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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 9, 2017

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COURT OF APPEALS

CASES REPORTED

FILED 18 AUGUST 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA COURT OF APPEALS

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

January 9 and 23

February 6 and 20

March 6 and 20

April 3 and 17

May 1 and 15

June 5

July None

August 7 and 21

September 4 and 18

October 2, 16 and 30

November 13 and 27

December 11

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

CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. D/B/A CAPE FEAR VALLEY HEALTH SYSTEM AND HOKE HEALTHCARE, LLC, PETITIONERS

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT

AND

FIRSTHEALTH OF THE CAROLINAS, INC. D/B/A FIRSTHEALTH MOORE REGIONAL HOSPITAL, RESPONDENT-INTERVENOR

No. COA14-1376

Filed 18 August 2015

1. Hospitals and Other Medical Facilities—certificate of need—no-review decision—capable of repetition yet evading review

In an appeal from the dismissal of a contested case against the North Carolina Department of Health and Human Services (DHHS) disputing the decision that a hospital was not required to obtain a new certificate of need, the Court of Appeals held that the Administrative Law Judge erred by dismissing the case as moot. DHHS's discretionary withdrawal of a no-review decision was an action capable of repetition yet evading review.

2. Hospitals and Other Medical Facilities—certificate of need—temporary reallocation of inpatient and emergency services

In an appeal from the dismissal of a contested case against the North Carolina Department of Health and Human Services (DHHS) disputing the decision that a hospital was not required to obtain a new certificate of need (CON), the Court of Appeals held that the Administrative Law Judge did not err by dismissing the case for failure to state a claim upon which relief could be granted. The hospital was not required to obtain a new CON to reallocate the ratio of inpatient and emergency services on a temporary basis to meet fluctuations in demand because the hospital did not add a new institutional health service, change the scope of services, or fail to materially comply with the existing CON.

Appeal by Petitioners from final decision and order of dismissal entered 21 August 2014 by Administrative Law Judge Augustus B. Elkins, II. Heard in the Court of Appeals 21 May 2015.

K&L Gates LLP, by Gary S. Qualls, Susan K. Hackney, Steven G. Pine, and Colleen M. Crowley, for petitioners-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee CON section.

Nelson Mullins Riley & Scarborough LLP, by Noah H. Huffstetler, III, Denise M. Gunter, and Candace S. Friel, for respondent-appellee FirstHealth.

INMAN, Judge.

The appeal in this case arises from a dispute over the Department of Health and Human Services' decision that a hospital was not required to obtain a new certificate of need in order to reallocate the ratio of inpatient and emergency services on a temporary basis to meet fluctuations in demand, where the hospital did not propose to increase or decrease its facility, equipment, or expenditures. We hold that, based on the record before us, a new certificate of need was not necessary because the hospital did not add a new institutional health service, change the scope of services previously approved in a certificate of need, or fail to materially comply with the existing certificate of need.

Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System and Hoke Healthcare, LLC (jointly, "Cape Fear" or "Petitioners"), appeal from the Administrative Law Judge's ("ALJ's") final decision dismissing Cape Fear's contested case against the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section ("DHHS" or "the Agency") and respondent-intervenor FirstHealth of the Carolinas, d/b/a FirstHealth Moore Regional Hospital ("FirstHealth") (jointly, "Respondents"). The ALJ concluded (1) that the Office of Administrative Hearings ("OAH") lacked subject matter jurisdiction to determine the controversy because the case had been rendered moot and, in the alternative, (2) that Cape Fear's petition failed to state any claim upon which relief could be granted. On appeal, Petitioners argue that the ALJ erred in each of these conclusions and in dismissing their petition.

After careful review, we conclude that the matter was not subject to dismissal on mootness grounds but that the petition was fatally deficient on the merits. Accordingly, we affirm the dismissal.

Background

In April 2012, DHHS issued a certificate of need ("CON") to FirstHealth to construct a hospital in Hoke County ("FirstHealth Hoke") with eight inpatient or "acute care" beds, one operating room, and an Emergency

Department ("ED") containing eight ED treatment rooms. The hospital opened in October 2013. As of February 2015, when Petitioners' appeal to this Court was filed, FirstHealth Hoke was the only hospital and the only ED in Hoke County.[1]

In its CON application, submitted in 2010, FirstHealth projected a need of 25 ED visits per day; however, according to FirstHealth, ED visits at FirstHealth Hoke have never been below 30 per day since its opening in 2013, peaking at 91 visits on Christmas Day, 2013. In 2014, the hospital continued experiencing ED visit volumes nearly four times higher than originally projected, but because it only operated eight ED treatment rooms, an increased number of patients left without being seen. In an effort to relieve this disparity, FirstHealth sent a request letter ("No Review Request") to DHHS in February 2014 seeking permission to use any available inpatient beds for overflow ED treatment on a temporary, as-needed basis. The No Review Request did not propose adding equipment or increasing the scope of services permitted by FirstHealth's CON. Cape Fear opposed FirstHealth's No Review Request in comments filed with DHHS on 14 March 2014.[2]

Over Cape Fear's objection, DHHS on 21 March 2014 issued its decision ("No Review Decision") approving the No Review Request, concluding that the proposal described in FirstHealth's correspondence "is not governed by, and therefore does not currently require, a certificate of need." DHHS provided notice of its decision to Cape Fear on 10 April 2014.

Cape Fear challenged DHHS's decision in a petition filed in the OAH on 21 April 2014, commencing a contested case proceeding. FirstHealth withdrew its No Review Request from DHHS on 6 May 2014 and obtained permission from the ALJ to intervene in the proceeding on 13 May 2014. On 28 May 2014, DHHS withdrew its No Review Decision, which was the subject of Cape Fear's petition.

On 30 May 2014, DHHS and FirstHealth jointly filed a motion to dismiss the contested case proceeding. The ALJ issued a final decision on

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1. As noted in the ALJ decision, Petitioner Hoke Healthcare already had a CON to develop its own hospital in Hoke County, but that hospital had not yet opened.

2. Cape Fear has unsuccessfully opposed FirstHealth in two other recent cases. *See Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 2014 WL 5770252 (Oct. 21, 2014) (unpublished), *disc. rev. denied*, __ N.C. __, 722 S.E.2d 860 (2015); *Cumberland Cnty. Hospital Sys., Inc. v. N.C. Dep't of Health & Human Servs.* __ N.C. App. __, 764 S.E.2d 491 (2014), *disc. rev. denied*, __ N.C. __, 772 S.E.2d 861 (2015).

21 August 2014 dismissing the matter on two alternative grounds: (1) concluding that the OAH lacked subject matter jurisdiction over the case because it was moot and (2) further concluding that Cape Fear had failed to state a claim upon which relief could be granted. Cape Fear filed timely notice of appeal.

Standard of Review

In certificate of need cases, an appeal from a final OAH decision proceeds directly to this Court. *AH North Carolina Owner LLC v. N.C. Dep't of Health and Human Servs.*, __ N.C. App. __, __, 771 S.E.2d 537, 541-42 (2015); *see also* N.C. Gen. Stat. §§ 7A-29(a), 131E-188(b) (2015).

> In reviewing a CON determination, [m]odification or reversal of the Agency's decision is controlled by the grounds enumerated in [N.C. Gen. Stat.] section 150B-51(b); the decision, findings, or conclusions must be:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious."

Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs., 205 N.C. App. 529, 534, 696 S.E.2d 187, 192 (2010) (quoting *Total Renal Care of N.C., LLC v. N.C. Dep't of Health and Human Servs.*, 171 N.C. App. 734, 739, 615 S.E.2d 81, 84 (2005)). "The first four grounds for reversing or modifying an agency's decision . . . are law-based inquiries. On the other hand, [t]he final two grounds . . . involve fact-based inquiries." *Id.* at 535, 696 S.E.2d at 192 (quoting *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 42, 684 S.E.2d 914, 920 (2009)). "In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health and Human Servs.*, __ N.C. App. __, __, 762 S.E.2d 468, 470 (2014) (quoting *Diaz v. Div. of Social Servs.*, 360 N.C. 384, 386, 628 S.E.2d 1, 2 (2006)). In conducting *de novo* review, this Court considers matters anew and freely substitutes its

own judgment for that of the administrative body. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004). In conducting "whole record" review, we must examine all the record evidence in order to determine whether there is substantial evidence to support the agency's decision. *Id.*

Accordingly, we review *de novo* the ALJ's decision granting Respondents' motion to dismiss for failure to state a claim upon which relief could be granted and dismissing the case as moot. We apply the whole record test in reviewing Petitioners' claims that the ALJ failed to take all of their factual allegations as true and reached conclusions of law unsupported by the findings of fact.[3]

Analysis

I. Mootness

[1] We first address the conclusion below that the OAH lacked subject matter jurisdiction to hear Petitioners' claim because the case was moot. Because we conclude that DHHS's withdrawal of its No Review Decision falls within at least one exception to the mootness doctrine – as a measure capable of repetition, yet evading review – we decline to dismiss the case for mootness, and we will reach the merits of this appeal.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Thus, the case at bar is moot if [an intervening event] had the effect of leaving plaintiff with no available remedy." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). "[A] moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.]" *Yeager v. Yeager*, __ N.C. App. __, __, 746 S.E.2d 427, 430 (2013) (citations omitted). Moreover, "[i]f the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action" for lack of subject matter jurisdiction. *Simeon v. Hardi*n, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation omitted).

One exception to the mootness doctrine permits our courts to address on the merits an otherwise moot claim where the case is "capable

3. While Petitioners make a passing reference to the "arbitrary or capricious" nature of the final decision, they do not support that argument with citation to any legal authority. Therefore, we deem this contention abandoned. *See* N.C. R. App. P. 28(b)(6) (2008) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

of repetition, yet evading review." *Ass'n for Home and Hospice Care of North Carolina, Inc. v. Div. of Medical Assistance*, N.C. Dep't of Health and Human Servs., 214 N.C. App. 522, 525, 715 S.E.2d 285, 288 (2011) (quoting *Thomas v. N.C. Dep't of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820–21 (1996)).[4] Where a CON holder obtains through the administrative process an agency decision allowing it to reallocate its services, even within the scope of the existing certificate, any challenge to the agency decision would be rendered meaningless if the holder of the certificate and the agency could preclude appellate review by withdrawing the underlying request and agency decision.

The ALJ concluded in the decision below that the "capable of repetition, yet evading review" exception to the mootness doctrine was inapplicable because DHHS had withdrawn its No Review Decision and was unlikely to "issue the same decision again." We disagree, concluding that the ALJ's analysis of the exception criteria was too restrictive.

Two elements are required for the "capable of repetition, yet evading review" exception to apply: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, __ N.C. App. __, __, 771 S.E.2d 920, 926 (2015) (quoting *Boney Publishers, Inc. v. Burlington City Counci*l, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002)); *see also State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 422-23 (2012) (applying this exception to allow the appeal of a criminal defendant who had at most nine months in which to seek confinement credit from the trial court, and if unsuccessful, to file and fully litigate an appeal); *N.C. Council of Churches v. State*, 120 N.C. App. 84, 88-89, 461 S.E.2d 354,

4. Petitioners argue that three established exceptions to the mootness doctrine apply in the case at bar: the "capable of repetition, yet evading review" exception; a "public interest" exception, *see N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (even if moot, a court may "consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution"); and a "voluntary cessation" exception, *see Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 293, 517 S.E.2d 401, 405 (1999) (noting that "a defendant's voluntary cessation of a challenged practice does not deprive a . . . court of its power to determine the legality of the practice." (citation omitted)). Because it is sufficient for this Court to conclude that any one of the mootness exceptions applies, we need not address Petitioners' alternative arguments on the question of mootness. *See In re Brooks*, 143 N.C. App. at 605-06, 548 S.E.2d at 751-52 (where state officials "argue[d] that at least three of the five exceptions to the mootness doctrine appl[ied]," the court "thoroughly reviewed the officers' arguments and [found] that at least one of the exceptions applies, the public interest exception.").

357-58 (1995) (where group opposed to the death penalty had sought to hold several execution vigils throughout the preceding decade, there was "every reason to believe they intend to hold such vigils at future executions").

DHHS's revocation of its No Review Decision satisfies the first element required by the exception: the challenged action was too short in its duration to be fully litigated prior to its cessation or expiration. The No Review Decision was withdrawn 37 days after Cape Fear filed its contested case, and just two days before Respondents filed their motion to dismiss the contested case petition.

Because Petitioners are deemed "affected person[s]"by statutes governing state regulation of medical facilities, *see* N.C. Gen. Stat. § 131E-188(c), they possessed a statutory right to file a contested case challenging the No Review Decision. *See* N.C. Gen. Stat. §§ 131E-188(a)-(c) ("[A]ffected person[s]" entitled to contested case hearing "[a]fter a decision of the Department to issue, deny or withdraw a certificate of need *or exemption* . . . ." (emphasis added)); *see also Hospice at Greensboro, Inc. v. North Carolina Dep't of Health and Human Servs.*, 185 N.C. App. 1, 17, 647 S.E.2d 651, 662 (2007) ("[T]he CON Section's issuance of a 'No Review' letter is the issuance of an 'exemption' for purposes of section 131E-188(a). Accordingly . . . section 131E-188(b) confers jurisdiction on this Court to hear the incident appeal.").

We also agree with Cape Fear that the second element of the exception – that the controversy is capable of repetition – is met in this case. The ALJ concluded that there is no expectation Cape Fear will be subject to the same action in the future, because that would require "FirstHealth . . . to write the same or substantially same letter again, and the Agency . . . to issue the same decision again." However, we are not required to find that a future dispute will involve the exact same parties and circumstances before applying the exception. *See In re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987) (applying the exception where a school board "*and other local school boards*" were likely to "be repeatedly subject to orders like the one in the case *sub judice*" in future cases involving student disciplinary proceedings) (first emphasis added); *cf. Crumpler v. Thornburg*, 92 N.C. App. 719, 723-24, 375 S.E.2d 708, 711-12 (1989) (exception did not apply where more than two years had passed since plaintiff was "arrested or refused a permit for a *similar* demonstration") (emphasis added).

Respondents cite *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 195 N.C. App. 378, 673 S.E.2d 137 (2009), in

which this Court dismissed a CON challenge as moot, to support their proposition that the "capable of repetition, yet evading review" exception can apply only if there is a reasonable expectation that Cape Fear will face precisely the same action again. *Total Renal Care* is distinguishable from the case at bar. It did not involve the issuance of a no-review decision. Instead, it concerned DHHS's approval of a provider's CON application to construct a new dialysis facility. *Id.* at 382-83, 673 S.E.2d at 140. The CON approval was challenged by a competitor. *Id.* The challenge became moot, however, once the new facility opened, because DHHS was "not authorize[d] . . . to withdraw a CON after the project or facility for which a CON was issued is complete or becomes operational." *Id.* at 381, 673 S.E.2d at 140 (citing N.C. Gen. Stat. § 131E-189). Therefore, because there was "no reasonable expectation that [the petitioner] would be subjected to the *same action* again," the Court held that the "capable of repetition, yet evading review" exception did not apply. *Id.* at 389, 673 S.E.2d at 145.

In contrast to the withdrawal of a CON, which is regulated by statute as noted in *Total Renal Care*, DHHS has discretionary authority to withdraw no-review decisions, as it did here. As this Court noted in *Hospice at Greensboro*, "[t]he 'No Review' process is not set forth in statute or rule, but is a practice DHHS developed over time," based on its understanding of this Court's prior caselaw. *Hospice at Greensboro*, 185 N.C. App. at 6, 647 S.E.2d at 655. There is no indication before us that DHHS plans to change its no-review process, including its ability to withdraw no-review decisions. Since DHHS will continue to accept and evaluate no-review requests, issue no-review decisions, and maintain the ability to later withdraw those decisions, it is reasonable to expect it will exercise its discretion in making those decisions in the future, potentially for the same parties before us. It is also reasonable to expect that there will be future challenges to no-review decisions as exemptions, and because Petitioners are among several types of plaintiff specifically entitled to file such challenges, *see* N.C. Gen. Stat. § 131E-190(h), it is reasonable to expect that future challenges will involve similarly situated parties. Despite Respondents' contention to the contrary, *Total Renal Care* does not require us to examine *only* the likelihood of the exact same action occurring in the future. The *Total Renal Care* Court, in support of its mootness analysis, relied on *Crumpler*, 92 N.C. App. at 723, 375 S.E.2d at 711. *Crumpler* in turn relied on *In re Jackson*, 84 N.C. App. at 170-71, 352 S.E.2d at 452 – a decision that, as noted above, considered similarly situated parties in applying the "capable of repetition, yet evading review" exception to the mootness doctrine.

Furthermore, this Court has previously declined to extend the mootness doctrine to a case in which the no-review process was exercised by DHHS. In *Hospice & Palliative Care Charlotte Region v. N.C. Dep't of Health & Human Servs.*, 185 N.C. App. 109, 648 S.E.2d 284 (2007), a hospice care provider received a favorable no-review decision from DHHS, advising that its proposal to open a new "branch office" did not require a new CON. *Id.* at 110-11, 648 S.E.2d at 285. That decision was subsequently overturned by a final Agency decision. *Id.* However, five days after receiving the initial no-review decision, and four days before the contested case was filed, the provider applied for and received a license to open the branch office, which it then did. *Id.* On appeal, the provider argued that the case became moot once the new office was "properly licensed and fully operational." *Id.* This Court rejected the "broad proposition" that the mere fact of licensure and subsequent office opening mooted the contested case and prevented judicial review to determine whether the action at issue (opening a branch office) was in fact a new institutional health service. *Id.* at 113-14, 648 S.E.2d at 287. Dismissing the appeal as moot "would accelerate the unlawful development of new institutional health services, encouraging health service providers to make questionable projects 'fully operational' *before an 'affected party' has time to challenge the action.*" *Id.* at 113, 648 S.E.2d at 287 (emphasis added).

A conclusion that this case is moot without exception would essentially immunize DHHS from court review of any future no-review decision that it subsequently withdraws. The General Assembly clearly intended to enable certain parties to challenge DHHS exemptions, which we have held include no-review decisions. *See* N.C. Gen. Stat. § 131E-188(a), (c); *Hospice at Greensboro*, 185 N.C. App. at 17, 647 S.E.2d at 662. DHHS cannot evade court review merely by rescinding such decisions amid pending litigation. This would nullify the statutory language granting a right of action to the enumerated "persons aggrieved" who believe a particular no-review decision violates the CON law. Accordingly, we hold that DHHS's discretionary withdrawal of a no-review decision is an action capable of repetition, yet evading review, and therefore Cape Fear's challenge to the No Review Decision at issue in this case was improperly dismissed as moot.

Review on the Merits

[2] Petitioners argue that the ALJ erred in dismissing their case for failure to state a claim upon which relief could be granted pursuant to Rule

12(b)(6) of the North Carolina Rules of Civil Procedure.[5] We disagree because Petitioners have not pointed to any statutory language showing, under the facts presented, that FirstHealth's No Review Request required a new CON, or exceeded or invalidated its existing CON.

A. New Institutional Health Service

First, Petitioners claim that the changes proposed in FirstHealth's No Review Request amounted to a "new institutional health service," requiring a new CON pursuant to N.C. Gen. Stat. § 131E-178(a). Specifically, Petitioners allege that the temporary use of inpatient beds for ED treatment should be considered a new institutional health service under N.C. Gen. Stat. § 131E-176(16)e. We disagree, because the proposed changes in service do not fall within the statutory definition of a "new institutional health service."

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citation omitted). Moreover, "an agency's interpretation of a statute that it is tasked with administering should be accorded some deference by the reviewing tribunal." *AH North Carolina Owner LLC*, __ N.C App. at __, 771 S.E.2d at 547.

"No person shall offer or develop a new institutional health service without first obtaining a certificate of need[.]" N.C. Gen. Stat. § 131E-178(a). Section 131E-176(16)e defines a new institutional health service, in part, as:

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5. Petitioners also argue that they possess an absolute statutory right under N.C. Gen. Stat. § 131E-188(a) to a full evidentiary hearing and that it was thus improper for the ALJ to grant Respondents' Rule 12(b)(6) motion. We find guidance in *Cumberland County Hosp. System, Inc.*, __ N.C. App. at __, 764 S.E.2d at 495. In that case, Cape Fear argued, as it does now, that the ALJ erred in granting a dispositive prehearing motion because Cape Fear possessed an absolute right to a contested case hearing under section 131E-188(a). This Court disagreed, holding that section 131E-188(a) must be considered in light of Chapter 150B of the General Statutes. The Court noted that among the applicable provisions in Chapter 150B, N.C. Gen. Stat. § 150B-23(a)'s "enumeration of specific requirements for a contested case petition indicates that the right to an evidentiary hearing is *contingent upon a valid petition*." *Id.* (emphasis added). The Court also observed that N.C. Gen. Stat. § 150B-33(b)(3a) provides that an ALJ may "[r]ule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure." *Id.* Respondents' motion to dismiss pursuant to Rule 12(b)(6) in this case, like the respondents' motion for summary judgment in *Cumberland County I*, is a prehearing motion authorized by the Rules of Civil Procedure. Accordingly, as before, we reject Cape Fear's argument that the ALJ lacked authority to rule on a dispositive prehearing motion. *See id.* ("Cape Fear's position would lead to the absurd result that an appellant would have an absolute right to a full evidentiary hearing, even if its petition were devoid of any allegations that might justify relief.").

> A change in project that was subject to certificate of need review and for which a certificate of need was issued, if the change is proposed during the development of the project or within one year after the project was completed. For purposes of this subdivision, a change in a project is a change of more than fifteen percent (15%) of the approved capital expenditure amount or the addition of a health service that is to be located in the facility, or portion thereof, that was constructed or developed in the project.

N.C. Gen. Stat. § 131E-176(16)e.

