat. § 42-42(a)(5) and (7) impose upon landlords the duty to provide operable smoke and carbon monoxide alarms, the duty is triggered only if a landlord is notified of its needed repair or replacement, or if it is the beginning of a tenancy. Here, Defendant-Tenant never notified Plaintiff-Landlord in writing, as required, the alarm provided by Mr. Kluth was defective or inoperable. Regardless of whether Plaintiff-Landlord discovered during the second pre-sale inspection the property did not have an alarm, there was no finding Plaintiff-Landlord knew or should have known the alarm provided by Mr. Kluth was not operable. Nor was there a finding Plaintiff-Landlord was notified about its inoperability. Furthermore, the trial court failed to make any finding as to when, if ever, a new tenancy was created after Plaintiff-Landlord became the new property owner and manager. Lacking the essential findings that Defendant-Tenant notified Plaintiff-Landlord the alarm provided by Mr. Kluth needed replacement or repair, or that a new tenancy was created after Plaintiff-Landlord became the property's owner and manager, the trial court's findings of fact do not support its conclusion that Plaintiff-Landlord breached the RRAA.

As to the award of rent abatement, the trial court did not articulate its rationale with any specificity in declaring how Plaintiff-Landlord's

alleged failure to verify the property had an operable smoke alarm and carbon monoxide alarm—without more—entitles Defendant-Tenant to a restitutionary remedy such as rent abatement. The trial court made no finding that the premises was unfit or uninhabitable during the period in which Defendant-Tenant paid rent. There was no finding or articulation supporting the value of the premises in its "uninhabitable" state, other than Defendant-Tenant's testimony his apartment's fair market value dropped $200.00, when considering all issues he alleged were breaches of the implied warranty of habitability.

We recognize that in *Cotton v. Stanely*, 86 N.C. App. 534, 358 S.E.2d 692 (1987), a case decided prior to the enactment of either provision at issue, this Court held indirect evidence of fair rental value, such as a tenant's testimony as to his belief of the "as is" fair rental value of the premises, is sufficient to support a calculation of rent abatement damages to compensate for a landlord's violation of N.C. Gen. Stat. § 42-42(a). *Id.* at 539, 358 S.E.2d at 695. This Court in *Cotton* held "[a] party is not required to put on direct evidence to show fair rental value," as a fact-finder is able to "[f]rom their own experience with living conditions[]" determine the "as is" fair rental value of the property to calculate an appropriate damage award for a tenant due to a landlord's violation of the RRAA, as it was enacted at the time. *Id.* In *Cotton*, this Court concluded a landlord who breached the RRAA "[would] be liable for the difference between the fair rental value of the units 'as is' and the units' fair rental value 'as warranted,' for the period between the expiration of a reasonable opportunity to repair after notice to the [landlord] and the date repairs were made, plus any special and consequential damages alleged and proven." *Id.* at 539, 358 S.E.2d at 695-96.

Here, Defendant-Tenant testified as to what he perceived was the property's fair market value in its allegedly dilapidated condition, which included a flooded basement that occurred "at least 50 times," a broken back step, frequent electrical shortages, inoperable bedroom windows, a busted pipe in the kitchen that caused water seepage for three to four months, mold in the kitchen and bedroom walls, a hole in the apartment that rats entered through, and an uneven floor. Although the trial judge concluded Plaintiff-Landlord did not breach the RRAA as to these other issues—as Defendant-Tenant failed to provide proper written notice and reasonable access to Plaintiff-Landlord to conduct an inspection—the

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2. N.C. Gen. Stat. § 42-42(a)(5) became effective in 1996. 1995 N.C. Sess. Laws 189, 191-92, ch. 111, § 2. N.C. Gen. Stat. § 42-42(a)(7) became effective in 2010. 2008 N.C. Sess. Laws 950, 953-54, ch. 219, § 2.

trial judge determined Defendant-Tenant should be entitled to $150.00 in rent abatement for each month Plaintiff-Landlord allegedly violated the RRAA by failing to verify the operability of the alarm. While this calculation is markedly difficult, the trial judge provided no basis for how he reached it, other than "[i]n the totality, . . . the Court [extracted $150.00] out of the $200.00 that [Defendant-Tenant] cited, [and] decided that was appropriate." We can discern no rationale for how $150.00 per month in rent abatement is an appropriate calculation under these facts, or how a restitutionary remedy such as rent abatement would be appropriate for an alleged violation of N.C. Gen. Stat. § 42-42(a)(5) or (7) alone.