Petitioners argue that the first sentence in the above language requires a new CON if *any* change is proposed to a project within one year after the project's completion. The second sentence, however, defines "change in project" in narrower and explicit terms: either (a) deviation of more than fifteen percent of the approved capital expenditure, or (b) addition of a health service in the facility.[6]

The ALJ's findings that FirstHealth's No Review Request did not propose (a) a change in expenditures, or (b) the addition of a new health service, are supported by competent evidence in light of the whole record, and those findings in turn support the ALJ's legal conclusion that FirstHealth did not propose a new institutional health service requiring a CON.

N.C. Gen. Stat. § 131E-176(9a) defines "health service" as "an organized, interrelated medical, diagnostic, therapeutic, and/or rehabilitative activity that is integral to the prevention of disease or the clinical management of a sick, injured, or disabled person." Rather than proposing the addition of a new "health service," FirstHealth merely sought to expand, on an as-needed and temporary basis, its capacity to offer the same ED services it had always provided to address an overflow issue. The expansion of a presently offered health service is not equivalent to the addition of a new health service. *See Cape Fear Mem'l Hosp. v. N.C. Dep't of Human Resources*, 121 N.C. App. 492, 494, 466 S.E.2d 299, 301

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6. Petitioners point to language in DHHS's No Review Decision to argue that "the Agency includes other changes in its own definition [of a 'change in project'] and does not limit the changes to those enumerated." We note that DHHS is bound by the statutory definition, which it has no authority to expand. *See High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (a state administrative agency " 'possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority' " (quoting *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 359 (2011)).

(1996) (in enacting the CON law, "the legislature clearly did not intend to impose unreasonable limitations on maintaining . . . *or* expanding . . . presently offered health services" (emphasis in original)).

In conjunction with this argument, Petitioners allege that the ALJ erred by not treating all of their factual allegations regarding the nature of FirstHealth's No Review Request as true. *See Burgess*, 326 N.C. at 209, 388 S.E.2d at 136 ("In ruling upon a Rule 12(b)(6) motion, the trial judge must treat the allegations of the complaint as admitted."). Specifically, they contend that the ALJ failed to take the following allegations as true: (1) that "the Agency did not limit the length of time that FirstHealth could use its acute care beds as ED beds," and (2) that "the Agency failed to limit the number of acute care beds[.]"

There is nothing in the final decision indicating that the ALJ did not treat as true the allegations that there was no specific limit on the time or number of beds to be used. Petitioners infer that because neither FirstHealth nor DHHS specified a concrete limit on the number of inpatient beds to be used as ED overflow or the length of time that this practice could continue, DHHS essentially gave FirstHealth permission to permanently convert any number of its inpatient beds into ED beds. While the ALJ was required to treat all factual allegations as true, it was not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005).

Petitioners' inference is not reasonable in light of the whole record; therefore, the ALJ was not required to accept it as true. *See id.* As the ALJ noted, the No Review Request specifically stated that the proposal "will be temporary while FirstHealth considers other long-term actions[.]" Furthermore, the ALJ correctly found that the No Review Decision "specifically referenced the fact that this proposal by FirstHealth was temporary." These findings are supported by substantial evidence, and the mere absence of a specific time limit does not mean that FirstHealth's proposal was not a temporary one.

Accordingly, we affirm the ALJ's legal conclusion that FirstHealth's proposal did not constitute a "new institutional health service" requiring a CON.

B. CON Scope

Petitioners also contend that DHHS's No Review Decision violated N.C. Gen. Stat. § 131E-181(a), which provides that "[a] certificate of need

shall be valid only for the defined scope, physical location, and person named in the application." Because FirstHealth's adjustment in services does not exceed the scope of its CON, we affirm the ALJ's decision overruling this argument.

Petitioners maintain that the Agency's No Review Decision "permitted FirstHealth to operate outside the scope of its CON, [by] allowing FirstHealth to use any or all of its acute care beds as ED beds for an undefined length of time." This, Petitioners claim, violated the plain language of N.C. Gen. Stat. § 131E-181(a), thereby requiring a new CON. We disagree.

Again, we conclude that Petitioners' inferences are unwarranted in light of the whole record. FirstHealth's 2012 CON approved a hospital with eight acute care beds, one operating room, 24-hour ED, with eight ED rooms, diagnostic imaging, and laboratory and pharmacy services. FirstHealth built the hospital according to the terms of the CON. The No Review Request explicitly stated that FirstHealth only sought to use whichever inpatient beds were "available" (indicating a continuation of inpatient services) for ED treatment on a temporary basis "while FirstHealth considers other long-term actions to address the dramatic increase in [ED] visits."

Nothing in the CON law restricts the type of action FirstHealth proposed in its No Review Request, i.e., temporary use of unoccupied inpatient beds as ED treatment beds pending a long-term solution. Contrary to Cape Fear's contention that the No Review Decision permitted FirstHealth to "operate *inter alia* a freestanding ED" with no inpatient beds, FirstHealth never stated or implied it intended to stop offering acute care services at FirstHealth Hoke. The No Review Request merely proposed a temporary measure to ameliorate an urgent problem, in a way that would not circumscribe its inpatient services but would help alleviate emergency room overcrowding.

Accordingly, we affirm the ALJ's conclusion that FirstHealth's proposal did not exceed the scope of its CON.

C. Material Compliance

Finally, Petitioners allege that the Agency's No Review Decision permitted FirstHealth to operate a "materially different facility" from that described in its original CON, in violation of N.C. Gen. Stat. § 131E-181(b). We disagree.

Section 131E-181(b) provides in pertinent part that "[a] recipient of a certificate of need . . . is required to materially comply with the representations made in its application for that certificate of need." N.C. Gen. Stat. § 131E-181(b). In assessing whether the recipient of a CON is operating a service which materially differs from representations made in its application, section 131E-181(b) specifies "cost increases to the recipient, or its successor," as a relevant factor.

We note again that FirstHealth's No Review Request did not propose any new expenditures or change in operating costs in order to implement the short-term measure it described. Further, neither the No Review Request nor the Agency's decision suggested that FirstHealth intended to stop offering inpatient services altogether at FirstHealth Hoke, and contrary to Petitioners' repeated assertions, it is clear that both FirstHealth and DHHS understood the proposal to be a stopgap fix rather than a permanent solution.

We conclude that FirstHealth's proposal in the No Review Request materially complied with the representations made in the 2012 CON, and Petitioners have failed to state a claim under N.C. Gen. Stat. § 131E-181(b).

Conclusion

For the foregoing reasons, we affirm the ALJ's final decision and order of dismissal.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

JOHN DOE 1K AND JOHN DOE 2K, PLAINTIFFS
v.
ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, DEFENDANT

No. COA15-102

Filed 18 August 2015

Statutes of Limitations and Repose—abuse by priest—fraud—failure to take steps to investigate claims

The trial correctly granted summary judge for defendant in an action for fraud arising from the sexual abuse of plaintiff John Doe 1K where the abuse occurred in 1977 and 1978 and plaintiff sued in 2011. Although plaintiff relied on the discovery rule and the contention that defendant had misrepresented that he would be safe under the supervision and care of the priest, plaintiff failed to exercise reasonable diligence in investigating his own claim. The alleged sexual abuse committed in this case is the type of event that triggers inquiry notice; moreover, this was not a case where plaintiff asserted any fraudulent concealment by defendant to hide wrongdoing after the fact.

Appeal by plaintiff from order entered 11 July 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 June 2015.

Tin Fulton Walker & Owen PLLC, by Sam McGee, for plaintiff-appellant.

McGuireWoods LLP, by Joshua D. Davey, L.D. Simmons, II, and Monica E. Webb, for defendant-appellee.

DIETZ, Judge.

Plaintiff John Doe 1K[1] sued the Roman Catholic Diocese of Charlotte for various tort claims stemming from sexual abuse allegedly committed by Father Kelleher, a Catholic priest affiliated with the Diocese, in 1977 and 1978. Doe concedes that he did not repress the memories of the abuse and has known of his injuries since they occurred.

1. John Doe 1K is a pseudonym used by Plaintiff to protect his privacy. Joe Doe 2K, another plaintiff at the trial court level, is not a party to this appeal.

In 2011, more than 30 years after the alleged abuse, Doe sued the Diocese. His complaint relied on legal theories involving fraud—in essence, that before the abuse occurred, the Diocese misrepresented that Doe would be safe and free from sexual abuse under the supervision and spiritual care of Father Kelleher. Doe relies on fraud-related claims because they are subject to the "discovery rule," which states that the statute of limitations does not begin to run until the plaintiff should have discovered the false statements in the exercise of reasonable diligence. Here, Doe argues that he could not have discovered that the Diocese lied to him until 2010, when Father Kelleher was arrested and other alleged victims came forward.

The trial court rejected this argument and entered summary judgment against Doe on the ground that his claims were barred by the statute of limitations. For the reasons discussed below, we agree. A plaintiff cannot rely on the discovery rule unless he has exercised reasonable diligence to discover the fraud. Here, Doe's theory of liability rests on the Diocese's false assurances in 1977 and 1978 that he would be safe with Father Kelleher. The very fact that Father Kelleher abused him, as Doe alleges, put him on notice that the Diocese's assurances may have been false. But Doe concedes that, after he reached the age of majority in 1980, he did not do anything to investigate the Diocese. Doe also concedes that the Diocese never concealed anything from him or misrepresented its actions to him after the fact—indeed, Doe never had any contact with the Diocese again after the alleged abuse.

Moreover, the record indicates that Doe knew many years before his lawsuit that the Diocese's alleged representations to him may have been false. For example, in 2006, Doe posted on an internet forum that he had been "molested" by a priest and wanted to "seek retribution from the catholic church." This undercuts Doe's claim that he had no reason to suspect the Diocese of wrongdoing, and to begin investigating his potential claims, until 2010 when he learned there were other victims of the same priest.

As a result, under settled North Carolina law, and consistent with every other state to address this issue, we hold that Doe's claims are barred by the statute of limitations because Doe did not exercise reasonable diligence in investigating them after being put on inquiry notice that the Diocese's representations to him may have been false. Accordingly, we affirm the trial court's entry of summary judgment.

Facts and Procedural History

The following recitation of the facts relies on evidence that is either undisputed or is disputed but viewed in the light most favorable to Plaintiff as the party opposing the motion for summary judgment. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). We recognize that the Diocese disputes many of these facts, but we must accept them as true for purposes of summary judgment. *Id.* As explained below, however, even when all facts are viewed in the light most favorable to Plaintiff, he cannot overcome the Diocese's statute of limitations defense as a matter of law.

Sometime around 1977, Plaintiff John Doe 1K was fourteen years old and having difficulty adjusting after his family's recent move to North Carolina. Doe's grandmother suggested that he meet with Father Kelleher, a priest affiliated with the Roman Catholic Diocese of Charlotte. Doe met Kelleher alone in the rectory at Our Lady of the Annunciation in Albemarle. During Doe's second meeting with Kelleher, Kelleher told him to lie down on the floor. Kelleher then knelt down next to him. They discussed Doe's family problems and then Kelleher began rubbing Doe's chest, arms, and legs. Kelleher then unbuttoned Doe's pants and massaged Doe's penis.

Doe met with Kelleher for counseling seven or eight times over a six toeight month period in 1977, and Kelleher molested him during four to six of those meetings. The abuse continued until Doe's family moved to Winston-Salem in early 1978. Doe did not tell anyone about his sexual abuse by Kelleher at the time because he was "terrified and ashamed." After being sexually abused by Kelleher, Doe suffered from increased emotional problems, including depression and anxiety, for which he sought medical treatment and counseling.

Although Doe did not report his abuse at the time, he testified that he always remembered the abuse and did not repress the memory. Doe also testified that no one employed by or speaking on behalf of the Church ever told him that he should not "speak up and report abuse by a priest."

In September 2005, Doe was hospitalized and reported "Physical/emotional/sexual abuse" by "father – priest." The hospital record notes that Doe reported the abuse "2 yrs. ago" to an "atty.," and the outcome was "statute ran out." At some point between 2005 and 2008, Doe contacted attorney Jeff Anderson in Minneapolis regarding possible civil claims against the Diocese. Anderson told Doe that "the statute of limitations had run out . . . a long time ago."

In March 2006, Doe posted on an internet message board maintained by Survivors Network of Those Abused by Priests, writing:

> i am searching for any information regarding Fr Joseph Kelleher. i was repeatedly abused and molested by this priest from age 14-15. i am trying to find out how to expose his crimes, and seek retribution from the catholic church. i have been told the statute of limitations in NC is 7 years more or less. my abuse occurred in 1976-1977.
>
> i am wondering if there are more victims and if there has been any actino [sic] taken against this guy.

Around the same time, Doe also conducted internet research on the statute of limitations for civil claims against Kelleher and the Diocese.

In his deposition, Doe testified that at the time he made the March 2006 Survivors Network post, he knew that he had been abused by Kelleher, that he had been damaged by the abuse, and that he wanted to seek retribution against Kelleher and the Diocese. He stated that the only reason he had not filed a lawsuit before 2006 was that the lawyer he contacted would not take his case. He further testified that neither the Diocese nor Father Kelleher had done anything to prevent him from filing a lawsuit.

On 10 September 2009, Doe reported his sexual abuse by Father Kelleher to the Albemarle Police Department. Doe testified that he made the decision to report his abuse to the police "impulsively" after a "personal epiphany" and that his decision was not prompted by any new information or advice. Law enforcement arrested Kelleher on 8 July 2010. Following news reports of Kelleher's arrest, other alleged victims came forward.

The day after he reported Father Kelleher to the police, Doe posted on a Survivors Network message board:

> yesterday i started the process of filing charges in Albemarle, where the abuse occurred. i am now looking for an attorney to represent me. i know the statute of limitations has run out, but i intend to step forward and make it known what this f*** did. i want him to pay in any way possible.

At oral argument, the parties informed the Court that Father Kelleher died in 2014, before he had been convicted of any charges.

On 28 September 2011, two years after Doe first reported his abuse claims to police, Doe filed a complaint against the Diocese. On 26 July 2012, Doe filed an amended complaint, asserting claims for constructive fraud, breach of fiduciary duty, fraud, and fraudulent concealment.[2] Doe's claims alleged that the Diocese "took advantage of and abused" its "relationship[ ] of trust and confidence with [Doe]," violated its fiduciary duty to provide a "reasonably safe and secure environment," breached its "duty to warn and to disclose and protect [Doe] from sexual abuse and exploitation," and "made false representations to and concealed material facts" from Doe.

During discovery, Doe testified in a deposition that he was not aware of any "fact or piece of information that the Diocese knew and concealed from" him that, had he known, would have enabled him to file his lawsuit earlier. When asked, "Did the Diocese misrepresent anything to you that caused you to delay in filing a lawsuit" and "Did the Diocese do or fail to do anything that caused you to delay in filing your lawsuit," Doe responded, "No." Doe testified that he "didn't interact with the Diocese whatsoever" after he was abused, and the Diocese had "no opportunity" to make misrepresentations to him after his alleged abuse. When asked why he delayed in investigating and filing his lawsuit against the Diocese, Doe stated, "there's really no way to tell why my brain worked that way."

On 20 December 2013, the Diocese filed a motion for summary judgment, arguing that Doe's claims accrued at the time he was abused, were tolled until he turned eighteen, and are now barred by the applicable statute of limitations. Doe argued in response that he could not reasonably have discovered his fraud- and misrepresentation-related claims against the Diocese until other alleged victims of Father Kelleher's abuse came forward. Doe also argued that equitable estoppel tolled the statute of limitations.

The trial court entered an order granting the Diocese's motion for summary judgment on 11 July 2014. In the same order, the trial court also granted several other motions brought by the Diocese to exclude evidence and testimony submitted by Doe, including the testimony of an expert on the Catholic Church who sought to testify about the Church's procedure and Canon law. Doe timely appealed the trial court's judgment.

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2. Doe's complaint also included claims for negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, and intentional infliction of emotional distress, but Doe subsequently abandoned these claims.

Analysis

I. Summary Judgment and Statute of Limitations

Doe argues that his claims are not barred by the statute of limitations. To address this argument, we must first address Doe's theory of liability against the Diocese.

All of Doe's claims against the Diocese are fraud-related or misrepresentation-related claims. The gist of Doe's claims is that the Diocese falsely represented that Doe would be safe and free from sexual abuse while under the supervision and spiritual care of Father Kelleher. Doe contends that the Diocese hid knowledge of Father Kelleher's abusive nature from him to protect the church and its interests.

Doe's fraud and misrepresentation legal theories are critical to his case because Doe concedes that he has known about Father Kelleher's alleged abuse—and his resulting injuries—since that abuse occurred nearly forty years ago. As a result, Doe relies entirely on claims that are subject to the "discovery rule" with regard to the running of the statute of limitations. Under the discovery rule, each of Doe's claims has a limitations period that begins to run when the plaintiff first becomes aware of facts and circumstances that would enable him to discover the defendant's wrongdoing in the exercise of due diligence. *See Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005).

Doe argues that "[a]t the time of the abuse in 1977 and 1978, Plaintiff was not aware of any evidence suggesting that . . . the Diocese knew about and ignored Kelleher's pattern of abusing children." Doe contends that he did not discover this information until 2010, when other victims of abuse by Father Kelleher came forward. "Only then," according to Doe, "did Plaintiff become aware that Kelleher was a serial abuser with many victims."

Doe's argument fails because the record demonstrates the he was on inquiry notice nearly three decades before these other victims came forward, but failed to exercise reasonable diligence in investigating his own claim. Under the discovery rule, a plaintiff has a duty to exercise reasonable diligence to discover the fraud or misrepresentations that give rise to his claim. *Forbis v. Neal*, 361 N.C. 519, 525, 649 S.E.2d 382, 386 (2007). Doe argues that there is a special relationship between him and the Diocese and that he would never assume the church would lie to him. But under North Carolina law, even when there is a special relationship between the plaintiff and the defendant, the duty of inquiry begins

"when an event occurs to excite the aggrieved party's suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud." *Id.*

The alleged sexual abuse committed by Father Kelleher is the type of event that triggers this inquiry notice. As a number of other jurisdictions have acknowledged, when a plaintiff is abused by a priest affiliated with a particular diocese—as is the case here—that triggers the duty to investigate the diocese. *See*, *e.g.*, *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 156 P.3d 806, 811 (Utah 2007); *see also Kelly v. Marcantonio*, 187 F.3d 192, 200-01 (1st Cir. 1999); *Mark K. v. Roman Catholic Archbishop of Los Angeles*, 67 Cal. App. 4th 603, 612-13 (Cal. Ct. App. 1998); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 774-75 (D.C. 1998); *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 273-77 (Ohio 2006); *Baselice v. Franciscan Friars Assumption BVM Province*, Inc., 879 A.2d 270, 277-79 (Pa. Super. Ct. 2005). Put another way, because Doe's theory of liability rests on the Diocese's false assurances that he would be safe with Father Kelleher, the very fact that he was not safe put Doe on inquiry notice that the Diocese's representations may have been false.

Importantly, this is not a case where Doe asserts any fraudulent concealment by the Church to hide its wrongdoing after the fact. Other jurisdictions have recognized that fraudulent concealment precludes a claim that the victim failed to investigate his claims with reasonable diligence. *See*, *e.g.*, *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 463 (Tenn. 2012). Here, however, Doe conceded under oath that the Diocese did not conceal any facts from him. In Doe's deposition testimony, when asked, "Did the Diocese misrepresent anything to you that caused you to delay in filing a lawsuit" and "Did the Diocese do or fail to do anything that caused you to delay in filing your lawsuit," Doe responded, "No." No other evidence in the record supports a claim of concealment; indeed, as explained below, Doe never had *any* contact with the Diocese following the alleged abuse. Thus, under settled statute of limitations precedent, Doe was on inquiry notice when he reached the age of majority and was required to take reasonable steps to investigate the representations made by the Diocese.

The record also establishes that Doe did not take reasonable steps to investigate his potential claims. Doe concedes that, after he reached the age of majority, he did not do *anything* to investigate the Diocese. Doe testified that he "didn't interact with the Diocese whatsoever" after he was abused. When Doe was asked why he did not investigate or pursue claims against the Diocese earlier, Doe stated, "there's really no way

to tell why my brain worked that way." Moreover, the record indicates that Doe knew many years before his lawsuit that the Diocese's alleged representations to him may have been false. For example, in 2006, Doe posted on an internet forum that he had been "molested" by a priest and wanted to "seek retribution from the catholic church." This undercuts Doe's claim that he had no reason to suspect the Diocese of wrongdoing until 2010 when he learned there were other victims of the same priest.

In sum, because Doe was on inquiry notice nearly three decades before filing suit, but did not take any reasonable steps to investigate his claims, the trial court correctly held that the statute of limitations barred Doe's claims as a matter of law.

Doe also argues that equitable estoppel prevents the Diocese from relying on the statute of limitations because the Diocese "engaged in extensive acts of concealment and misrepresentations of material facts . . . so that victims . . . would not bring civil suits against" it. We reject this argument because, as explained above, there is no evidence in the record that the Diocese concealed anything from Doe, or misrepresented anything to him, after his alleged abuse.

"In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *A.H. Beck Found. Co., Inc. v. Jones Bros., Inc.*, 166 N.C. App. 672, 683, 603 S.E.2d 819, 826 (2004) (internal quotation marks omitted). But in Doe's deposition testimony, he stated that the Diocese did *not* misrepresent anything to him or conceal anything from him that caused him to delay in filing a lawsuit. Indeed, as explained above, Doe testified that he "didn't interact with the Diocese whatsoever" after he was abused, and thus the Diocese had "no opportunity" to make misrepresentations to him in order to conceal their alleged wrongdoing. In light of Doe's own testimony, and the lack of any other record evidence of after-the-fact concealment or misrepresentations by the Diocese directed at Doe, the trial court did not err in rejecting this argument as a matter of law.

II. Evidentiary Rulings

Doe also argues that the trial court erred in granting the Diocese's motion to limit the testimony of Doe's expert witness and its motion *in limine* excluding other related evidence. We need not address these issues because the testimony and evidence Doe sought to admit does not relate to the issue of whether Doe exercised reasonable diligence in investigating his claims against the Diocese. As a result, the admission or exclusion of that evidence would not affect our holding that the trial

court properly entered summary judgment based on expiration of the statute of limitations. Accordingly, any error in these evidentiary rulings is harmless. *See* N.C. R. Civ. P. 61 (2014).

Conclusion

For the reasons discussed above, we hold that Doe's claims against the Roman Catholic Diocese of Charlotte are barred by the applicable statutes of limitations. Accordingly, we affirm the trial court's entry of summary judgment.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

PATRICIA L. HEAD, Plaintiff
v.
ADAMS FARM LIVING, INC., Defendant

No. COA14-1353

Filed 18 August 2015

1. Employer and Employee—religious accommodation—flu shot

Defendant employer did not have a legal duty to reasonably accommodate plaintiff's religious beliefs where plaintiff worked in a skilled nursing and healthcare facility which suffered a flu outbreak and required staff to have a flu shot. Although plaintiff asserted that the duty of reasonable accommodation under Title VII of the Civil Rights Act of 1964 should be read into N.C.G.S. § 143-422.2, the North Carolina statute did not impose a corresponding duty of reasonable accommodation by an employer.

2. Employer and Employee—flu shot—disparate treatment

Applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, there was no disparate treatment where plaintiff worked in a skilled nursing and healthcare facility which suffered a flu outbreak, all staff were required to have a flu shot, plaintiff refused and was terminated, and others who refused were not terminated.

Appeal by plaintiff from order entered 5 September 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 7 April 2015.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Thomas A. Farr and J. Allen Thomas, and Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant-appellee.

DAVIS, Judge.

Patricia L. Head ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Adams Farm Living, Inc. ("Defendant") on her claim that she was wrongfully discharged in violation of North Carolina public policy due to her religious beliefs. After careful review, we affirm.

Factual Background

Defendant operates a skilled nursing and healthcare facility ("the Facility") in Jamestown, North Carolina. Plaintiff served as the Activities Director for the Facility from 13 November 2006 until her discharge on 10 December 2012. In performing her role as Activities Director, Plaintiff regularly came into contact — and interacted — with residents of the Facility, the majority of whom were elderly.

Plaintiff is a Seventh-Day Adventist. As a member of this religious denomination, she adheres to many of the Levitical dietary laws and consequently cannot "receiv[e] any organic material derived from pigs" into her body. However, she can consume eggs.

In November 2012, the Facility experienced a flu outbreak. In response to the outbreak, the Guilford County Health Department recommended to Patti Anderson ("Anderson"), the Facility's Administrator, and Dr. Michael Robson ("Dr. Robson"), its Medical Director, that the Facility's employees and contractors receive the flu vaccine. On 2 December 2012, Anderson posted a notice mandating that all of the Facility's employees receive a flu shot. The notice stated, in pertinent part, as follows:

All Staff

INFLUENZA VACCINATION

The vaccine is for your protection, the protection of your family and community AND the protection of our resident family. The flu has already resulted in two deaths in Forsyth County. Let's all work together to protect our community.

MANDATORY VACCINATION

- All Adams Farm staff and contractors are required to have the flu vaccine no later than 11:59 p.m. Wednesday, December 5, 2012.
- Declining is not an option. This is a dead virus and the only standard reason for not receiving [sic] is an allergy to eggs.
- THEREFORE, to not receive the vaccine would require a physician statement dated between today and Wednesday December 5, 2012, stating the *specific* medical justification.
- Failure to receive the vaccination or provide the required documentation will result in being taken off the work schedule.

On 3 December 2012, Plaintiff obtained a letter from Dr. W. P. Hollar ("Dr. Hollar"), a chiropractor (who is also Plaintiff's father), asking that she be exempted from the vaccine requirement. The letter stated, in pertinent part, as follows:

To Whom it May Concern:

I am respectfully submitting this document to help you understand why [Plaintiff] is respectfully declining to take the flu shot at your skilled nursing facility. She has told me that you have made it mandatory to all your employees. That is why she has ask [sic] for my guidance in this matter.

It is my opinion that, because in [Plaintiff's] childhood she suffered from a [sic] autoimmune disease that debilitated her, so much that she was taken out of school for several months and has had several exacerbations in her adult life

> as well. I don't want her to take the risk and [sic] her fear of compromising her immune system. [Plaintiff] will be willing to wear a face mask if necessary I am sure. If I may be of any further help in this matter, please let me know.
>
> Thank you in advance for your understanding in this matter and your inconvenience.

Plaintiff submitted Dr. Hollar's letter to Anderson during a meeting between the two of them on or about 4 December 2012 in which Plaintiff explained that she "did not want to take the vaccine, and if it had swine stuff in it, no, I did not [want to take the vaccine], because of my religion." During the meeting, Plaintiff also provided Anderson with an Internet article titled "Pastor: Vaccines Are Not Kosher." The article stated, in part, that "[i]f you stay clear of pork and shellfish, as the Bible instructs, you need to know flu vaccines include: animal tissues and fluids forbidden in the Bible . . . Vaccines include horse blood, rabbit brain, dog kidney, monkey kidney, pig blood, and porcine (pig) protein/tissue among other things. . . ." In response, Anderson "pointed out [to Plaintiff] that the flu shot we were asking her to take was egg based and that the vaccine was not for the swine flu. [Plaintiff] agreed she was not allergic to eggs and admitted she ate eggs."

Anderson informed Plaintiff that she would consider Plaintiff's request to be exempted from the vaccine policy along with the letter and article Plaintiff had provided. Anderson then consulted with Dr. Robson regarding Plaintiff's request. Dr. Robson told Anderson that Plaintiff's childhood illness "actually made it even more important for her own health that she receive a flu shot." Dr. Robson also offered to meet with Plaintiff, telling Anderson that Plaintiff could "[c]ome and talk to me anytime" about her concerns with taking the flu shot.

On 6 December 2012, Anderson had another meeting with Plaintiff. At this meeting, Plaintiff was informed that Anderson could not accept Dr. Hollar's letter as she did not consider it to be a "physician statement" as required by the vaccine notice. Anderson further informed Plaintiff that based on her own research she had learned that the Seventh-Day Adventist Church – doctrinally – takes no position on the propriety of receiving flu shots.

Plaintiff reiterated her refusal to take the flu shot, stating — among other things — that "[she] didn't want to take the flu shot based upon [her] views of [her] own health" and that her "dietary concerns . . . w[ere] personal to [her]." Anderson informed Plaintiff of Dr. Robson's

offer to meet with her, but Plaintiff declined the offer. Anderson also told Plaintiff she could have additional time to obtain a letter from a physician providing a medical justification for her refusal to be vaccinated.

On 7 December 2012, Anderson called Plaintiff at her home "in another and final attempt to assure that [Plaintiff] had sufficient opportunity to consider her decision and seek medical doctor input[.]" Anderson then "reviewed for a final time [Plaintiff's] position as [she] understood it."

Four days later, Plaintiff called and spoke with Anderson again. Plaintiff informed Anderson that she would not agree to take the flu shot. Anderson then terminated her employment with Defendant.

Three other employees of Defendant provided medical notes stating that they could not take the flu shot because they were either allergic to eggs or had experienced an adverse reaction to a flu vaccination in the past. Based on these notes, these employees were excused from the vaccine requirement. One other employee resigned rather than be vaccinated.

On 28 January 2013 — over a month after her discharge — Plaintiff obtained a letter from Dr. Stephen Leighton ("Dr. Leighton"), a licensed physician, stating that he had advised Plaintiff not to take the flu shot because receiving the vaccination could result in a recurrence of the autoimmune disease she experienced as a child. Plaintiff did not provide this letter to Anderson. Nor did she make any request that Defendant reinstate her to her former job.

On 30 October 2013, Plaintiff filed a complaint in Guilford County Superior Court asserting claims against Defendant for wrongful discharge in violation of North Carolina public policy. In her complaint, she alleged that her discharge violated North Carolina's public policies against religious discrimination and interference with the physician-patient relationship. On 30 December 2013, Defendant filed an answer to the complaint.

On 16 July 2014, Defendant filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In support of its motion, Defendant submitted an affidavit from Anderson, the depositions of Plaintiff and Dr. Robson, and a number of exhibits. Defendant filed an amended motion for summary judgment on 15 August 2014 for the purpose of supplementing the record with an additional affidavit from Anderson. In response to Defendant's motion, Plaintiff submitted her own affidavit.

A hearing on Defendant's amended motion for summary judgment was held before the Honorable R. Stuart Albright on 2 September 2014. On 5 September 2014, Judge Albright entered an order granting summary judgment in favor of Defendant. Plaintiff filed a timely notice of appeal to this Court.

Analysis

Plaintiff's sole argument on appeal is that the trial court erred in granting Defendant's motion for summary judgment. She contends that because (1) Defendant failed to provide a reasonable accommodation for her religious beliefs; and (2) she produced sufficient evidence to create a jury question under a disparate treatment theory as to whether her discharge resulted from religious discrimination, the trial court's order should be vacated and the case remanded for trial.[1]

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, __ N.C. App. __, __, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted). "The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, __ N.C. App. __, __, 769 S.E.2d 214, 216 (2015) (citation omitted).

I. Wrongful Discharge in Violation of Public Policy

It is well settled that "[i]n North Carolina, absent an employment contract for a definite period of time, both employer and employee are

1. Plaintiff does not challenge the trial court's entry of summary judgment as to her claim that her discharge violated North Carolina's public policy against interfering with the physician-patient relationship. Therefore, that issue is not before us in this appeal. *See* N.C.R. App. P. 28(b)(6); *Wilkerson v. Duke Univ.*, __ N.C. App. __, __, 748 S.E.2d 154, 161 (2013) ("Plaintiff makes no argument on appeal that the trial court erred in granting summary judgment in favor of defendants with regards to his claims of public stigmatization and negligence. These arguments are deemed abandoned.").

generally free to terminate their association at any time and without reason. An exception to the employment-at-will doctrine exists when an employee is discharged in contravention of public policy." *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 321-22, 528 S.E.2d 368, 370 (2000) (internal citations and quotation marks omitted).

In order to state such a claim, "an employee must plead and prove that the employee's dismissal occurred for a reason that violates public policy." *Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 259, 580 S.E.2d 757, 761-62 (2003) (citation, quotation marks, and alterations omitted). Furthermore, "[t]he public policy exception to the at-will employment doctrine is confined to the express statements contained within our General Statutes or our Constitution." *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005).

In her appeal, Plaintiff asserts that her discharge violated North Carolina's public policy against religious discrimination as articulated by our General Assembly in N.C. Gen. Stat. § 143-422.2, which states, in pertinent part, that

> [i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143-422.2 (2013).

A. Duty to Accommodate

[1] Plaintiff contends that Defendant had a legal duty to reasonably accommodate her religious beliefs and failed to do so. In making this argument, Plaintiff asserts that because a duty of reasonable accommodation exists under Title VII of the Civil Rights Act of 1964, such a requirement should likewise be read into N.C. Gen. Stat. § 143-422.2.

Plaintiff is correct that employers generally have a duty — subject to certain exceptions — to reasonably accommodate the religious beliefs of their employees under Title VII. 42 U.S.C. § 2000e-2 provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion[.]" 42 U.S.C. § 2000e-2(a)(1) (2013). This statutory provision operates in conjunction with 42 U.S.C. § 2000e(j), which states, in part,

that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (2013).

However, we have previously held that N.C. Gen. Stat. § 143-422.2 does *not* impose a corresponding duty of reasonable accommodation by an employer. In *Simmons*, the plaintiff-employee, a welder, brought a wrongful discharge claim against his former employer alleging that he was terminated in violation of North Carolina public policy as articulated in N.C. Gen. Stat. § 143-422.2 due to a respiratory condition that rendered him disabled and unable to perform his job duties. *Simmons*, 137 N.C. App. at 319-20, 528 S.E.2d at 369. The defendant moved for summary judgment, asserting that the plaintiff was discharged not because of his medical condition but rather because of his poor job performance. *Id.* at 320-21, 528 S.E.2d at 369. The plaintiff contended that any deficiencies in his job performance were the result of the defendant's failure to make reasonable accommodations for his respiratory condition by, for example, providing him with breathing masks, ceiling fans, and other breathing aids that would have allowed him to perform his job duties despite his disability. *Id.* at 320, 528 S.E.2d at 369. He argued that the defendant's failure to reasonably accommodate his disability violated N.C. Gen. Stat. § 143-422.2. *Id.*

On appeal, we affirmed the trial court's entry of summary judgment in favor of the defendant. In rejecting the plaintiff's reasonable accommodation argument, we held that

> plaintiff's concern with the defendant's alleged failure to provide reasonable accommodations to the plaintiff is misplaced. Had plaintiff filed a claim under N.C. Gen. Stat. § 168A-11, which provides a civil cause of action under the NCHPPA, such a discussion may have been appropriate. However, since plaintiff's claim is based on wrongful discharge in violation of public policy under N.C. Gen. Stat. § 143-422.2, a discussion of reasonable accommodations . . . is irrelevant.

Id. at 323, 528 S.E.2d at 371.

Therefore, *Simmons* establishes that no duty of reasonable accommodation exists under N.C. Gen. Stat. § 143-422.2. While *Simmons* concerned a claim of discrimination based on disability rather than religion, this distinction is irrelevant given that the articulation of public policy

set out in N.C. Gen. Stat. § 143-422.2 prohibits discrimination in employment based on both disability and religion. Plaintiff's argument on this issue is therefore overruled.

B. Disparate Treatment

[2] Plaintiff next argues that even if no duty of reasonable accommodation existed, the trial court nevertheless erred in granting Defendant's motion for summary judgment based on a disparate treatment theory. In analyzing Plaintiff's allegations of disparate treatment, we apply the analytical framework articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668 (1973).

> The Supreme Court of the United States in *McDonnell Douglas* established evidentiary standards to be applied governing the disposition of an action challenging employment discrimination. First, the claimant carries the initial burden of establishing a prima facie case of discrimination. The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. If a legitimate, nondiscriminatory reason has been articulated, the claimant has the opportunity to show that the employer's stated reason for the claimant's rejection was in fact pretext.
>
> The North Carolina Supreme Court has explicitly adopted the Title VII evidentiary standards in evaluating a state claim under § 143-422.2 insofar as they do not conflict with North Carolina statutes and case law.

Johnson v. Crossroads Ford, Inc., __ N.C. App. __, __, 749 S.E.2d 102, 107-08, *disc. review denied*, 367 N.C. 283, 752 S.E.2d 471 (2013) (internal citations, quotation marks, and brackets omitted).

In applying this test, "the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee." *Id.* at __, 749 S.E.2d at 108 (citation, quotation marks, and brackets omitted). Therefore, we must apply the *McDonnell Douglas* test in reviewing the trial court's entry of summary judgment for Defendant.

1. Prima Facie Case

Our Supreme Court has observed that "[t]he burden of establishing a prima facie case of discrimination is not onerous. It may be established

in various ways." *N.C. Dep't of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983) (internal citation omitted).

In *Johnson*, we held that "[i]n order to establish a prima facie case of disparate treatment pursuant to N.C.G.S. § 143-422.2, plaintiff must show by a preponderance of the evidence that: (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." *Johnson*, __ N.C. App. at __, 749 S.E.2d at 108 (citation and brackets omitted).

> When a prima facie case is established, a presumption arises that the employer unlawfully discriminated against the employee. The showing of a prima facie case is not equivalent to a finding of discrimination. Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations.

Gibson, 308 N.C. at 138, 301 S.E.2d at 83 (internal citations omitted).

As a Seventh-Day Adventist, Plaintiff was a member of a protected class. *See Vanderburg v. N.C. Dep't of Revenue*, 168 N.C. App. 598, 609-11, 608 S.E.2d 831, 839-40 (2005) (recognizing religious affiliation as constituting membership in protected class in employment discrimination context). Furthermore, she contends — and Defendant does not dispute — that she was qualified for her position and was satisfactorily performing her job duties. Finally, she was terminated for her refusal to take the flu vaccine while three other employees who were not Seventh-Day Adventists were allowed to keep their jobs despite not taking the vaccine.

Therefore, Plaintiff has made out a *prima facie* case of religious discrimination. *See Vanderburg*, 168 N.C. App. at 610-11, 608 S.E.2d at 840 (where plaintiff "offered substantial evidence showing his dismissal was not based on his alleged unacceptable job performance" and that termination was allegedly based, in part, on his religious expression and practices, "evidence was sufficient to show a *prima facie* case of discrimination . . . based on his religious practices").

2. Legitimate Nondiscriminatory Reason

It is well settled that

> [o]nce a prima facie case of discrimination is established, the employer has the burden of producing evidence to rebut the presumption of discrimination raised by the prima facie case. . . . The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination.

Gibson, 308 N.C. at 138, 301 S.E.2d at 83 (emphasis omitted).

"To rebut the presumption of discrimination, the employer must clearly explain by admissible evidence, the nondiscriminatory reasons for the employee's rejection or discharge. The explanation must be legally sufficient to support a judgment for the employer. If the employer is able to meet this requirement, the prima facie case, and the attendant presumption giving rise thereto, is successfully rebutted." *Id.* at 139, 301 S.E.2d at 84 (internal citations omitted).

In the present case, Defendant has clearly established a nondiscriminatory reason for Plaintiff's discharge. In her affidavit, Anderson discussed the circumstances giving rise to the Facility's requirement that its employees receive the flu vaccination.

> 4. In late November 2012, we had a flu "outbreak" at our facility as defined by the Center for Disease Control ("CDC"). Our residents are highly vulnerable to respiratory illnesses due to their age and/or multiple and complex comorbidities. These comorbidities, when combined with acute respiratory illness, can cause our residents to suffer serious medical complications and can even lead to death.
>
> 5. To protect residents from the serious health dangers associated with a flu outbreak, the CDC, through its published bulletins, and the Guilford County Health Department, through its direct communications with both me and our Medical Director, strongly recommended that a flu shot be required for employees and contractors working at healthcare facilities who come in contact with residents.
>
> . . . .

> 22. As a result of the flu outbreak in November-December 2012, 31 residents (36% of all residents) were diagnosed with upper respiratory infection (probable flu), 4 residents were hospitalized, and, based on the Medical Director's review, 3 residents died for reasons related to the outbreak. It was only after it was determined that our facility had a verified influenza outbreak per CDC guidelines that the decision to require employee vaccination was made and the mandatory vaccination policy was implemented.

Anderson's affidavit further related the entire sequence of events leading up to Plaintiff's discharge, including Anderson's efforts to resolve the issues raised by Plaintiff's refusal to take the vaccine. Anderson testified that after her initial meeting with Plaintiff, she "consulted with [her] supervisor, Debbie Combs-Jones. [Combs-Jones] and [Anderson] agreed that [Plaintiff] needed to provide . . . a note from a medical doctor in order to be excused from taking a flu shot. This standard applied to all employees who asked to be excused from taking a flu shot."

Anderson's affidavit also stated the following:

> At approximately 3 p.m. on Friday December 7, 2012, in another and final attempt to assure that [Plaintiff] had sufficient opportunity to consider her decision and seek medical doctor input, I called [Plaintiff] at her home and reviewed for a final time [Plaintiff's] position as I understood it. Ms. Connie Ostler, our facility human resources professional, was present for this discussion. The following points were reviewed: 1) [Plaintiff] had no justification that allowed her an exception; 2) [Plaintiff] did not have an allergy to eggs; 3) [Plaintiff] had been encouraged to seek advice from a medical doctor; 4) [Dr. Robson] was willing to answer any questions [Plaintiff] had about the actual vaccine; 5) [Plaintiff] acknowledged that she did not state a medical justification that made her eligible for an exception by the CDC; 6) [Plaintiff] had the justification for the requirement of the vaccination explained to her, including the fact that [Plaintiff's] position as Activities Director required that she have ongoing contact with the residents of [the Facility]; 7) [Plaintiff] had been offered an opportunity to think about her decision before committing to a final decision. [Plaintiff] agreed to the above points of discussion. [Plaintiff] further stated that she did not wish to speak to [Dr. Robson] because he had "already made up his mind."

Anderson's unambiguous testimony established that Plaintiff was discharged because "she refused to take a flu shot without providing a medical excuse from a medical doctor . . . [H]er religion played no role in [the] decision." Accordingly, Defendant has met its burden of articulating a nondiscriminatory reason for her discharge. *See Johnson*, __ N.C. App. at __, 749 S.E.2d at 109 ("Defendant rebutted plaintiff's [*prima facie*] case [for wrongful discharge in violation of North Carolina public policy] by producing evidence of a legitimate, nondiscriminatory reason for plaintiff's dismissal[.]").

3. Pretext

Because Defendant met its burden of setting forth a legitimate nondiscriminatory reason for discharging Plaintiff, the burden shifts back to Plaintiff to show that Defendant's asserted ground is merely a pretext for discrimination. *See Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 791, 618 S.E.2d 201, 207 (2005) ("If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual."). "To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's [nondiscriminatory] motive." *Manickavasagar v. N.C. Dept. of Pub. Safety*, __ N.C. App. __, __, 767 S.E.2d 652, 659 (2014) (citation and quotation marks omitted).

Plaintiff makes several arguments in an attempt to show that Defendant's asserted nondiscriminatory reason for her discharge was pretextual. Based on our thorough review of the entire record, we conclude that she has failed to meet her burden on this issue. We address each of her arguments in turn.

First, she contends that by refusing to accept Dr. Hollar's letter, Defendant treated her differently than the three employees who were excused from the vaccine requirement based on their submission of letters from medical providers. The flaw with her argument is that the 2 December 2012 notice explaining the mandatory vaccination policy to Defendant's employees required a "physician statement" containing a "specific medical justification" in order to be exempt from the vaccine requirement. We believe that Defendant could have reasonably determined that Dr. Hollar's letter did not comply with these requirements.