In summary, lacking these and other specific findings of facts essential to support its conclusions Plaintiff-Landlord breached the RRAA and Defendant-Tenant is entitled to rent abatement, the trial court's judgment must be reversed. Because we conclude the trial court's findings do not support its conclusion Plaintiff-Landlord breached the RRAA, Defendant-Tenant's claims for rent abatement and UDTP, as well as the award of trebled damages and attorney's fees pursuant to UDTP, necessarily fail.

III. Conclusion

Based upon the foregoing and our review of the record, we reverse the trial court's judgment.

REVERSED.

Judges Stephens and Tyson concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 AUGUST 2015)

EASLEY v. TLC COS. No. 15-62	N.C. Industrial Commission (Y10014)	Affirmed
FIELDS v. FIELDS No. 14-1204	New Hanover (12CVS1299)	Partial summary judgment affirmed; partial new trial
HARDISON v. GOODYEAR TIRE & RUBBER CO. No. 14-1391	N.C. Industrial Commission (X81052)	Affirmed
IN RE N.C. No. 15-320	Nash (13JT16-21)	Affirmed
IN RE N.N.N. No. 15-229	Wake (14JA234-237)	Affirmed
IN RE Z.D.N.T. No. 15-177	Craven (13JT6)	Affirmed
LOUIS v. SHRUM No. 14-1410	Lincoln (14CVS0596)	Affirmed
MOORE v. MOHAWK INDUS., INC. No. 14-1058	N.C. Industrial Commission (546801)	Affirmed
ODOM v. KELLY No. 15-38	Wake (14CVS3200)	Affirmed in part, reversed in part, and remanded.
QUALITY BUILT HOMES INC. v. TOWN OF CARTHAGE No. 15-115	Moore (13CVS1264)	Affirmed
SHOEHEEL FARMS v. CITY OF LAURINBURG No. 14-1089	Scotland (14CVS23)	Dismissed
STATE v. FULLARD No. 15-93	Forsyth (12CRS54625) (12CRS6418)	No Error
STATE v. GEMEILLE No. 15-70	Wake (13CRS201648)	No Error

STATE v. HARDIN No. 14-1296	Guilford (13CRS24476) (13CRS76339)	No Error
STATE v. HARDING No. 15-148	Cumberland (08CRS68715)	Affirmed
STATE v. KEEL No. 15-69	Pitt (09CRS61566)	Vacated and Remanded
STATE v. McKEITHEN No. 15-223	Moore (14CR52428)	Affirmed
STATE v. OWLE No. 14-1373	Jackson (08CRS81)	Affirmed
STATE v. PUTNAM No. 14-1304	Cleveland (12CRS51187) (12CRS847)	No Error
STATE v. ROSS No. 15-87	Cleveland (08CRS4060-61)	Vacated and Remanded
STATE v. SELLERS No. 14-1272	Wake (12CRS218675) (12CRS218676)	No error in part; remanded for resentencing.
STATE v. SELLERS No. 15-10	Stokes (13CRS50279) (14CRS88)	No prejudicial error
STATE v. SELLS No. 14-1163	Stanly (09CRS51269) (09CRS51270)	No Prejudicial Error
STATE v. SKINNER No. 14-1262	Pitt (11CRS2396)	No error in part; Dismissed in part
STATE v. STANLEY No. 14-1347	Johnston (13CRS52974-75)	No Error
STATE v. STITT No. 14-1200	Mecklenburg (12CRS233826) (13CRS26981) (13CRS8135)	No Error
STATE v. WARD No. 15-225	Wilson (13CRS54026) (14CRS265) (14CRS52585)	Dismissed

THOMPSON v. BANK OF AM., N.A. No. 15-20	Mecklenburg (13CVS20158)	Dismissed in part; Affirmed in part
TRABER v. BANK OF AM. No. 14-1028	Polk (13CVS129)	Affirmed
TYSON v. N.C. DEP'T OF TRANSP. No. 14-1357	Beaufort (12CVS985)	Affirmed
ZUROSKY v. SHAFFER No. 14-954 R	Mecklenburg (09CVD30462)	Reversed and Remanded

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