It is undisputed that Dr. Hollar was a chiropractor. Our General Assembly has made clear that

> [a]ny person obtaining a license from the Board of Chiropractic Examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, *but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery.*

N.C. Gen. Stat. § 90-151 (2013) (emphasis added). "Chiropractic" is statutorily defined as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body." N.C. Gen. Stat. § 90-143(a) (2013). North Carolina law recognizes the existence of limitations on a chiropractor's expertise in health matters. *See* N.C. Gen. Stat. § 90-157.2 (placing limits on medical issues as to which chiropractors can provide expert testimony in a court of law). Notably, for purposes of the present case, N.C. Gen. Stat. § 90-151 expressly mandates that a chiropractor "shall not prescribe for or administer to any person any medicine or drugs[.]" N.C. Gen. Stat. § 90-151.

Plaintiff argues that Defendant's refusal to accept the letter from Dr. Hollar, a chiropractor, cannot be reconciled with the fact that it accepted a note from a physician assistant offered by one of the three employees who was granted an exception from the vaccine requirement. However, pursuant to N.C. Gen. Stat. § 90-18.1, physician assistants are authorized — subject to certain conditions — to "write prescriptions for drugs," "compound and dispense drugs," and "order medications, tests and treatments in hospitals, clinics, nursing homes, and other health facilities." N.C. Gen. Stat. § 90-18.1(b)-(d) (2013).

We recognize that chiropractors provide valuable services to their patients for the types of physical conditions encompassed by N.C. Gen. Stat. § 90-143. We are also cognizant of the fact that physician assistants provide medical care only under the supervision of a licensed physician. However, as shown above, physician assistants are authorized to perform a number of services in the course of providing medical care to patients that chiropractors lack the power to provide.

Given that the issue here concerned the existence of a medical justification for refusing a flu vaccine, we cannot say that it was illogical under these circumstances for Defendant to accept a note from a physician assistant while refusing to accept the letter from Dr. Hollar. Thus, we believe that Defendant's actions in this regard were neither

objectively unreasonable nor suggestive of an impermissible motive to discriminate against Plaintiff's religious beliefs.

Furthermore, key differences existed between the medical justification cited in Dr. Hollar's letter as compared with those contained in the notes submitted by the three employees who sought — and received — exemptions from the vaccination requirement. According to the notes submitted on behalf of those employees, one had experienced a past adverse reaction to the flu vaccine and the remaining two were allergic to eggs.

Conversely, the letter from Dr. Hollar merely stated that Plaintiff had previously suffered from an autoimmune disease. While Dr. Hollar made a vague reference to a fear of "compromising her immune system," the letter neither (1) identified an actual link between the autoimmune disease she had experienced and the flu vaccine; nor (2) explained — even in general terms — how the flu vaccine had the potential to adversely affect her immune system. For this reason, Dr. Hollar's letter did not satisfy the requirement contained in the 2 December 2012 notice that a physician statement requesting an exemption for an employee state the "*specific* medical justification" for refusing the vaccination.

We further note that Anderson encouraged Plaintiff to take additional time to think over her decision, offered her the opportunity to speak with Dr. Robson, and gave her the chance to submit a new letter from a physician. These acts by Anderson are inconsistent with the notion that Defendant used Plaintiff's refusal to take a flu shot as an excuse to terminate her on account of her religious beliefs.

As a second basis for attempting to establish pretext, Plaintiff asserts that the employees of Defendant's sister facility — Heartland Living & Rehabilitation ("Heartland") in Greensboro, North Carolina — were not required to take the flu vaccination, and, therefore, were not subject to discharge for refusing to do so. However, Anderson testified that Heartland "did not require its employees to receive a flu vaccine because it did not have a flu outbreak as defined by the CDC guidelines." Conversely, as a result of the flu outbreak at the Facility, three residents died, four were hospitalized, and 31 were diagnosed with upper respiratory infections.

For these reasons, it was logical for the Facility to impose a mandatory flu vaccination policy for its employees despite the absence of a comparable policy at Heartland, and Plaintiff cannot show that she was similarly situated to the employees at Heartland for purposes of establishing pretext. *See Wang v. UNC-CH Sch. of Med.*, 216 N.C. App. 185, 204, 716 S.E.2d 646, 658 (2011) ("A Plaintiff relying on disparate treatment evidence must show that she was similarly situated in all material

respects to the individuals with whom she seeks to compare herself[.]" (citation, quotation marks, and alteration omitted)).

Finally, Plaintiff argues that the letter she obtained on 28 January 2013 from Dr. Leighton, a physician, established a medical justification for her refusal to take the flu shot. However, she obtained this letter over a month after her discharge and never provided the letter to Anderson. Nor did Plaintiff ever request that she be reinstated following her termination. Therefore, the existence of Dr. Leighton's letter lacks any relevance to Defendant's justification for terminating her employment over one month earlier.

We are satisfied that none of Plaintiff's arguments — either singularly or in combination — are sufficient to raise a genuine issue of material fact as to whether Defendant's asserted rationale for her discharge was a pretext for religious discrimination. *See Fatta v. M & M Props. Mgmt., Inc.*, 221 N.C. App. 369, 375-76, 727 S.E.2d 595, 601 (2012) ("Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact with respect to the pretext issue. Accordingly, we affirm the trial court's order granting summary judgment in favor of defendant." (internal citation omitted)), *disc. review denied*, 366 N.C. 601, 743 S.E.2d 182, 182-83 (2013). As this Court has recognized,

> a plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action. It is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff. Even in discrimination cases where motive and intent are critical to the analysis, summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation.

Id. at 375, 727 S.E.2d at 601 (internal citations and quotation marks omitted). We conclude that this is such a case.

Conclusion

For the reasons stated above, we affirm the trial court's order granting summary judgment in favor of Defendant.

AFFIRMED.

Judges BRYANT and INMAN concur.

TIMOTHY W. HOLLIDAY, EMPLOYEE, PLAINTIFF
v.
TROPICAL NUT & FRUIT CO., EMPLOYER, FARMINGTON CASUALTY CO., CARRIER, DEFENDANTS

No. COA14-1030

Filed 18 August 2015

1. Workers' Compensation—company conference—laser tag—all expenses paid by company

In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, there was copious competent evidence supporting the Industrial Commission's finding that the company controlled and paid for all components of the conference.

2. Workers' Compensation—company conference—laser tag—business event

In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, there was evidence supporting the Industrial Commission's characterization that the laser tag was more of a business event that was calculated to further, directly or indirectly, the employer's business than a social or employee appreciation event.

3. Workers' Compensation—injury arising from employment—laser tag

In a case in which plaintiff sought compensation for an injury sustained during a game of laser tag at a company conference, the Industrial Commission did not err in finding that plaintiff's injury arose out of his employment. None of the N.C. cases cited involved a situation where the employee's attendance was expressly mandated at the event in question or where the employer received a benefit from the event beyond an intangible improvement to employee morale. The nexus between the injury and the employment in the present case was substantially greater than that in the cases relied upon by defendants.

4. Workers' Compensation—injury by accident—company conference—laser tag—specific evidence of injury

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff's knee injury constituted an

injury by accident. Plaintiff's testimony that he felt a "sharp pain" in his leg approximately 15 minutes into the activity and that he "could tell something was wrong" once he attempted to move from his position was sufficiently specific to demonstrate that the injury he suffered was neither a mere gradual build-up of pain nor a result of "multiple events occurring over a period of time. Moreover, defendants did not cite any case law requiring greater specificity under analogous circumstances so as to mandate a contrary result.

5. Workers' Compensation—disability—total knee replacement—work restrictions

Defendants contend that the Industrial Commission's determination that "Plaintiff was and remained disabled as of 24 May 2013, the date he underwent total knee replacement surgery" was not supported by sufficient evidence because there was no evidence presented regarding plaintiff's work restrictions following his knee replacement surgery. Contrary to defendants' assertions, the absence of evidence as to the type of limited or restricted work plaintiff could perform did not bar his disability claim because Dr. Barnett's testimony supported the conclusion that plaintiff was incapable of performing *any* work after his knee replacement.

Appeal by defendants from opinion and award entered 10 June 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 February 2015.

Ganly & Ramer, by Thomas F. Ramer, for plaintiff-appellee.

Northup McConnell & Sizemore, PLLC, by Charles E. McGee, for defendants-appellants.

DAVIS, Judge.

Tropical Nut & Fruit Co. ("Tropical") and Farmington Casualty Co. (collectively "Defendants") appeal from the Opinion and Award of the North Carolina Industrial Commission ("the Commission") awarding Timothy W. Holliday ("Plaintiff") workers' compensation benefits. On appeal, Defendants argue that the Commission erred in (1) concluding that Plaintiff's injury arose out of his employment; (2) determining that Plaintiff sustained a compensable injury by accident; and (3) awarding Plaintiff temporary total disability benefits. After careful review, we affirm the Commission's Opinion and Award.

Factual Background

Plaintiff is a 54-year-old man who, at the time of his injury, had been employed by Tropical as a territory manager and outside sales representative in Asheville, North Carolina for approximately one and a half years. From 18 August to 20 August 2011, Plaintiff attended Tropical's annual three-day National Sales and Marketing Conference ("the Conference") in Charlotte, North Carolina. At the Conference, Tropical discussed the past year's sales, introduced new products, held training sessions, discussed prospective strategies for the company, presented end-of-year awards, and provided an opportunity for the employees to meet vendors as well as colleagues who worked for Tropical in various other locations.

Attendance at the Conference was mandatory for Plaintiff. He was paid his normal salary during the three days the Conference was held, and he was not permitted to bring his spouse or children to the Conference.

On 18 August 2011, the first evening of the Conference, Tropical organized a social event at Sports Connection in Charlotte for the members of its sales staff who were attending the Conference. The activities consisted of bowling and laser tag. Tropical paid all of the expenses for the activities, assigned the employees to teams, and informed the employees which activity they would be assigned to participate in — laser tag or bowling — upon their arrival at the event.

Plaintiff's first assigned activity was laser tag. During the game, Plaintiff was "covering the floor [of the laser tag arena], and going up and down ramps, and twisting and bending around columns, trying to catch people . . . with the laser." Approximately 15 minutes into the game, Plaintiff "started feeling some sharp pain" in his leg, which became severe when he attempted to continue the game. As a result, Plaintiff remained in one location and "[took] it a little easier . . . until the thirty minutes was up."

At that point, Plaintiff was "in quite a bit of pain" and "had a very noticeable limp." He sat down to remove his laser tag gear and informed his general manager that he believed he had hurt his right knee. Plaintiff applied ice to his knee and was able to attend the remainder of the Conference.

He continued to perform his job duties once he returned from the Conference to Asheville, but his right knee pain persisted and he scheduled an appointment with Dr. Thomas Baumgarten ("Dr. Baumgarten"),

an orthopedist, for 30 August 2011. During this appointment, Dr. Baumgarten observed that Plaintiff had fluid in his right knee joint, tenderness along the medial joint line, and "a positive McMurray's test which is usually indicative of some type of torn meniscus or torn cartilage." An MRI scan revealed tears to the medial meniscus and the lateral meniscus.

On 3 October 2011, Plaintiff underwent arthroscopic right knee surgery to repair the meniscal tears. Plaintiff did not miss work due to his right knee pain or surgery and was able to continue performing his job duties until he was laid off on 13 July 2012 due to a company-wide restructuring.

On 25 October 2012, Plaintiff saw Dr. Jesse West ("Dr. West"), an orthopedic specialist, for a second opinion concerning his right knee following the arthroscopic surgery. Dr. West noted chondromalacia, or cartilage damage, to Plaintiff's right knee and referred him to Dr. T. Marcus Barnett ("Dr. Barnett") based on his determination that Plaintiff required a total knee replacement. Dr. West also completed a "work status report," which stated that Plaintiff could return to work with modified duties, meaning that he was restricted from "prolonged standing or walking," lifting over ten pounds, and squatting, kneeling, or twisting. Dr. West further noted on this document that if modified duties were not available, Plaintiff should be considered "off work."

During this time, Plaintiff experienced low back pain, which radiated down his right buttock, hip, and thigh. Plaintiff underwent back surgery on 9 January 2013 to repair a disc herniation at S1-2 with moderate stenosis at L3-4 and L4-5. After Plaintiff recovered from his back surgery[1], Dr. Barnett performed a total knee replacement of his right knee on 24 May 2013. Plaintiff had not yet had his first post-operative visit at the time of Dr. Barnett's deposition on 11 June 2013, but in his deposition testimony Dr. Barnett anticipated that Plaintiff would have a three- to six-month recovery period following the total knee replacement.

Plaintiff filed a Form 18 seeking workers' compensation benefits in connection with his 18 August 2011 injury, and Defendants filed a Form 61 denying Plaintiff's claim. Plaintiff requested that his claim be assigned for hearing, and on 28 August 2012, the claim was heard by Deputy Commissioner George R. Hall, III. Deputy Commissioner Hall

1. The Commission concluded that Plaintiff "failed to prove that his low back complaints were caused or aggravated by the injury he sustained to his right knee on August 18, 2011," and Plaintiff has not challenged this determination on appeal.

filed an opinion and award on 26 August 2013 concluding that "Plaintiff sustained a compensable right knee injury on August 18, 2011, which required surgical correction and ultimate knee replacement which were both necessitated by the aggravation caused by his laser tag injury" and that Plaintiff was temporarily totally disabled. Consequently, Deputy Commissioner Hall awarded Plaintiff temporary total disability benefits and ordered Defendants to provide any medical treatment reasonably required to effect a cure and provide relief for his right knee injury. Defendants appealed to the Full Commission, and the Commission affirmed the deputy commissioner's decision in an Opinion and Award entered 10 June 2014. Defendants filed a timely notice of appeal to this Court.

Analysis

Our review of an opinion and award of the Industrial Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/ Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). When reviewing the Commission's findings of fact, this Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding[s]." *Id.* (citation and quotation marks omitted).

The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009). The Commission's conclusions of law, however, are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74, *disc. review denied*, ___ N.C. ___, 719 S.E.2d 26 (2011). Evidence supporting the plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and the plaintiff is entitled to the benefit of any reasonable inferences that may be drawn from the evidence. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

Under the Workers' Compensation Act ("the Act"), an injury is compensable if the claimant proves three elements: "(1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). In the present case, Defendants contend that Plaintiff's injury is not compensable because

(1) the injury did not arise out of his employment; and (2) the injury was not caused by an accident for purposes of the Act. Defendants further contend that the Commission erred in awarding Plaintiff total temporary disability benefits. We address each of these arguments in turn.

I. "Arising Out of" Element

[1] Defendants' primary contention on appeal is that Plaintiff's injury is not compensable because it did not arise out of his employment with Tropical. We disagree.

The "arising out of the employment" element of compensability refers to "the origin or cause of the accident," and in order to satisfy this element, "the employment must be a contributing cause or bear a reasonable relationship to the employee's injuries." *Morgan v. Morgan Motor Co. of Albemarle*, ___ N.C. App. ___, ___, 752 S.E.2d 677, 680 (2013) (citations and quotation marks omitted), *aff'd per curiam*, ___ N.C. ___, 772 S.E.2d 238 (2015). Defendants here assert that because participation in the laser tag event was not mandatory, the event was a "fun outing" that did not provide any measurable benefit to Tropical. Defendants consequently challenge the Commission's findings that reach a contrary result, arguing that the Commission's resulting determination that Plaintiff's injury arose from his employment is contrary to established caselaw.

A. Findings of Fact

The Commission made the following pertinent findings of fact in support of its determination that Plaintiff's injury arose from his employment:

> 2. On August 18, 2011, Plaintiff attended Defendant-Employer's National Sales and Marketing Conference in Charlotte, North Carolina, an annual event that included various scheduled activities, including sales meetings, new product meetings, dinners, award ceremonies, pastry training, video production of spoof commercials, a Jeopardy game, bowling, and laser tag. It was mandatory that Plaintiff attend the conference, and he was not permitted to bring his family with him. During the entire time he was at the conference, from Thursday, August 18 through the afternoon of Saturday, August 20, 2011, Plaintiff was considered to be working, and as a salaried employee, he was paid his normal salary.

3. Defendant-Employer paid for and controlled every aspect of the conference for its 68 participants, including making airline reservations for those employees who were flying in from other parts of the country, making hotel reservations, assigning rooms and roommates, making dinner reservations, choosing and scheduling all events, including laser tag, and assigning the attendees to teams for the various activities. The cost and expenses associated with the conference were written-off by Defendant-Employer as necessary business expenses.

4. Defendant-Employer held its annual conference to recap the year's sales, to introduce new products, to give end of year awards, and to give sales persons an opportunity to meet vendors and network with colleagues who worked in other cities. Training was provided during the structured parts of the conference to talk about products, strategies, and goals. The "fun" parts of the conference were scheduled to thank, recognize and encourage the employees and to give them "all the chances they can to be with the other folks from other operational centers." Attendance at all scheduled functions, including the "fun" activities, was mandatory, and attendance was taken because "the whole idea was to get people together so they would meet new people . . . ." Defendant-Employer's President, John Bauer, testified that it "was not meant to be an employee appreciation event — it's more of a business event."

5. For the 2011 annual conference, the "fun" activity that Defendant-Employer scheduled for the attendees was an evening of laser tag and bowling at the Sports Connection in Charlotte. Conference attendees were emailed directions to Sports Connection in advance of the conference, and they were given tickets purchased by Defendant-Employer to buy drinks. All conference attendees were expected to attend the event at the Sports Connection, and attendance was taken to make sure no one skipped the event. Arnold Stone, Defendant-Employer's VP of Marketing and Sales, testified that the laser tag and bowling were considered to be part of the meeting content and that "the overall evening was an essential part of the meeting content." However, while attendance was

required, participation in the laser tag and bowling activities was not required, and if an attendee did not feel comfortable participating for whatever reason, there would be no adverse consequences in terms of his status with Defendant-Employer. In this regard, Mr. Stone testified that, "we wanted people to participate but there weren't any requirements — it's more of a bonding exercise."

6. On August 18, 2011, during the required business outing, Plaintiff and the other employees attending the conference were assigned to teams to play laser tag. Plaintiff testified that while playing laser tag for approximately 20 minutes, he walked up and down ramps, crouched behind walls and other obstacles, and quickly and repeatedly twisted in an effort to shoot the opposing team and score points for his team. Plaintiff confirmed, and the Full Commission finds, that these activities were not activities he normally performed as a Territory Manager/Outside Sales Representative for Defendant-Employer.

7. Plaintiff testified, and the Full Commission finds, that about half-way through the laser tag event, after he had been running up and down ramps and twisting and bending around columns, Plaintiff began to experience pain in his right knee. By the time the laser tag ended, Plaintiff was in quite a bit of pain, so he told his supervisor that he thought he hurt his knee playing laser tag.

. . . .

22. On August 18, 2011, Plaintiff sustained an injury by accident to his right knee arising out of and in the course of his employment with Defendant-Employer. Playing laser tag constituted an interruption of Plaintiff's regular work routine and the introduction of unusual conditions likely to result in unexpected consequences.

. . . .

24. Because Defendant-Employer sponsored and paid for the annual conference, which had a substantial business purpose, maintained a known custom of requiring its employees to attend the conference, took a record of attendance at each conference event, including the "fun" events, and financed and scheduled all events at

> the conference, the injury Plaintiff sustained while playing laser tag arose out of his employment with Defendant-Employer. Plaintiff's trip to the conference and his participation in all events scheduled during the conference by Defendant-Employer, was calculated to further, directly or indirectly, Defendant-Employer's business.

Of the above-quoted findings of fact, Defendants challenge findings 3, 4, and 24 on appeal.[2] With regard to finding of fact 3, Defendants contend that the portion of the finding stating that Tropical "paid for and controlled every aspect of the conference for its 68 participants" is unsupported by competent evidence. Because the record does not "in any way indicate[ ] employees were required by Tropical to physically participate in the Laser Tag/bowling activities," Defendants assert, there was "no support for the Commission's determination in Finding of Fact 3 that all aspects of the Sales Conference were controlled by Tropical."

The itinerary for the Conference set forth a detailed schedule of meetings, trainings, and activities for the three-day duration of the event. Beginning at 4:00 p.m. on Thursday afternoon, employees were scheduled for back-to-back events until 10:00 p.m. The programmed events commenced again at 8:00 a.m. on Friday and proceeded until 10:00 p.m. that night. The schedule for the final day of the Conference included meetings from 8:00 a.m. to 1:30 p.m. Other than the evenings (after 10:00 p.m.) and a few 15-minute breaks, the employees were in organized activities for the entire Conference. Tropical's President, John Bauer ("Bauer"), testified that Tropical covered all of the expenses associated with the Conference. He further explained that the Conference is "once a year and the expectation is clear that [employees] are to attend all the events."

Thea Hatton ("Hatton"), one of the sales managers for Tropical, likewise testified that the whole Conference was a "package," and

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2. Defendants also challenge the Commission's determination that Plaintiff "sustained an injury by accident to his right knee arising out of . . . his employment with Defendant-Employer" contained in finding of fact 22. As the issue of whether an accident arose out of the employment is a mixed question of law and fact, we deem it appropriate to address Defendants' contentions concerning finding 22 in our analysis of whether the findings of fact as a whole support the determination that Plaintiff's injury arose from his employment. *See Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977) ("[T]he determination of whether an accident arises out of . . . employment is a mixed question of law and fact, and this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence.").

the employees were required to attend all portions of it. Another employee, Tobey Marshall ("Marshall"), similarly reported that the entire Conference was "a coordinated series of events" and that it was mandatory for Conference participants to attend the laser tag and bowling outing, as well as all of the other scheduled events. This evidence demonstrates that Tropical specifically planned each segment of the Conference and ensured turnout at each event by expressly mandating the employees' attendance. We therefore conclude that there was copious competent evidence supporting the Commission's finding that Tropical controlled and paid for all components of the Conference.

[2] Defendants next challenge the Commission's characterization of the laser tag and bowling activities in findings of fact 4 and 24 as more of a "business event" that "was calculated to further, directly or indirectly, Defendant-Employer's business" than a social or "employee appreciation" event. Defendants assert that (1) the laser tag outing was separate and distinct from the business portions of the Conference; and (2) there was no evidence offered to demonstrate that this activity "provided anything other than an immeasurable benefit to Tropical employee morale." Defendants' argument lacks merit.

Arnold Stone ("Stone"), Tropical's vice president of marketing and sales, testified that the overall evening at Sports Connection "was an essential part" of the three-day event and characterized the outing as part of the "team building" and "networking" content of the Conference. He explained that the Conference had a pretty tightly packed schedule with "not a whole lot of time for networking." He then described "networking" as "get[ting] to know people, just . . . get[ting] to meet people" and testified that the Sports Connection event was designed "to get people together so they would meet new people . . . and have fun together."

Hatton likewise stated that "the laser tag and bowling was an activity to help us meet the people that we work with every single day" and helped "[p]ut a name with the face — or with the voice . . . I talked to on a daily basis in the other divisions." Marshall testified that she believed the laser tag and bowling outing served a beneficial purpose to Tropical's business because the event facilitated interaction between employees at various offices and Tropical "want[ed] us to meet everybody at the other offices and kind of have a relationship because we do sometimes have to call . . . [and] ask for something." Thus, this testimony supported the Commission's finding that the laser tag and bowling event was an essential part of the Conference's content and served a business purpose for Tropical.

Although Bauer gave testimony to the effect that the outing was not work- or business-related — testifying that the purpose of it was "[t]otally a social event, a thank you for coming to the event, and for a good sales year" — this testimony does not negate the fact that other competent evidence existed in the record to support the Commission's finding to the contrary. Our Supreme Court has repeatedly explained that when reviewing an opinion and award from the North Carolina Industrial Commission, the Commission's findings are binding if supported by competent evidence even if there is also evidence in the record that would support contrary findings. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552-53 (2000).

An appellate court is not permitted "to weigh the evidence and decide the issue on the basis of its weight"; rather, our duty "goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* at 115, 530 S.E.2d at 552 (citation and quotation marks omitted); *see also Philbeck v. Univ. of Mich.*, ___ N.C. App. ___, ___, 761 S.E.2d 668, 674 (2014) (explaining that because the Commission is the "sole judge of the credibility of the witnesses and the weight to be given their testimony. . . . its determinations regarding the credibility of witnesses or the weight certain evidence is to be accorded are not reviewable on appeal." (citations and quotation marks omitted)). Consequently, because findings of fact 4 and 24 are supported by the testimony of Stone, Hatton, and Marshall, these findings are binding on appeal.

As we have determined that the Commission's findings of fact on this issue are supported by competent evidence in the record, we next turn to whether these findings adequately support the Commission's conclusion that Plaintiff's injury arose from his employment.

B. North Carolina Caselaw Analyzing Injuries Sustained at Employer-sponsored Events

[3] Our appellate courts have addressed on a number of occasions the applicability of the Act to injuries sustained by employees during employer-sponsored social and recreational events. *See Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 185, 639 S.E.2d 429, 433 (2007) ("The Act's application to injuries occurring during recreational and social activities related to employment is well established in the jurisprudence of North Carolina."). In *Perry v. Am. Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964), our Supreme Court set out guiding principles to be considered when determining the compensability of an injury sustained by an employee in this context. The plaintiff in *Perry* suffered a

fractured cervical vertebra after diving into a hotel pool while attending an out-of-town sales conference that the defendant-employer arranged and financially sponsored. *Id.* at 273, 136 S.E.2d at 644-45. The Supreme Court explained that in determining whether the injury arose out of the plaintiff's employment,

> [t]he question is whether [the plaintiff's] use of the pool was an authorized activity calculated to further, directly or indirectly, his employer's business, or whether it was employment connected to the extent that it may be concluded that there was a causal relation between the employment and the accident and the accident resulted from a risk involved in the employment. In providing plaintiff accommodations at Sedgefield Inn the employer provided him the recreational facilities maintained by the Inn for its guests. These recreational facilities undoubtedly influenced the employer in selecting Sedgefield Inn as the site for the meeting. Plaintiff was not required or expressly invited by his employer to use the swimming pool, but during his free time he was at liberty to use it. By providing the facility for him the employer impliedly invited him to use it, and he could swim or not at his option. Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does not arise out of the employment. Plaintiff's activity in swimming was not a function or duty of his employment, was not calculated to further directly or indirectly his employer's business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn. The injury did not have its origin in or arise out of the employment.

Id. at 274-75, 136 S.E.2d at 646 (internal citations omitted).

The Supreme Court acknowledged three scenarios where an injury sustained during a recreational or social activity *would* be compensable: (1) when it occurs "on the premises during a lunch or recreation period as a regular incident of the employment"; (2) when the employer "by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment"; and (3) when the employer derives a benefit from the

activity "beyond the intangible value of improvement in [the] employee's health and morale that is common to all kinds of recreation and social life." *Id.* at 275, 136 S.E.2d at 646. The Court concluded that "the case at bar does not qualify for compensation . . . under these rules or suggested guides." *Id.*

In *Chilton v. Bowman Gray Sch. of Med.*, 45 N.C. App. 13, 262 S.E.2d 347 (1980), this Court adopted a six-factor inquiry to further guide compensability determinations for injuries sustained at employer-sponsored recreational and social activities.

> (1) Did the employer in fact sponsor the event?
>
> (2) To what extent was attendance really voluntary?
>
> (3) Was there some degree of encouragement to attend evidenced by such factors as:
>
> a. taking a record of attendance;
>
> b. paying for the time spent;
>
> c. requiring the employee to work if he did not attend; or
>
> d. maintaining a known custom of attending?
>
> (4) Did the employer finance the occasion to a substantial extent?
>
> (5) Did the employees regard it as an employment benefit to which they were entitled as of right?
>
> (6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Id. at 15, 262 S.E.2d at 348. While these factors are not controlling, they can "serve as helpful guideposts" in the inquiry of whether an injury incurred by an employee at such an event arose out of the employment. *Frost*, 361 N.C. at 187, 639 S.E.2d at 434.

Defendants direct our attention to *Frost*, *Perry*, and *Chilton*, as well as to the following additional cases, in which our appellate courts have determined that the injuries sustained by employees at recreational or social events did not arise out of employment: *Berry v. Colonial Furniture Co.*, 232 N.C. 303, 60 S.E.2d 97 (1950), *Graven v. N.C. Dep't*

of Pub. Safety-Div. of Law Enforcement, ___ N.C. App. ___, 762 S.E.2d 230 (2014), and *Foster v. Holly Farms Poultry Indus., Inc.*, 14 N.C. App. 671, 189 S.E.2d 744, *cert. denied*, 281 N.C. 621, 190 S.E.2d 465 (1972).

In *Frost*, the plaintiff, an emergency medical technician for Salter Path Fire & Rescue ("Fire & Rescue"), was injured in a go-cart accident while attending a "Fun Day" organized by the community to thank the Fire & Rescue staff and volunteers. *Frost*, 361 N.C. at 182-83, 639 S.E.2d at 431. The Supreme Court concluded that the plaintiff's injury did not arise from her employment because she attended the event "on a purely voluntary basis" and the activities "were authorized merely for her optional pleasure and recreation while she was off duty." *Id.* at 186-88, 639 S.E.2d at 433-34.

In *Perry*, as discussed above, the Supreme Court held that the plaintiff's injury at a hotel swimming pool the day before an employer-sponsored conference did not arise from his employment. The Court reached this result because the plaintiff's "activity in swimming . . . was not calculated to further directly or indirectly his employer's business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn." *Perry*, 262 N.C. at 275, 136 S.E.2d at 646.

Berry involved a company-sponsored fishing trip to the coast "after the store had closed for the day's work on Saturday." *Berry*, 232 N.C. at 306, 60 S.E.2d at 100 (internal quotation marks omitted). The Supreme Court concluded that the plaintiff's injury, which was sustained when he fell out of the company truck on the way to the coast, did not arise from his employment because "[b]usiness hours were over," and there was no connection between the "trip for pleasure" and the employment. *Id.* at 307, 60 S.E.2d at 100.

Graven involved injuries sustained by two employees when their vehicle spun out of control after encountering a patch of ice on the way back from a holiday lunch "to celebrate the department's hard work." *Graven*, ___ N.C. App. at ___, 762 S.E.2d at 232 (quotation marks omitted). Because attendance at the lunch was purely voluntary, employees were required to pay for their own meals, and no formal speeches or awards were presented at the event, we concluded that "the holiday lunch is similar to the type of event that is described in *Perry* . . . which the Supreme Court stated would not arise out of the employment." *Id.* at ___, 762 S.E.2d at 235.

In *Chilton*, the plaintiff, a professor at a medical school, broke his ankle while playing volleyball at a picnic organized by the medical school

faculty so that incoming residents could become acquainted with faculty members. *Chilton*, 45 N.C. App. at 13-14, 262 S.E.2d at 347-48. This Court concluded that the plaintiff's injury did not arise from his employment based on the fact that (1) it was "not clear that the radiology department sponsored the picnic"; (2) attendance was voluntary and while faculty members "felt they should go . . . they were not compelled to do so"; (3) the participants were not paid for the time spent at the picnic; (4) the picnic "was not an event that [an] employee regarded as being a benefit to which he was entitled as a matter of right"; and (5) "the radiology department did not utilize the picnic as an opportunity to give a 'pep' talk or grant awards." *Id.* at 17-18, 262 S.E.2d at 350.

Finally, in *Foster*, this Court concluded that the plaintiff's fatal injury, which occurred when he was robbed by two men and shot while attending a conference that "had no connection with [the plaintiff's] work at [the defendant-employer's business]," did not arise from his employment with the defendant-employer. *Foster*, 14 N.C. App. at 672, 189 S.E.2d at 744. We held that because the evidence demonstrated that the plaintiff's attendance at the conference was solely for his own benefit (rather than for the benefit of the defendant-employer) and that the defendant-employer only paid the expenses of the trip "as a 'fringe benefit' or gesture of good will," the plaintiff's injury was not compensable. *Id.* at 674, 189 S.E.2d at 746.

C. Application of Prior Caselaw to Plaintiff's Injury

In the present case, Defendants argue the Commission's determination that Plaintiff's injury arose from his employment is (1) based solely on the fact that Tropical financially sponsored the laser tag event; and (2) inconsistent with the cases from North Carolina's appellate courts discussed above. We address each of these contentions in turn.

First, the evidence before the Commission demonstrated more than mere financial sponsorship of the laser tag outing by Tropical. The Commission concluded — and we agree — that the evidence of record showed Tropical also (1) expressly mandated employee attendance and implicitly encouraged participation in the laser tag and bowling activities; (2) fully financed the outing; and (3) benefited from the event. Indeed, the testimony from Plaintiff, Stone, Bauer, Hatton, and Marshall clearly demonstrates that Tropical required its employees to attend the laser tag and bowling activities by both taking attendance and making employees aware in advance that their attendance was mandatory.

The evidence also showed that actual participation in the activities was encouraged by Tropical. Specifically, Stone testified that Tropical

"wanted people to participate" and "set up teams," assigning each employee to a specific group and then assigning those groups to participate in either the laser tag or bowling activity. Furthermore, while Stone and Bauer both testified that "there weren't any formal requirements [to participate,]" each also conceded that Tropical did not expressly inform the Conference attendees that only their attendance, rather than their physical participation in the activities, was mandatory.[3]

Given that employees were required to attend the laser tag and bowling activities and were assigned to teams by Tropical (thereby being at least implicitly encouraged to participate), we agree with the Commission's conclusion that "the totality of the circumstances surrounding the purpose of and expectations surrounding Defendant-Employer's conference and Plaintiff's and other employees' participation therein" points in favor of a determination that Plaintiff's injury arose from his employment. *See Chilton*, 45 N.C. App. at 14-15, 262 S.E.2d at 348 (explaining that when employers sponsor recreational activities and an employee is injured, "it is clear that recovery will be allowed when attendance is required, [but] the question becomes closer when the degree of employer involvement descends to mere sponsorship or encouragement").

Finally, there was evidence demonstrating that Tropical benefited from the activities at issue. First, Stone — one of the organizers of the Conference — explained that the Sports Connection event was "an essential part [of the meeting content]" and that the Conference, as a whole, was calculated to benefit the company by providing training and education for its employees. Stone further testified that the evening's activities were also designed to bring Tropical employees from all of its regional offices together so that they could get to know each other. There was evidence that the teams were assigned purposefully to ensure a mix of employees from each of Tropical's six offices so that employees would mingle with members of offices other than their own and be able to "[p]ut a name with the face — or with the voice" when they needed to reach out to another office for assistance or support. The record supports the conclusion that this occasion for networking and team building, which brought together geographically distant employees who were often required to seek support or guidance from each

3. Stone did state that in past company outings various attendees had elected not to physically participate and that "there was never any . . . forcing of anybody to do anything, other than be at the event."

other over the telephone, constituted a benefit to Tropical "beyond the intangible value of improvement in employee[ ] health and morale that is common to all kinds of recreation and social life." *Perry*, 262 N.C. at 275, 136 S.E.2d at 646.

In sum, because Tropical (1) specifically required its employees to attend the event; (2) encouraged their participation in the laser tag activity; and (3) derived a business benefit from the Conference as a whole (of which the outing to Sports Connection was an "essential part") and from the team-building and networking opportunities generated thereby, we believe this case is distinguishable from the facts and circumstances presented in *Frost*, *Perry*, *Berry*, *Graven*, *Chilton*, and *Foster*. None of those cases involved a situation where the employee's attendance was expressly mandated at the event in question or where the employer received a benefit from the event beyond an intangible improvement to employee morale. We therefore conclude that the nexus between the injury and the employment in the present case was substantially greater than that in the cases relied upon by Defendants. *See Martin v. Mars Mfg. Co.*, 58 N.C. App. 577, 579-81, 293 S.E.2d 816, 818-19 (concluding that employee's injury sustained while dancing at employer-sponsored Christmas party was distinguishable from *Perry* and its progeny where event was sponsored and partially financed by employer, attendance was encouraged, and employer benefited from event "through such tangible advantages as having an opportunity to make speeches and present awards"), *cert. denied*, 306 N.C. 742, 295 S.E.2d 759 (1982). Accordingly, the Commission did not err in finding that Plaintiff's injury arose out of his employment with Tropical.

II. Injury by Accident

[4] Defendants next contend that Plaintiff failed to prove that he suffered an injury by *accident* because Plaintiff was "unable to discern when exactly his alleged knee injury occurred and what exactly he was doing — whether it be twisting, jumping, running, bending, stooping, or nothing at all — when his knee pain began."

Our Court has previously explained that when determining compensability under the Act,

> [t]he terms "accident" and "injury" are separate and distinct concepts, and there must be an "accident" that produces the complained-of "injury" in order for the injury to be compensable. An "accident" is an "unlooked for event" and implies a result produced by a "fortuitous cause." If an employee is injured while carrying on the employee's

> usual tasks in the usual way the injury does not arise by accident. In contrast, when an interruption of the employee's normal work routine occurs, introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. The "essence" of an accident is its "unusualness and unexpectedness . . . ."

Gray v. RDU Airport Auth., 203 N.C. App. 521, 525, 692 S.E.2d 170, 174 (2010) (internal citations, select quotation marks, and brackets omitted).

For purposes of the Act, "an accident must result from 'an . . . event,' and multiple events occurring over a period of time, therefore, do not constitute an 'accident.' " *Lovekin v. Lovekin & Ingle*, 140 N.C. App. 244, 248, 535 S.E.2d 610, 613, *disc. review denied*, 353 N.C. 266, 546 S.E.2d 105 (2000). Likewise, this Court has explained that in order to demonstrate an injury by accident, "[t]here must be a specific fortuitous event, rather than a gradual build-up of pain." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 551, 335 S.E.2d 502, 504 (1985). Defendants contend the Commission's findings of fact do not support its conclusion that Plaintiff sustained an injury by accident because it made "no determinative or meaningful finding regarding what 'specific fortuitous event' caused his alleged pain."

In its Opinion and Award, the Commission determined in findings of fact 6 and 22 that the right knee injury Plaintiff sustained while playing laser tag constituted an injury by accident because (1) "these activities were not activities [Plaintiff] normally performed as a Territory Manager/Outside Sales Representative for Defendant-Employer"; and (2) the act of playing laser tag "constituted an interruption of Plaintiff's regular work routine and the introduction of unusual conditions likely to result in unexpected consequences." Those findings of fact, which are supported by competent evidence in the record, demonstrate that the requisite "specific fortuitous event" was the laser tag activity itself. Evidence as to the exact moment in time or precise motion that tore his medial meniscus and lateral meniscus was not necessary to establish the fact that Plaintiff's injury while playing laser tag — a significant departure from Plaintiff's customary job duties (which "were essentially administrative in nature and required him to perform normal and customary sales activities . . . and customer service work") — constituted an injury by accident. *See Gray*, 203 N.C. App. at 525, 692 S.E.2d at 174 (explaining that in order for injury sustained to qualify as a compensable injury by accident for purposes of the Act, "the injury must involve more than the employee's performance of his or her usual and customary duties in the usual way").

Plaintiff's testimony that he felt a "sharp pain" in his leg approximately 15 minutes into the activity and that he "could tell something was wrong" once he attempted to move from his position was sufficiently specific to demonstrate that the injury he suffered was neither a mere "gradual build-up of pain," *Bowles*, 77 N.C. App. at 551, 335 S.E.2d at 504, nor a result of "multiple events occurring over a period of time," *Lovekin*, 140 N.C. App. at 248, 535 S.E.2d at 613. Moreover, Defendants have not directed us to any case law requiring greater specificity under analogous circumstances so as to mandate a contrary result on this issue. Accordingly, the Commission did not err in determining that Plaintiff's right knee injury constituted an injury by accident.

III. Temporary Total Disability Benefits

[5] In their final argument on appeal, Defendants contend that the Commission's determination that "Plaintiff was and remained disabled as of 24 May 2013, the date he underwent total knee replacement surgery" was not supported by sufficient evidence. We are not persuaded.

In its Opinion and Award, the Commission concluded that

> [a]s a result of the injury and resulting knee surgeries, Plaintiff was unable to earn the same wages he was earning at the time of the injury in the same or any other employment beginning May 24, 2013, and he is therefore entitled to compensation pursuant to N.C. Gen. Stat. § 97-29 from that date until he returns to work or further order of the Industrial Commission.

Defendants argue that this award of temporary total disability benefits was improper because there was no evidence presented regarding Plaintiff's work restrictions following his knee replacement surgery. Under North Carolina law,

> [t]he term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. N.C. Gen. Stat. § 97-2(9) (2013). Accordingly, to support a conclusion of disability, the Commission must find
>
> > (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other

> employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.
>
> *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

Philbeck, ___ N.C. App. at ___, 761 S.E.2d at 674.

It is the claimant's burden to establish the existence and extent of his disability, and he may do so by presenting medical evidence that he is physically incapable of work in any employment because of his injury. *See Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 420-21, 760 S.E.2d 732, 736-37 (2014) (explaining that medical evidence demonstrating (1) the plaintiff is incapable of earning wages; and (2) this incapability was caused by the injury, will support legal conclusion of disability).

Here, Plaintiff underwent a total right knee replacement surgery performed by Dr. Barnett on 24 May 2013. Dr. Barnett was deposed on 11 June 2013, less than a month after this surgery and prior to Plaintiff's initial post-operative visit. Dr. Barnett testified as follows:

> [Plaintiff's counsel:] How long do you anticipate [Plaintiff] will be recovering post-surgically from the surgery you undertook a couple of weeks ago? In other words, when will he be able to try to return to some kind of work or look for work?
>
> [Dr. Barnett:] I think typically the recovery is about three to six months after a knee replacement.

Given that Plaintiff's post-surgery follow-up appointment had not yet occurred at the time of the deposition, it was appropriate for Dr. Barnett to express his opinion as to Plaintiff's recovery in general terms for the average knee replacement patient. Contrary to Defendants' assertion on appeal, the above testimony from Dr. Barnett supports the Commission's finding of fact that Dr. Barnett "did not expect Plaintiff to be able to return to work for three to six months."

Moreover, we believe that this testimony concerning surgical recovery time — which was in direct response to a question as to when Plaintiff would be able to attempt to return to some kind of employment — was sufficient to establish that Plaintiff could not work in any capacity immediately following the surgery that was necessitated by his compensable injury. Thus, contrary to Defendants' assertions, the absence of evidence as to the type of limited or restricted work Plaintiff could perform does not bar his disability claim because Dr. Barnett's testimony supports the

conclusion that Plaintiff was incapable of performing *any* work after his knee replacement. Because the medical evidence indicated that Plaintiff was temporarily incapable of earning wages in any employment, there was sufficient evidence for the Commission to conclude that Plaintiff was temporarily totally disabled as of 24 May 2013. Defendants' argument on this issue is therefore overruled.

Conclusion

For the reasons stated above, we affirm the Commission's 10 June 2014 Opinion and Award.

AFFIRMED.

Judges STROUD and DILLON concur.

IN THE MATTER OF THE ESTATE OF CHARLES W. PICKELSIMER, JR.

No. COA14-1192

Filed 18 August 2015

1. Evidence—caveat—excluded evidence—other evidence admitted

In a caveat to a will where the caveators argued that the trial court erred by excluding testimony about the reason for the decedent's disenchantment with a beneficiary, the jury heard the gist of the challenged testimony, and the admission of additional testimony regarding the reason the decedent removed himself from the Brevard College Board in the late 1980s would not have altered the jury's verdict

2. Evidence—challenged evidence—not actually excluded

In a caveat proceeding, there was no merit to the caveators' contention that the trial court erred by excluding testimony as to the decedent's statements that would allegedly shed light on his relationship with his children or on his mental condition. In fact, the challenged statement, "I am not mentally up for it right now," made when the decedent's daughter asked to talk about business matters, was not excluded.

3. Wills—reference to will as exhibit—sufficiently accurate

The trial court did not err or abuse its discretion in a caveat proceeding by referring to propounders' proffered "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" as "Propounders Exhibit 2" on the jury verdict sheet. Although the caveators argued that the record failed to contain a paper writing marked as "*Propounders'* Exhibit 2, the propounders, caveators, and the trial court agreed to compile exhibits into a notebook referred to as Courtroom Exhibit 1, with the decedent's Last Will and Testament included in Courtroom Exhibit 1 and marked for identification and referred by propounders as Exhibit 2. The phraseology of the issues presented was sufficiently accurate to resolve any factual controversies and enabled the trial court to fully render judgment in the cause; further, the trial court's judgment clearly resolved any perceived ambiguity.

Appeal by caveators from judgment entered 6 December 2013 by Judge Anderson Cromer in Transylvania County Superior Court. Heard in the Court of Appeals 2 June 2015.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for caveator-appellants.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Jessica C. Dixon, for propounder-appellee Brevard College.

Long Parker Warren Anderson & Payne, P.A., by Robert B. Long, Jr., Esq., and Philip S. Anderson, Esq., for propounder-appellee David Albertson, Executor of the estate of Charles W. Pickelsimer, Jr.

Roberts & Stevens, P.A., by Phillip Jackson, Esq., for propounder-appellee Transylvania Community Hospital, Inc. d/b/a Transylvania Regional Hospital.

Wishart Norris Henninger & Pittman, by Robert Wishart, Esq., and Shumaker, Loop & Kendrick, LLP, by June Allison, Esq.,for propounder-appellee Betty McCrary.

Ramsey & Pratt, P.A., by Michael K. Pratt, for Shelter Available for Family Emergency (SAFE), Inc., of Transylvania County, did not file a brief on appeal.

BRYANT, Judge.

Where caveators cannot establish prejudice as a result of the trial court's ruling excluding certain testimony, we find no prejudicial error. Where propounders, caveators, and the trial court all acknowledged during trial that propounders' "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" would be admitted into evidence as Exhibit 2, the trial court cannot be held to have abused its discretion in referring to the 17 August 2010 will as Propounders' Exhibit 2.

Charles W. Pickelsimer, Jr. (Charles or the decedent), was born on 25 May 1931. He was a resident of Transylvania County and was married to Ann B. Pickelsimer. They had two children, Lynn P. Williams and Charles W. Pickelsimer, III (Chuck). In the 1960s, Charles inherited from his father stock in a family telecommunications company, Citizen's Telephone Company. For Christmas, Charles often gave his children and grandchildren stock certificates in the company, certificates that accumulated over the years. In 2008, Charles began experiencing severe headaches. He was diagnosed with temporal arteritis and began experiencing significant memory lapses.

In December 2008, Charles sold the company. According to David Albertson, the executor of Charles's estate and an employee of Citizen's Telephone Company since 1963 and serving as secretary-treasurer controller since 1983, near the time of the sale, the company had accumulated cash reserves in the amount of $19 million. A dividend was declared and the cash was distributed to shareholders just before the company was sold. Charles' daughter, Lynn, and Lynn's daughter, Whitney A. Butterworth, held an aggregate of ten percent of the company stock. Likewise, Charles' son, Chuck, and his children, also held an aggregate of ten percent of the stock. The stock dividend distribution yielded Lynn and her daughter between $1.9 and $2 million, the same approximate yield that went to Chuck and his children. Citizen's Telephone Company was sold for $65 million. At the time of the sale, due to their aggregate stock holdings, Lynn and her daughter received approximately $6 million, as did Chuck and his children.

In 2009, Charles and his wife, Ann executed an estate plan designed to protect their assets and minimize estate taxes during conveyance. The 2009 Estate Plan included a will and a revocable trust (the "2009 Will" and the "2009 Trust"). Lynn, Chuck, and Whitney (caveators) were the primary beneficiaries of the 2009 Estate Plan.

In December 2009, Ann was diagnosed with cancer. Her health declined rapidly, and she died on 20 March 2010. In January 2010, just prior to Ann's death, Charles was diagnosed with mild dementia and memory loss. Following Ann's death, Charles's condition continued to decline. According to caveators, he became "increasingly erratic and paranoid. At times he was not oriented to time and place." Caveators alleged that during this time, Betty McCrary (friend of Charles Pickelsimer and former friend of the Pickelsimer family), Albertson, and possibly others forced themselves upon Charles in order to drive a wedge between him and his children, and that "one or more of these individuals told Decedent repeatedly that his children had stolen money from him and were trying to steal more . . . ."

In April 2010, Charles' daughter Lynn learned that Charles had revoked the durable power of attorney and healthcare power of attorney held by her since Charles executed it in 2009. Then, in August 2010, Charles revoked the 2009 Estate Plan and executed a new 2010 Estate Plan consisting of a 2010 Will and a 2010 Trust. Charles Pickelsimer, Jr., died on 6 July 2011. Charles was survived by his two children, caveators Lynn P. Williams and Charles W. Pickelsimer, III, three grandchildren—including caveator Whitney A. Butterworth—and one great-grandchild.

On 11 July 2011, the Transylvania County Clerk of Court received a four-page document titled "Last Will and Testament of Charles W. Pickelsimer, Jr.," dated 17 August 2010. The Clerk of Court admitted the document to probate on 11 July 2011 and appointed David Albertson as Executor of decedent's estate. According to caveators, they only learned of the 2010 Will and 2010 Trust after Charles' death.

On 20 November 2012, in Transylvania County Superior Court, caveators Lynn P. Williams, Charles W. Pickelsimer, III (Chuck), and Whitney A. Butterworth, individually and on behalf of their minor and unborn issue, entered a caveat to the probate of the document titled "LAST WILL AND TESTAMENT OF CHARLES W. PICKELSIMER, JR.," dated 17 August 2010.

Caveators acknowledged that pursuant to the 2010 Will, David Albertson, Betty McCrary, Shelter Available for Family Emergency (SAFE), Inc., Brevard College, and Transylvania Hospital, Inc., (propounders) had an interest in Charles's estate. However, caveators allege that McCrary, Albertson, and others prevailed upon Charles to disinherit his children and grandchildren and instead benefit McCrary, Albertson, and others, and that they interfered with caveators' attempts to spend time with their father. Caveators charge that Charles's 2010 Will and

2010 Trust "disinherit[s] his own family and leav[es] substantial assets instead to or for the benefit of Mr. Albertson, Ms. McCrary and others who were not the natural objects of his bounty." Caveators assert that "[t]he 2010 Will and 2010 Trust do not reflect the desires and wishes of [Charles Pickelsimer, Jr.]"

All propounders received a citation and notice of caveat, and all propounders except SAFE (Shelter Available for Family Emergency, Inc.) responded to the citation and notice of caveat.

A jury trial on the caveat proceeding was held in Transylvania County Superior Court during the 14 October 2013 Civil Session before the Honorable Anderson Cromer, Judge presiding. Extensive testimony was presented by both propounders and caveators. During the course of the proceeding, the last will and testament that Charles Pickelsimer, Jr., signed on 17 August 2010 was introduced as Exhibit 2. The trial court entered a directed verdict for propounders determining they had met their burden of proof required to establish that the challenged will was validly executed. The burden of proof then shifted to caveators to establish that the will was procured by undue influence. At the conclusion of all the evidence, the jury returned a unanimous verdict against the caveators, determining as a matter of fact that the execution of Propounders' Exhibit 2 was not procured by undue influence. Further, the jury found that "Propounders' Exhibit 2 and every essential part of it" was the last will and testament of Charles W. Pickelsimer, Jr. The trial court entered judgment on 6 December 2013 in accordance with the jury verdict and ordered that "[t]he document dated 17 August 2010, marked as Propounders' Exhibit 2 at trial, propounded for probate, and every part thereof, is the Last Will and Testament of Charles W. Pickelsimer, Jr., and it is hereby admitted to probate in solemn form."

Caveators moved for a new trial; however, on 30 December 2013, the trial court denied the motion for a new trial. Caveators then entered notice of appeal from the trial court's 6 December 2013 order admitting to probate the Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010.

Legal Background

"A caveat is an *in rem* proceeding. G.S. § 31-32. It is an attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the res involved in the litigation." *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961) (citation omitted). The

administration of a decedent's estate is a process necessarily overseen by the Clerk of Superior Court. *In re Will of Durham*, 206 N.C. App. 67, 79, 698 S.E.2d 112, 122 (2010). "Upon the filing of a caveat, the clerk shall transfer the cause to the superior court for trial by jury. The caveat shall be served upon all interested parties in accordance with . . . [our] Rules of Civil Procedure." N.C. Gen. Stat. § 31-33(a) (2013). "The 'parties' are not parties in the usual sense but are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script. It [is] for the trial judge to determine what persons fit the statutory description . . . ." *In re Ashley*, 23 N.C. App. 176, 181, 208 S.E.2d 398, 401 (1974) (citations omitted).

> The issue of whether the decedent made a will and whether a given document is his will, is known as *devisavit vel non*, translated from the Latin as "he devises or not." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 272 (2nd ed. 1995). "*Devisavit vel non* [sic] requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will." *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987) (citation omitted).

In re Will of Mason, 168 N.C. App. 160, 162, 606 S.E.2d 921, 923 (2005).

> In a caveat proceeding, the burden of proof is upon the propounders to prove that the instruments in question were executed with the proper formalities required by law. *In re Will of West*, 227 N.C. 204, 41 S.E.2d 838 (1947). Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that the execution of the will was procured by undue influence. *Id.*

In re Andrews, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980).

In this appeal caveators raise two issues: whether the trial court erred by (I) excluding testimony of decedent's statements; and (II) entering a directed verdict and judgment for *devisavit vel non* on the issue of whether "propounders exhibit 2" constituted the last will and testament of Charles W. Pickelsimer, Jr.

I

[1] Caveators argue that the trial court committed prejudicial error in excluding testimony of statements made by Charles under the Dead

Man's Statute. Caveators contend that had the jury heard the excluded testimony, a different result would have likely ensued. We disagree.

> [T]he standard of review for use [in reviewing a trial court's exclusion of evidence pursuant to our Rules of Evidence, Rule 601(c)] is one that involves a *de novo* examination of the trial court's ruling, with considerable deference to be given to the decision made by the trial court in light of the relevance-based inquiries that are inherent in the resolution of certain issues involving application of Rule 601(c), including the provisions which result in "opening the door" to the admission of otherwise prohibited testimony.

In re Will of Baitschora, 207 N.C. App. 174, 181, 700 S.E.2d 50, 55-56 (2010).

Rule 601(c) of our Rules of Evidence is commonly referred to as the Dead Man's Statute. It is entitled "Disqualification of interested persons" and provides as follows:

> Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his or her interest or title by assignment or otherwise, shall not be examined as a witness in his or her own behalf or interest, or in behalf of the party succeeding to his or her title or interest, against the executor, administrator or survivor of a deceased person, or the guardian of an incompetent person, or a person deriving his or her title or interest from, through or under a deceased or incompetent person by assignment or otherwise, concerning any oral communication between the witness and the deceased or incompetent person. However, this subdivision shall not apply when:
>
> (1) The executor, administrator, survivor, guardian, or person so deriving title or interest is examined in his or her own behalf regarding the subject matter of the oral communication.
>
> (2) The testimony of the deceased or incompetent person is given in evidence concerning the same transaction or communication.

> (3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, guardian or person so deriving title or interest.

N.C. Gen. Stat. § 8C-1, Rule 601 (2013).

Caveators first contend that propounders opened the door to the admission of evidence regarding Charles Pickelsimer's statements on why he had "fallen out" with Brevard College. Caveators contend that the excluded evidence goes to a factual issue central to this case: Charles' relationship with Brevard College.

During the trial, propounders presented testimony from John Kelso, the attorney who drafted the 2010 Will and 2010 Trust. Kelso testified to conversations he had with Charles, particularly one that took place on 16 July 2010 during a brainstorming session during which Charles indicated to whom he might leave money or assets, how to go about conveying those assets, and charitable giving. During his testimony Kelso referred to notes he had taken during the meeting.

> A. Don't want to leave them a goddamn thing because they have basically stolen his money from him. He is absolutely sure of that. Is not exactly sure of where he does want to leave things to, but is very sure of where he doesn't want to leave things.
>
> Q. And this doesn't indicate who "them" references. . . .
>
> A. His children.
>
> . . .
>
> A. Is interested in some charitable organizations. Is closest to Brevard College of any of the organizations around here. Maybe some for the hospital. He knows his children were afraid of his getting remarried. . . . If he was going to leave it to someone now, it would be Betty McCrary. She has three children who have been nicer to him than his own children. . . . He is thinking on Cascade, if he can get others to go along with him, of selling it to the federal government . . . .
>
> . . .
>
> Thinking about an amount for Betty. Maybe leave the Cascade Power stock in a way that it might somehow go to the State. Want to leave some for SAFE, a

> battered woman's shelter, help women and children get out of abusive homes.

Following Kelso's testimony, Caveators submitted a brief to the trial court arguing that propounders had opened the door to testimony otherwise excluded by Rule 601(c). The trial court ruled that Kelso's testimony of oral communications with Charles had indeed opened the door to testimony by other interested parties of oral communications with Charles. Caveators then submitted a proffer of what their witnesses might say if asked questions about communications with Charles. Specifically, in regard to the support of Brevard College, caveators' proffer stated the following:

> [Charles Pickelsimer's children, Chuck and Lynn Williams, would testify] that they had multiple oral communications with Mr. Pickelsimer during which he stated his displeasure with Brevard College, the decisions of the administration, and lack of oversight of its trustees. Charles III recalls conversations with Mr. Pickelsimer after he resigned from the college board during which he stated that that [sic] he was "so disgusted with the college he would not give them a God damned dime" (or words to that effect). These conversations continued into the late 2000s. Mr. Pickelsimer was offended that the "Pickelsimer Memorial Garden" with reflecting pool and cross in front of the Jones Dormitory had been filled in and renamed the " 'McClarty Garden," with no substitute location to honor the family's past giving.

The trial court ruled that caveators would be allowed to testify regarding specific conversations with Charles about Brevard College as set forth in their proffer.

Lynn Williams thereafter testified in pertinent part:

> A. [Charles Pickelsimer, Jr.] served on the board [of Brevard College] for a short time. *And when he left the board, he left because he was disturbed by the lack of oversight in the spending.* He felt that the college president –
>
> . . .

[Counsel for propounders]: Objection

The Court: Sustained.

. . .

Q. As it relates specifically to charitable giving after that, after he resigned and the reasons he told you why he resigned, *did he tell you his views about charitable giving to Brevard College?*

A. *Yes, he did.*

. . .

He didn't feel too comfortable doing it.

(Emphasis added). Lynn testified she was surprised to see that her father had included Brevard College as a beneficiary to his will. The discussions she had had with her father indicating his lack of any comfort with charitable giving to Brevard College had continued into the late 2000s.

Caveators contend that the trial court erred in excluding testimony explaining the reason for Charles' disenchantment with Brevard College, and that such exclusion was highly prejudicial. They assert that, in light of testimony about several meetings which occurred following the death of Ann Pickelsimer between Charles Pickelsimer and a former president of Brevard College and Kelso's testimony concerning Charles' desire to benefit Brevard College in his 2010 Will, this desire "represented a seismic shift in attitude toward Brevard College occurring in the summer of 2010 [and] would be highly relevant to the level of influence being asserted by [the former President] in the weeks and months following Ann's death." Specifically, caveators contend that Lynn's excluded testimony concerning Charles' falling out with Brevard College would show that for decades Charles remained disturbed by the way the College was operated, "making it very unlikely he would have left his sizeable residual estate, including the 100 acre 'donut hole' property, to Brevard College unfettered[,] claiming he was 'closest' to Brevard College. This evidence goes directly to the 'extent' of the influence asserted by [former Brevard College President] on behalf of Brevard College."

We find this argument unpersuasive, mainly because the jury heard the gist of the testimony caveators now say was excluded. Where the trial court admitted testimony regarding the reason Charles removed himself from the Brevard College Board in the late 1980's, we fail to

see the merit in caveators' argument.[1] Further, Lynn testified regarding Charles' views on charitable giving to Brevard College, and why it was unlikely Charles would leave a sizeable, unrestricted residuary estate gift to the college. We do not agree that the admission of additional testimony regarding the reason Charles removed himself from the Brevard College Board in the late 1980's would have altered the jury's verdict. We note that caveators' proffer regarding Charles being offended that the former "Pickelsimer Memorial Garden" on the campus had been altered and renamed the " 'McClarty Garden," might have been relevant on the issue of why Charles may have been continually displeased with Brevard College; however, this portion of the proffer was not offered as testimonial evidence.

[2] Caveators also contend that Charles' statement to his daughter Lynn during a discussion regarding a transfer of $12.9 million from his trust was improperly excluded. Lynn testified that upon learning her mother's diagnosis was terminal, she without telling Charles, transferred $12.9 million from Charles' trust to Ann's trust to avoid estate taxes. Caveators assert that the exclusion of Charles response to Lynn's attempt to discuss the transfer was highly prejudicial as it precluded the jury from hearing the caveator's version of Charles' comments that would have shed light on their relationship as well as Charles' mental condition. In the proffer of what caveators expected their witnesses would say when questioned, caveators proposed that Lynn and Chuck would testify that "they had oral communications with [Charles] on several occasions to tell him about the transfers after they were made but before April 19, 2010, but that he told them that he was 'not mentally up' for the discussion (or words to that effect)."

At trial, Lynn provided the following pertinent testimony:

> Q. Since he lost all control of that money how did he come out better once it was transferred to your mother's trust than before you took it from him?
>
> A. Because that transfer made his dream come true.
>
> Q. So then you would have no problem discussing it with him in the eight weeks that transpired between early March and April 28th; correct?

---

1. Lynn Williams testified that "Charles served on the board [of Brevard College] for a short time. *And when he left the board, he left because he was disturbed by the lack of oversight in the spending.*"

> A. My father was not well and he was in deep grief. I said, "I have business things I need to talk to you about, daddy." And he said, "I am not mentally up for it right now."

Lynn's testimony appears to be in accordance with the proffer that caveators anticipated she and/or Chuck would state if questioned about the transfer of $12.9 million from Charles' trust account to Ann's trust account. Therefore, we find no merit to caveators' contention that the trial court erred by excluding testimony as to Charles' statements that would shed light on his relationship with his children or on his mental condition where in fact the challenged statement "I am not mentally up for it right now" was not excluded. Accordingly, we find caveators suffered no prejudicial error and overrule caveators' argument that the trial court erred in excluding testimony of statements made by Charles under the Dead Man's Statute.

II

[3] Next, caveators contend that the trial court erred in entering a directed verdict and judgment for *devisavit vel non* on the issue of whether "Propounders' Exhibit 2" constituted the last will and testament of Charles Pickelsimer, Jr. Specifically, caveators contend that no exhibit was identified as Propounders' Exhibit 2 in the record. As such, caveators contend that the trial court erred in entering a directed verdict concluding that Propounders' Exhibit 2 was executed according to the law for a validly executed will and that the trial court erred in entering judgment on the jury verdict where the jury returned a verdict on the validity of "Propounders' Exhibit 2" which does not appear in the record. On this basis, caveators contend they are entitled to a new trial. We disagree.

We review the number, form and phraseology of the issues presented to the jury for abuse of discretion. *Griffis v. Lazarovich*, 161 N.C. App. 434, 440, 588 S.E.2d 918, 923 (2003).

In their brief to this Court, caveators acknowledge that

> a document purporting to be Charlie's 2010 Will was included in a notebook of documents which was received into evidence as "Courtroom Exhibit 1." . . . It is also true that a document dated 17 August and testified to as a "pourover last will and testament" was identified as "Exhibit 2, Tab 2" . . . . A "Courtroom Exhibit 2" notebook was also identified. . . . In "Courtroom Exhibit 1," there is a

> document labeled "Defendant's Exhibit 2" which purports to be a Last Will and Testament signed on 17 August 2010.

The record reflects that during trial and prior to the testimony of Kelso, the attorney who drafted the 2010 will, counsel for propounder Albertson announced to the trial court that

> we have prepared exhibit notebooks with the exhibits that the caveators have agreed are authenticated for the purposes of the pretrial order. And we propose to give those to the jurors at the beginning of Mr. Kelso's deposition. . . . [W]e can direct them to the right tab as we go and move to admit as we go with the Court's permission.

The trial court stated that "I appreciate you all agreeing on the notebooks and all of the documents being admitted. That is going to move things along a lot. And you don't have to worry about making sure you've identified everything and you proffered it the proper way. You've all agreed." Counsel for Albertson clarified that each exhibit in the notebook was internally numbered. The trial court stated that while the exhibits were to be internally numbered, the notebook itself would be referred to as Courtroom Exhibit 1.

> [Propounder Counsel]: Your Honor, I don't know that I ever formally moved to admit the evidence, the exhibits that I introduced.
>
> The Court: Are you talking about Exhibit 1 and all of the contents?
>
> [Propounder Counsel]: Yes. Everything.
>
> The Court: I understood that there was an agreement that they would be.
>
> [Caveator Counsel]: Yes.
>
> The Court: And they are. We all had a discussion about it.

Before the jury, Debra Cooper, Charles Pickelsimer's former secretary, was asked to identify Exhibit 2 at Tab 2 in the notebook provided. She acknowledged that the document was entitled "the Last Will and Testament of Charles W. Pickelsimer, Jr." Moreover, the record on appeal provides that within the contents of Courtroom Exhibit 1 (the notebook) is contained Exhibit 2 – the "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010."

At the close of the evidence, the jury returned verdicts finding that the execution of Propounders' Exhibit 2 was not procured by undue influence. The jury further found that "Propounders' Exhibit 2 and every essential part of it, [was] the last will and testament of Charles W. Pickelsimer, Jr." On 6 December 2013, the trial court entered judgment in accordance with the jury verdicts and ordered that "[t]he execution of the document, entitled 'Last Will and Testament of Charles W. Pickelsimer, Jr.,' dated 17 August 2010, marked as propounders' Exhibit 2 at trial was not procured by undue influence" and "is hereby admitted to probate in solemn form."

Caveators now argue that the record fails to contain a paper writing marked as "*Propounders'* Exhibit 2" and that the trial court erred in entering judgment in accordance with the jury verdict. Caveators contend the jury entered *devisavit vel non* based on a "Propounders' Exhibit 2" which does not appear in the record. At oral argument, caveators extended this argument pointing out that this was an *in rem* proceeding: it was not about the parties but, rather, the will of Charles Pickelsimer, Jr. The burden of proof to establish the validity of the will was on the propounders, and caveators could not waive the issue of validity. By tasking the jury with determining whether Propounders' Exhibit 2 was the last will and testament of Charles Pickelsimer, Jr., and entering judgment in accordance with the jury's verdict in the affirmative, caveators claim that an ambiguity was created. Caveators assert that as no exhibit was entered into the record as "Propounders' Exhibit 2," the Clerk of Court cannot be certain as to which document the jury found to be Charles Pickelsimer, Jr.'s last will and testament. We find this argument unpersuasive.

> It is an elementary principle of law that the trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence. The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.

Griffis, 161 N.C. App. at 440, 588 S.E.2d at 922–23 (citations and quotations omitted).

Here, propounders, caveators, and the trial court agreed to compile exhibits into a notebook referred to as Courtroom Exhibit 1. The record

reflects that Charles Pickelsimer, Jr.'s Last Will and Testament dated 17 August 2010, included in Courtroom Exhibit 1, was marked for identification by propounders and referred to by propounders as Exhibit 2. Propounders moved that all exhibits included in Courtroom Exhibit 1 be admitted in evidence, and they were admitted by the trial court with no objection by caveators. Neither during the course of the trial, the charge conference, nor following the jury instruction[2] did caveators raise an objection to the referral of Charles Pickelsimer, Jr.'s 2010 Will as Propounders' Exhibit 2.

As the phraseology of the issues presented in this caveat proceeding was sufficiently accurate to resolve any factual controversies and enabled the trial court to fully render judgment in the cause, the trial court did not err or abuse its discretion in referring to propounders' proffered "Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010" as "Propounders Exhibit 2" on the jury verdict sheet.

Even if we were to accept caveators' contention that an ambiguity was created where the jury verdict sheet referenced Propounders' Exhibit 2 while no exhibit marked as *Propounders'* Exhibit 2 was entered into the record, we note that an exhibit marked as "Exhibit 2" was introduced by propounders as their exhibit and was entered in the record. Further, we note that the trial court's judgment clearly resolves any perceived ambiguity.

1. The execution of the document entitled "Last Will and Testament of Charles W. Pickelsimer, Jr.," dated 17 August 2010, marked as Propounders' Exhibit 2 at trial, was not procured by undue influence.

2. The document dated 17 August 2010, marked as Propounders' Exhibit 2 at trial, propounded for probate, and every part thereof, is the Last Will and Testament of Charles W. Pickelsimer, Jr. and it is hereby admitted to probate in solemn form.

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2. In his charge to the jury, the trial court specifically stated:

> The Propounders seek to establish the writing as a valid will. The Caveators contest that this . . . is a valid will for certain legal reasons, which I will discuss throughout my following instructions.
>
> *The writing at issue was marked as Propounders' Exhibit No. 2, and it's in your white book as Exhibit No. 2, and is dated August 17, 2010.*

(Emphasis added).

> [T]he existence of an ambiguity in a court order is . . . a question of law, but resolution of the ambiguity is a question of fact. *See Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002) (Trial court's determination of whether the language in a consent judgment was ambiguous is a question of law). The existence of an ambiguity in the orders is a question of law to be decided by the judge and is not a question of fact for the jury.

Emory v. Pendergraph, 154 N.C. App. 181, 185, 571 S.E.2d 845, 848 (2002).

Therefore, we hold that any ambiguity created in this case was resolved by the trial court as a matter of law. *See id.* As the assertions of the parties appearing before the trial court made clear, the Last Will and Testament of Charles W. Pickelsimer, Jr., dated 17 August 2010 is Propounders' Exhibit 2. Accordingly, caveators' arguments on these issues are overruled, and the judgment of the trial court is affirmed.

NO PREJUDICIAL ERROR; NO ERROR.

Judges STEPHENS and DIETZ concur.

IN THE MATTER OF D.L.P. AND H.L.P.

No. COA 15-168

Filed 18 August 2015

Child Abuse, Dependency, and Neglect—incompetent parent—Rule 17 guardian ad litem appointed—not present during hearing

On appeal from an order finding respondent-mother's children neglected and dependent juveniles, the Court of Appeals held that the trial court erred by proceeding when respondent's Rule 17 guardian ad litem (GAL) was not present. The trial court's orders were vacated and the case was remanded.

Appeal by Respondent from orders entered 18 November 2014 by Judge Robert Martelle in Rutherford County District Court. Heard in the Court of Appeals 27 July 2015.

IN RE D.L.P.

[242 N.C. App. 597 (2015)]

Merri B. Oxley for petitioner-appellee Rutherford County Department of Social Services.

Lee F. Taylor for guardian ad litem.

Robert W. Ewing for respondent-appellant mother.

TYSON, Judge.

Rhonda S. Price ("Respondent") appeals from adjudication and disposition orders finding her two sons to be neglected and dependent juveniles. We hold that once the trial court appointed Respondent a Rule 17 guardian ad litem ("GAL"), the hearings should not have proceeded without the GAL being present. The trial court's orders are vacated and the cases are remanded.

I. Background

The Rutherford County Department of Social Services ("DSS") filed the petitions in response to Respondent's report of an incident on 6 May 2014, where the father of both juveniles allegedly threatened to beat H.L.P. "until he was bruised all over with blood running all over him." Respondent sought assistance, but repeatedly told DSS staff she was unable and unwilling to leave the father and move her children to a safe place. On 7 May 2014, DSS filed petitions alleging Respondent's two minor children, D.L.P. and H.L.P., were neglected and dependent juveniles and took non-secure custody of D.L.P. and H.L.P.

The pre-adjudication and adjudication hearings occurred on 12 August 2014. Respondent was not present for the hearings. Respondent's appointed counsel was present and indicated he had "not been advised that well" and that "he will stand mute." After DSS presented evidence, Respondent's appointed counsel did not question the witness and the court noted "Mr. Rogers is mute." The trial court found H.L.P. and D.L.P. to be neglected and dependent juveniles. Due to Respondent's absence, the court held the disposition hearing open until the next day.

Respondent was present for the disposition hearing the following day. At the outset, Respondent's appointed counsel notified the court that Respondent had retained counsel and asked the court to release him from his appointment. The trial court agreed to release appointed counsel after the conclusion of the disposition hearing. At this point, Respondent told the court her retained counsel "has every intention of asking for this to be retried or refiled for a readjudication [sic] hearing,

for another hearing." The trial court indicated Respondent could request a new hearing, but asked Respondent to allow the court to finish the disposition hearing before moving forward with anything else.

During disposition, the court received evidence from DSS and the GAL for both juveniles. Respondent's appointed attorney did not question, examine or participate. The juveniles' GAL requested that both Respondent and the juveniles' father be required to undergo psychological evaluations. At that time Respondent announced she was leaving the courtroom. The court ordered the bailiff to take Respondent into custody and hold her in the courtroom, to which she replied, "[t]hen you can take me to jail . . . I don't need to be here." Respondent refused to remain quiet and finally stated, "I am not going to be quiet until you remove me from this courtroom." Following this exchange, the court ordered the bailiff to remove Respondent from the courtroom.

Because of Respondent's outburst, a discussion on the record ensued between the court, Respondent's appointed attorney, Respondent's husband, and the juveniles' GAL attorney about possible ways to obtain a mental assessment or treatment for Respondent. Ultimately, the Court ordered Respondent to be held in protective custody until she was assessed by the Mobile Crisis Unit.

The trial court entered its adjudication and disposition orders over three months later on 18 November 2014. Separate, but identical, orders address each juvenile, with each order entitled, "Adjudication and Disposition Order." In both juveniles' orders, the Court made the following findings of fact:

> 9. The Respondent Mother has suffered an organic brain injury requiring brain surgery.
>
> . . . .
>
> 12. The Respondent Mother was present during disposition. In open court she exhibited erratic and belligerent behavior. The Court believes these behaviors may be affiliated with her injury as described above.
>
> 13. As a result of her harmful behavior the Court had the Respondent Mother taken into protective custody. The Court determined the Respondent Mother required a Rule 17 Guardian Ad Litem, and Allyson Shroyer was appointed as the Respondent Mother's Rule 17 Substitute GAL. The Respondent Mother was held in custody until she met with the Rutherford County Mobile Crisis Unit.

The adjudication and disposition orders set forth the permanent plan for D.L.P. and H.L.P., with the stated goal of "reunification with one or both of the respondent parents."

Both juveniles' adjudication and disposition orders show that the trial judge appointed a GAL for Respondent at some point prior to the entry of the orders. Neither the record nor the transcript contain findings of fact from the trial court's inquiry into Respondent's competency, nor is there any clear indication in the transcript whether the Court appointed a GAL for Respondent during the hearings. At no point during the pre-adjudication, adjudication, or disposition hearings was a GAL present for Respondent. Respondent appeals.

II. Issue

Respondent argues once the trial court appointed her a GAL, it was not permitted to conduct the adjudication and disposition hearings without the presence of Respondent's GAL.

III. Standard of Review

"A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). The decision whether to conduct such an inquiry is firmly within the discretion of the trial court. *In re J.R.W.*, __ N.C. App. __, __, 765 S.E.2d 116, 119 (2014).

IV. Analysis

Respondent argues once the trial court determined Respondent required a GAL, the hearing could not proceed without Respondent's GAL present. We agree.

"On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-602(c) (2013). Rule 17 sets forth the procedures for appointment of a GAL for an incompetent person. N.C. Gen Stat. § 35A-1101 defines "incompetent" as it relates to an adult as one who "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property . . . ." N.C. Gen Stat. § 35A-1101(7) (2013).

In the adjudication and disposition orders, the trial court stated it had determined Respondent required a GAL and appointed one for

her. The trial court made this determination "[a]s a result of her harmful behavior" during the disposition hearing. We also note the record is replete with documentation of Respondent's mental and psychological difficulties apparently related to her "organic brain injury requiring surgery" and inability to make decisions regarding the care of the children or her case plan.

Nothing in the transcript indicates exactly when the trial court appointed Respondent's GAL. It is clear from the record and transcript that the trial court appointed Respondent's GAL sometime after the adjudication hearing on 12 August 2014. The adjudication and disposition orders contain language indicating that Respondent's conduct during the disposition was a key factor in the court's competency determination.

The adjudication and disposition hearings were held on 12 and 13 August 2014 and the orders were not entered until 18 November 2014. Because the adjudication and disposition orders are the only express evidence in the record of Respondent being appointed a GAL, we must presume the court decided Respondent was incompetent at some point during the hearings and expressly appointed a "Rule 17" GAL due to her incompetence.

This Court in *In re A.S.Y.* sets forth a comprehensive analysis of a GAL's duties after appointment pursuant to N.C. Gen. Stat. § 7B-602 (2013).

> Ultimately, after the appointment of a GAL, "the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered." N.C. Gen. Stat. § 1A–1, Rule 17(e). Thus, Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed. The presence and active participation of a GAL appointed according to the provisions of Rule 17 effectively removes any legal disability of the party that is so represented.

In re A.S.Y., 208 N.C. App. 530, 538, 703 S.E.2d 797, 802 (2010).

The transcript reflects Respondent had not advised her appointed attorney "that well" and that he would and did "stand mute." The transcript also reflects her court appointed attorney sought to withdraw and be relieved of his duties. There does not appear to be any communication

between Respondent and her court appointed attorney at the disposition hearing. It appears Respondent's situation is specifically anticipated by Rule 17 and N.C. Gen. Stat. § 7B-602 and is sanctioned by this Court in *In re A.S.Y. Id.*

The trial court determined Respondent could not adequately represent her own interests and appointed a GAL to represent her pursuant to N.C. Gen. Stat. § 7B-602. Conducting the hearing without the presence and participation of the GAL for Respondent was error. *In re A.S.Y.* at 540, 703 S.E.2d at 803. The trial court's orders of adjudication and disposition must be vacated.

When the court determined Respondent was incompetent and appointed a GAL, it should not have allowed the hearing to go forward without Respondent's GAL. The record clearly shows a Rule 17 GAL was appointed, but is unclear as to when. Once Respondent "has been appointed a GAL according to Rule 17, the presence and participation of the GAL is necessary in order for the trial court to 'proceed to final judgement, order or decree against any party so represented.' " Id. (citation omitted).

V. Conclusion

We vacate the adjudication and disposition orders and remand this case for further proceedings. The trial court will be in the unique position to receive reports, observe the demeanor of Respondent, and determine whether further competency determinations are necessary. If incompetency remains, a GAL must be present at further proceedings.

The trial court's orders are vacated and the cases are remanded.

VACATED AND REMANDED.

Judges GEER and STROUD concur.

IN RE J.A.U.

[242 N.C. App. 603 (2015)]

IN RE J.A.U., A MINOR JUVENILE

S.A.U., PETITIONER
v.
MICHAEL HORTON, RESPONDENT

No. COA15-135

Filed 18 August 2015

Termination of Parental Rights—jurisdiction—standing—paternal grandmother filing petition

The trial court was without subject matter jurisdiction and an order terminating a father's parental rights was vacated where the petitioner, the paternal grandmother, did not fall within any of the categories enumerated in N.C.G.S. § 7B-1103(a) and therefore lacked standing.

Appeal by respondent from order entered 28 October 2014 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 27 July 2015.

John Benjamin "Jak" Reeves and Anne C. Wright for petitioner-appellee.

Michael E. Casterline for respondent-appellant.

GEER, Judge.

Respondent appeals from an order terminating his parental rights to J.A.U. Because petitioner, J.A.U.'s maternal grandmother, lacked standing to file a petition to terminate respondent's parental rights, we vacate the trial court's order.

Facts

J.A.U. ("Jeffrey") was born in New York State in 2006 and moved to North Carolina with his mother, "Kayla," when he was six weeks old.[1] Jeffrey and Kayla lived with petitioner when they first moved to North Carolina. In 2007 or 2008, Kayla took Jeffrey to Virginia, where she attended school. Beginning in around 2009, Kayla and Jeffrey lived with

1. The pseudonyms "Jeffrey" and "Kayla" have been used throughout the opinion to protect the child's privacy and for ease of reading.

the father of Kayla's second child for about two years. However, Jeffrey had frequent visits with petitioner during the first six years of his life, and petitioner provided financial support for Kayla and Jeffrey.

Kayla had ongoing problems with substance abuse and, on 8 October 2012, she voluntarily placed Jeffrey with a family friend and entered a detox facility. On 6 November 2012, the Wilkes County Department of Social Services ("DSS") obtained nonsecure custody of Jeffrey and placed him in the Ebenezer Gardens Christian Children's Home, a group home. DSS filed a petition on 6 November 2012 alleging that Jeffrey was a dependent juvenile and filed an amended petition on 8 November 2012 alleging that Jeffrey was a neglected and dependent juvenile. The amended petition reiterated the allegations from the first petition and added that Kayla had recently named respondent, who was incarcerated, as Jeffrey's father.

On 17 December 2012, Judge David V. Byrd entered an order adjudicating Jeffrey a neglected and dependent juvenile, continuing Jeffrey's custody with DSS, denying respondent the right to visitation with Jeffrey during his incarceration, and allowing Kayla visitation, subject to certain conditions. On 15 March 2013, Judge Michael D. Duncan entered a review order finding that respondent remained incarcerated and that Kayla had done little towards completing the items on the plan developed by DSS. The review order also found that petitioner was interested in having Jeffrey placed in her home, but that she was physically unable to care for him, given that she was recovering from back surgery. The order continued Jeffrey's legal and physical custody with DSS and gave DSS authority to place Jeffrey with petitioner if it became appropriate.

On 21 May 2013, Jeffrey was placed with petitioner, but remained in the legal and physical custody of DSS. Judge Duncan entered a permanency planning order on 28 June 2013, stating that the court had "seriously considered" a permanent plan of placement with petitioner, but had decided to allow Jeffrey's parents an additional 90 days to demonstrate compliance with the DSS case plan. On 10 October 2013, Judge Duncan entered a new permanency planning order granting legal and physical custody of Jeffrey to petitioner. On 24 March 2014, Judge Jeanie R. Houston entered a permanency planning order that continued Jeffrey's custody with petitioner, relieved DSS of further responsibility, and converted the matter to a civil custody action pursuant to the provisions of Chapter 50 of the North Carolina General Statutes.

On 6 May 2014, petitioner filed a petition to terminate respondent's parental rights to Jeffrey pursuant to N.C. Gen. Stat. § 7B-1111(a)(7)

(2013) (willful abandonment) and N.C. Gen. Stat. § 7B-1111(a)(3) (willful failure to pay a reasonable portion of the cost of care for the juvenile). Following a hearing conducted on 2 October 2014, the trial court entered an order terminating respondent's parental rights on 28 October 2014. Respondent timely appealed to this Court.

Discussion

Respondent first argues the trial court lacked jurisdiction over the termination of parental rights proceeding because petitioner did not have standing to file a petition to terminate his parental rights to Jeffrey. We agree and find this issue dispositive of respondent's appeal.

"In North Carolina, standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re E.T.S.*, 175 N.C. App. 32, 35, 623 S.E.2d 300, 302 (2005) (internal quotation marks omitted). Standing to initiate a termination of parental rights action is governed by N.C. Gen. Stat. § 7B-1103(a) (2013), which provides:

> A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:
>
> (1) Either parent seeking termination of the right of the other parent.
>
> (2) Any person who has been judicially appointed as the guardian of the person of the juvenile.
>
> (3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.
>
> (4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.
>
> (5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

In this case, petitioner is not a parent of Jeffrey, a county department of social services, or a guardian ad litem, and she had not filed a petition to adopt Jeffrey at the time she filed a petition to terminate respondent's parental rights. Therefore, the only possible bases for petitioner's standing arise under subsections (a)(2), as a "person who has been judicially appointed as the guardian of the person of the juvenile[,]" or (a)(5), as a "person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion."

As regards N.C. Gen. Stat. § 7B-1103(a)(2), it is undisputed that at the time petitioner filed a petition seeking termination of respondent's parental rights, she had not been "judicially appointed as [Jeffrey's] guardian." The record indicates that the trial court awarded only legal and physical custody of Jeffrey to petitioner, and the termination order specifically finds that "[t]here is no person appointed as guardian of the person of the minor child[.]" Therefore, petitioner did not have standing to seek termination of respondent's parental rights under that subsection.

Petitioner, however, argues that she had standing under N.C. Gen. Stat. § 7B-1103(a)(2) because her status as Jeffrey's custodian was equivalent to that of a legal guardian. We addressed this argument in *In re B.O.*, 199 N.C. App. 600, 681 S.E.2d 854 (2009). In *In re B.O.*, the petitioners contended that their status as custodians granted them the same status as guardians and established their standing to file a termination of parental rights petition. *Id.* at 603, 681 S.E.2d at 857. We rejected that argument, noting that our Juvenile Code recognizes a distinction between "custodian" and "guardian" and that:

> [u]nder the [Juvenile] Code, "guardians" clearly have far greater powers over their wards than do "custodians." These terms are not synonymous under the statute, and N.C. Gen. Stat. § 7B-1103 includes no provision granting "custodians" standing to petition for termination of another's parental rights.

Id. at 604, 681 S.E.2d at 857. Therefore, "[w]e [could not] hold that the words 'custody' and 'judicially appointed . . . guardian' as used in N.C.

Gen. Stat. § 7B-1103 were not intended to have specific, distinct meanings." *Id.* at 603, 681 S.E.2d at 857.

Petitioner acknowledges the holding of *In re B.O.* but urges us to disregard it, based on the fact that the statutory definition of "custodian" has changed since our decision in that case. When *In re B.O.* was decided, N.C. Gen. Stat. § 7B-101(8) (2009) defined custodian as "[t]he person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court." The legislature amended the statute effective 1 October 2013, and "custodian" is now defined as the "person or agency that has been awarded legal custody of a juvenile by a court." N.C. Gen. Stat. § 7B-101(8) (2013). The effect of this change was to eliminate the extra-judicial definition of a custodian.

Petitioner appears to contend that the legal status of a custodian is now the same as a guardian, because both may only be appointed by a court. Although custodians and guardians are both designated by a court, petitioner cites no authority for the proposition that the two are now identical, or that *In re B.O.* was overruled by the definitional change, and we have found no indication that the legislature intended to conflate the two terms. Moreover, in both the present case and *In re B.O.*, the petitioner was a court-appointed custodian. We therefore have no reason to revisit our holding in *In re B.O.*, and we hold that petitioner did not have standing as a judicially-appointed guardian to file a termination of parental rights petition.

We also conclude that petitioner did not have standing to file for termination of respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1103(a)(5) because she was not a "person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." Petitioner filed a petition for termination of respondent's parental rights on 6 May 2014. Therefore the relevant time period was 6 May 2012 to 6 May 2014.

The record shows that (1) Jeffrey lived with Kayla from November 2011 until DSS became involved with the family on 8 October 2012; (2) DSS placed Jeffrey in a group home in November 2012; and (3) DSS did not place Jeffrey with petitioner until 21 May 2013. When petitioner filed the petition for termination of respondent's parental rights on 6 May 2014, Jeffrey had been living with her for slightly less than a year. By the plain language of the statute, petitioner is not a person "with

whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." *Id.*

Petitioner contends that her standing is established in the trial court's Finding of Fact No. 10, which found that Jeffrey "has resided with Petitioner all of the child's life with the exception of a few days when the child resided with his biological mother." Respondent challenges Finding of Fact No. 10 as unsupported by clear, cogent, and convincing evidence, and we agree. Jeffrey may have lived with petitioner at various points in his life. However, the evidence is undisputed that he did not live with petitioner for "all of the child's life with the exception of a few days[.]" For example, petitioner testified that Kayla and Jeffrey lived in Virginia during 2007 or 2008, and that they lived with the father of Kayla's other child for about two years, starting when Jeffrey was age three. The record shows he also lived with Kayla between November 2011 and October 2012 and that he was in a group home from November 2012 until 21 May 2013. We conclude that this finding of fact is unsupported by the evidence, which establishes that Jeffrey had lived apart from petitioner for periods significantly longer than "a few days" and had lived with petitioner continuously for less than one year at the time she filed a termination petition. Accordingly, we hold that petitioner did not have standing to file a termination of parental rights petition under N.C. Gen. Stat. § 7B-1103(a)(5).

In urging us to reach a contrary conclusion, petitioner contends that there is evidence that Jeffrey had lived with petitioner for "the majority of his life." However, petitioner does not argue that Jeffrey had lived with petitioner continuously for at least two years prior to the filing of the petition, which is the statutory standard. Petitioner also cites language in *In re E.T.S.*, describing the two-year requirement set out in N.C. Gen. Stat. § 7B-1103(a)(5) as being "based upon the relationship between the petitioner and the child." *In re E.T.S.*, 175 N.C. App. at 38, 623 S.E.2d at 303. However, in *In re E.T.S.*, the minor had lived with the petitioner for more than two years. The quoted language, which is arguably *dicta*, does not hold that a long-term relationship is a valid substitute for the requirement of N.C. Gen. Stat. § 7B-1103(a)(5).

Petitioner also cites *In re A.D.N.*, ___ N.C. App. ___, 752 S.E.2d 201 (2013), *disc. review denied*, 367 N.C. 321, 755 S.E.2d 626 (2014), in which we held that where the juvenile had lived with the petitioner for more than two years, the petitioner's standing to file a petition for termination of parental rights was not defeated by the fact that during the two-year period the child had visited the respondent parents for a few days on a

number of occasions. *In re A.D.N.* is factually distinguishable from the present case, in which Jeffrey had not lived with petitioner for at least two years prior to the filing of the termination petition.

In conclusion, petitioner does not fall within any of the categories enumerated in N.C. Gen. Stat. § 7B-1103(a), and she therefore lacked standing to file a petition to terminate respondent's parental rights. Because she lacked standing, the trial court did not have subject matter jurisdiction over the termination proceedings. Accordingly, we must vacate the trial court's order terminating respondent's parental rights. Because we are vacating the trial court's order, we need not address respondent's remaining arguments on appeal.

VACATED.

Judges STROUD and TYSON concur.

LEIGH BOWMAN MALINAK, PLAINTIFF
v.
PAVOL MALINAK, DEFENDANT

No. COA14-1354

Filed 18 August 2015

Child Custody, Support and Visitation—support—overdue payments—laches not a defense

Laches was not an applicable defense to the non-payment of court-ordered child support obligations.

Appeal by plaintiff from order entered 7 August 2014 by Judge Deborah Brown in Alexander County District Court. Heard in the Court of Appeals 21 May 2015.

Wesley E. Starnes for plaintiff-appellant.

W. Wallace Respess, Jr., for defendant-appellee.

McCULLOUGH, Judge.

Leigh Bowman Malinak ("plaintiff") appeals from a contempt order holding Pavol Malinak ("defendant") in willful civil contempt and

holding defendant owes $6,800.00 in back child support. For the following reasons, we reverse and remand.

I. Background

Plaintiff and defendant were married 22 June 1996, had one child together during their marriage on 6 November 1996, and separated with the intent to remain permanently separated on 4 February 1999. On 26 January 2000, plaintiff filed a complaint in Alexander County District Court seeking custody of and support for the child. Pursuant to a consent order filed 31 March 2000, plaintiff was granted primary custody and defendant was ordered to pay $400.00 per month in child support.

On 18 April 2000, defendant filed an answer and counterclaims seeking child custody, child support, attorney's fees, and absolute divorce. Plaintiff replied to defendant's counterclaims and joined defendant's request for absolute divorce on 28 June 2000. The same day plaintiff filed her reply, the trial court filed a judgment granting absolute divorce. All other matters were severed and reserved for future determination.

More than a decade later on 1 April 2014, plaintiff filed a motion to show cause based on defendant's alleged failure to make child support payments. Specifically, plaintiff alleged defendant owed $48,000.00. After several continuances, defendant filed a pleading on 23 July 2014 asserting the affirmative defenses of laches, the statute of limitations, and unclean hands.

Following a hearing on plaintiff's motion to show cause in Alexander County District Court, the Honorable Deborah Brown announced her decision to hold defendant "in contempt of the prior court order in that he is in arrears on his child support in the amount of six thousand, eight hundred dollars." The trial judge explained her reasoning and calculations in open court and later memorialized her decision in a written order of contempt filed 7 August 2014. The following findings of fact in the order of contempt explain her ruling:

> 6. The parties entered into a Consent Judgment on March 31, 2000, which provides for among other things for the payment of child support in the amount of $400.00 per month.
>
> 7. The Defendant paid child support until May 2001.
>
> 8. The Plaintiff discouraged the Defendant from visiting with the minor child and represented to the Defendant

that she would not enforce the child support order if he would not visit.

9. The lack of visitation does not excuse the payment of child support.

. . . .

13. The Defendant began paying child support again in October in 2012, and has paid child support consistently since that time.

. . . .

15. The Plaintiff has waited 13 years to attempt to enforce the consent order of March 31, 2000. The Plaintiff is barred by the docrtrine [sic] of Laches from seeking child support prior to March 26, 2011.

16. The Plaintiff testified that she did not pursue the child support as she did not have monies with which to do so. She did however obtain Medicaid through the Department of Social Services and could have pursued child support.

17. From March 26, 2011, through July 2014, the Defendant should have paid $14,400.00 in child support. The Defendant has paid $7,600.00 leaving a balance of $6,800.00.

18. The Defendant's failure to pay was wilful [sic] and without lawful justification or excuse.

19. The purposes for which the order was entered can still be served by its' enforcement.

Plaintiff filed notice of appeal from the order of contempt on 4 September 2014.

II. Discussion

The sole issue raised on appeal by plaintiff is whether the trial court erred by barring the recovery of unpaid child support prior to 26 March 2011 under the doctrine of laches. The doctrine of laches is an affirmative defense which the pleading party bears the burden of proving. *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976).

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay

> of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001). The applicability of the doctrine of laches in child support cases is a question of law. "We review questions of law *de novo*." *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

In the present case, plaintiff concedes recovery of unpaid child support accruing prior to 1 April 2004 is barred by the ten year statute of limitations provided in N.C. Gen. Stat. § 1-47, *see State of Michigan v. Pruitt*, 94 N.C. App. 713, 714, 380 S.E.2d 809, 810 (1989), but contends the trial court erred in applying the doctrine of laches to bar recovery of child support owed from 1 April 2004 until 26 March 2011, "thereby denying plaintiff $33,600.00 in accrued child support that was owing during the relevant period of the statute of limitations." Plaintiff cites *Napowsa v. Langston*, 95 N.C. App. 14, 381 S.E.2d 882 (1989), and *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981), in support of her argument. Upon review, we agree the trial court erred in applying the doctrine of laches to limit plaintiff's recovery of past due child support.

In *Larsen*, fourteen years after a divorce decree was entered ordering the plaintiff's former husband to pay child support, the plaintiff filed suit against her former husband's estate seeking to collect $10,710.00 in past due child support. 54 N.C. App. at 166-67, 282 S.E.2d at 552. Despite the estate's assertion of laches as a bar to the plaintiff's recovery, the trial court entered summary judgment awarding the plaintiff child support owed during the applicable ten year statute of limitations period prior to the date of the plaintiff's former husband's death. *Id.* at 167, 282 S.E.2d at 552. On appeal, this Court affirmed the trial court's entry of summary judgment in favor of the plaintiff, distinguishing the case from prior cases that recognized the doctrine of laches as a valid defense on the basis that those prior cases did not involve claims of past due court-ordered payments, such as the continuing obligation of court-ordered child support. *Id.* at 167-68, 282 S.E.2d at 552-53. Furthermore, in *Larsen*

this Court acknowledged prior cases in which this State's appellate courts have held the defense of laches was untenable in suits to recover past due support obligations, *see Nall v. Nall*, 229 N.C. 598, 50 S.E.2d 737 (1948), and *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977), and ultimately held, "[t]he only bar to [the] plaintiff's action for enforcement of the child support judgment is the applicable ten-year statute of limitations[.]" *Larsen*, 54 N.C. App. at 169, 282 S.E.2d at 553.

Years later in *Napowsa*, this Court addressed a defendant's argument that "the trial court erroneously denied his motion to dismiss on the ground that laches barred [the] plaintiff from recovering past child support since the action was not filed until the child was seventeen years of age." 95 N.C. App. at 22, 381 S.E.2d at 887. Relying in part on *Larsen*, this Court expressed that it "believe[d] the doctrine of laches is not applicable to an action for retroactive child support since the public policy concerns about stale claims are already adequately served by the . . . statute of limitations" and stated it was "aware of no decision of this State which has accepted laches as a defense to the enforcement of a court order for child support." *Id.* at 22, 381 S.E.2d at 887. Thus, in *Napowsa* this Court held "the trial court properly refused to dismiss [the] plaintiff's action based on the defense of laches." *Id.* at 23, 381 S.E.2d at 887.

In his brief on appeal, defendant acknowledges the holdings of *Larsen* and *Napowsa* and "concedes that generally speaking our Courts have not embraced the equitable defense of laches barring claims for unpaid alimony and child support." Defendant, however, argues there are exceptions for the application of equitable defenses to the payment of child support and requests that we carve out a rule. Defendant cites *Ribelin v. Creel*, No. COA 14-643, 2015 WL 660788 (N.C. App. Feb. 17, 2015), a recent unpublished opinion by this Court, and *Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000), in support of his argument. We decline defendant's request as both *Ribelin* and *Tepper* are not controlling in this case.

Although *Ribelin* is unpublished, defendant "submits that it is so recent having been handed down on February 17, 2015, that it has some precedential value." We are not persuaded. First, nothing in Rule 30(e) of the North Carolina Rules of Appellate procedure provides that an unpublished opinion has precedential value merely because it is recent. Second, *Ribelin* is easily distinguished from the present case because the defendant in *Ribelin* was not under a prior court order to pay child support. 2015 WL 660788, at *4. Thus, this Court held in *Ribelin* that it

was within the trial court's discretion to limit the amount of child support retroactively ordered in an order imposing a child support obligation on the defendant for the first time. *Id.* In contrast, defendant in the present case failed to make child support payments subsequent entry of the trial court's order requiring him to do so. We hold laches is not applicable in such a situation to avoid a court-ordered obligation.

Regarding *Tepper*, while this Court upheld the trial court's application of laches to bar the plaintiff's recovery of past due child support, it did so applying laches as construed by the Illinois courts. 140 N.C. App. at 361-62, 536 S.E.2d at 659-60. Its decision was not based on the applicability of laches under North Carolina law and, therefore, the opinion is not controlling in the present case.

III. Conclusion

For the reasons discussed, laches is not an applicable defense to the non-payment of court ordered child support obligations and, therefore, the trial court erred in limiting the arrears owed by defendant in this case.

REVERSED AND REMANDED.

Judges STROUD and INMAN concur.

SHEILA ROBINSON, Petitioner
v.
UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM, Respondent

No. COA14-1194

Filed 18 August 2015

1. Public Officers and Employees—State employee—work rules

The work rules under which a UNC Health System employee were dismissed were applicable to her even though she had achieved career State employee status before the applicable date in N.C.G.S. § 116-37, which she contended meant that she was not subject to rules adopted after that date. The provisions in question were "written work rules"; there was no dispute that they were known to petitioner; and "written work rules" of this type were authorized by N.C.G.S. § 116-37(d)(2) as of 31 October 1998, and that had not changed.

2. Civil Rights—complaints to employer—no notice of protected class factors—discharge not retaliation

Petitioner was not terminated in retaliation for her complaints to her employer, in violation of 42 U.S.C. § 2000e, where petitioner failed to put respondent on notice of any relevant factors concerning a protected class, so that respondent had no knowledge that petitioner was engaged in a protected activity and could not have engaged in retaliation.

3. Public Officers and Employees—wrongful termination—burden of proof

The agency and trial court did not err in placing the burden of proof upon petitioner where petitioner was terminated from the UNC Health Care System for her conduct. Despite statutory changes, petitioner failed to demonstrate that the burden of proof applicable to her case changed, so it remained on the employee who was challenging just cause for termination. Also, the result would have been the same even if the burden of proof had been upon respondent, since petitioner did not deny that she behaved in the manner alleged by respondent and did not challenge any of the findings of fact as unsupported by substantial evidence.

4. Public Officers and Employees—termination of employment—unacceptable personal conduct

The trial court did not err by concluding that respondent had just cause to terminate petitioner's employment. Petitioner had the burden of proving that her conduct was not unacceptable personal conduct as defined in the statute, but she did not deny that she had behaved in the manner respondent alleged and did not allege that any of the findings of fact were unsupported by the evidence.

Appeal by petitioner from order entered 18 July 2014 by Judge G. Bryan Collins, Jr., in Durham County Superior Court. Heard in the Court of Appeals 8 April 2015.

Merritt, Webb, Wilson & Caruso, PLLC, by Joy Rhyne Webb, for petitioner-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Kathryn J. Thomas, for respondent-appellee.

STROUD, Judge.

Where just cause existed to terminate petitioner's employment, the trial court did not err in upholding the Final Agency Decision affirming her termination. Where petitioner did not allege discrimination based upon a protected class, petitioner's workplace complaints were not protected conduct. Where rules implemented after 1998 do not apply to petitioner, a statute effective after 1998 shifting the burden of proof to respondent did not apply to petitioner.

I. Factual and Procedural Background

Sheila Robinson (petitioner) began her employment with UNC Hospitals in May 1992, in the Patient Account Services Department. She was employed with UNC Hospitals, which became part of the University of North Carolina Health Care System (respondent) as of 1 November 1998, continuously from May 1992 until 20 November 2012, at which point her employment was terminated. Petitioner had achieved career State employee status, as defined by N.C. Gen. Stat. § 126-1.1, by 31 October 1998. In January 2001, petitioner was transferred to the Accounts Payable Department, in the position of Accounts Payable Technician, and remained there until her employment was terminated in 2012.

On 6 December 2012, petitioner filed a grievance challenging her termination. Following a meeting concerning petitioner's grievance, petitioner received a written response on 4 January 2013, in which the vice president and CFO of UNC Hospitals upheld the decision to terminate petitioner's employment. Petitioner appealed this decision, which was investigated and reviewed by an administrative panel. The panel recommended that petitioner's termination be upheld, and the panel's recommendation was followed. Petitioner was notified of this decision by letter dated 8 April 2013.

Petitioner sought a further administrative hearing of the issue on 16 April 2013. The hearing was held on 17 September 2013. On 30 September 2013, the panel issued its recommendation that petitioner's termination be upheld and her requested relief be denied. The President of UNC Hospitals accepted the panel's recommendation in its entirety, upheld petitioner's termination, and denied her requested relief. The Final Agency Decision containing this determination was issued and served on 25 October 2013.

On 22 November 2013, petitioner filed a petition for judicial review in Durham County Superior Court. On 27 November 2013, respondent filed a response to the petition for judicial review. On 14 July 2014, the trial court heard arguments on the petition.

Tammy Stone (Stone), who became petitioner's supervisor in January 2012, testified that petitioner's termination was based upon personal conduct, including a significant past record of unfounded allegations and complaints about co-workers and managers in violation of respondent's Code of Conduct, explosive behavior in department meetings, argumentative and disrespectful interactions with supervisors, and repeated and unsupported claims that she was being singled out or treated differently. The dismissal notice that petitioner received stated that petitioner's discharge was based on her personal conduct, specifically: (1) she alleged that policies were not being applied equally to her on multiple occasions; (2) she alleged that she alone was being held to respondent's Time and Attendance policy on multiple occasions; (3) she alleged that other Accounts Payable staff were receiving preferential treatment; (4) she alleged discrimination; (5) she alleged harassment and intimidation by Stone; (6) she alleged ostracism from her coworkers; (7) she alleged that she was unfairly given a greater workload on multiple occasions; (8) she alleged that she was not receiving proportionate assistance from the department volunteer on multiple occasions; (9) she alleged that employees with children or dependents were receiving unfair benefits with regard to respondent's "Notification Less than 24 Hours in Advance" policy. Stone acknowledged that petitioner performed her job adequately, and that job performance did not play a part in her termination.

On 18 July 2014, it entered its order, affirming the Final Agency Decision.

Petitioner appeals.

II. Standard of Review

> Where the petitioner alleges that the agency decision was either unsupported by the evidence, or arbitrary and capricious, the [reviewing] court applies the 'whole record test' to determine whether the agency decision was supported by substantial evidence contained in the entire record. Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency.

Campbell v. N.C. Dep't of Transp., Div. of Motor Vehicles, 155 N.C. App. 652, 657, 575 S.E.2d 54, 58 (2003) (quoting *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 3-4, 541 S.E.2d 750, 752, *aff'd per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001)).

III. Final Agency Decision

[1] Petitioner first contends that the trial court erred in concluding that the Final Agency Decision was not erroneous because the UNC Health Care Code of Conduct which was adopted after 31 October 1998 does not apply to her. We disagree.

Petitioner contends that, as a career State employee, and having achieved that status prior to 31 October 1998, petitioner was not subject to "rules regarding discipline or discharge adopted after 31 October 1998." Petitioner relies upon N.C. Gen. Stat. § 116-37, which states that "an employee who has achieved career State employee status as defined by G.S. 126-1.1 by October 31, 1998, shall be subject to the rules regarding discipline or discharge that were effective on October 31, 1998, and shall not be subject to the rules regarding discipline or discharge adopted after October 31, 1998." N.C. Gen. Stat. § 116-37(d)(2) (2013). Petitioner contends that she was terminated pursuant to respondent's Code of Conduct policy, which allowed respondent to terminate an employee without prior written counseling or warning. She contends, however, that because this policy was adopted after 31 October 1998, it did not apply to her.

Respondent argues that the Code of Conduct policy is not a "rule regarding discipline or discharge" which was not subject to change after 31 October 1998, but is simply an "administrative policy governing working conditions and behavioral expectations for employees[.]" In fact, the very same subsection of N.C. Gen. Stat. § 116-37(d) upon which petitioner relies includes other provisions, which make the distinction between written work rules and "rules regarding discipline or discharge." The entire subsection is as follows:

> (2) The board of directors may adopt or provide for rules and regulations concerning, but not limited to, annual leave, sick leave, special leave with full pay or partial pay supplementing workers' compensation payments for employees injured in accidents arising out of and in the course of employment, working conditions, service awards and incentive award programs, grounds for dismissal, demotion, or discipline, other personnel policies, and any other measures that promote the hiring and retention of capable, diligent, and effective career employees. However, an employee who has achieved career State employee status as defined by G.S. 126-1.1 by October 31, 1998, shall not have his or her compensation reduced

> as a result of this subdivision. Further, an employee who has achieved career State employee status as defined by G.S. 126-1.1 by October 31, 1998, shall be subject to the rules regarding discipline or discharge that were effective on October 31, 1998, and shall not be subject to the rules regarding discipline or discharge adopted after October 31, 1998.

N.C. Gen. Stat. § 116-37(d)(2).

Petitioner's argument is essentially that the legislation which created the UNC Health Care System and established its governance including authorization to "adopt or provide for rules and regulations" regarding employment did not allow the Board of Directors to adopt any new rules governing behavior of employees in the workplace if a violation of one of those rules could ultimately lead to dismissal or discharge. Thus, the UNC Code of Conduct, as adopted initially or as amended over the years, could never apply to any employee who had achieved career State employee status by 31 October 1998. We disagree.

Under N.C. Gen. Stat. § 116-37, the Board of Directors of the UNC Health System had the authority to adopt written work rules including "grounds for dismissal, demotion, or discipline, other personnel policies, and any other measures that promote the hiring and retention of capable, diligent, and effective career employees." The Code of Conduct provisions in question are the type of rules which are allowed under N.C. Gen. Stat. § 116-37(d)(2). Respondent correctly notes that petitioner's argument would lead to the "absurd result" that her work rules and job description and duties would have been frozen in place as of 1998.

In addition, N.C. Gen. Stat. § 126-35 provides that a career State employee under Chapter 126 of the North Carolina General Statutes may be terminated for "just cause." N.C. Gen. Stat. § 126-35(a) (2013). This provision was made effective by the legislature in 1990, and was therefore a rule in place "effective on October 31, 1998[.]" See 1989 N.C. Sess. Laws, c. 1025, § 2 (eff. 1990). "Just cause" may be based upon unsatisfactory job performance or unacceptable personal conduct; the North Carolina Administrative Code defines "unacceptable personal conduct" as:

> (d) the willful violation of known or written work rules; [or]
>
> (e) conduct unbecoming a state employee that is detrimental to state service;

25 N.C. Admin. Code 1J.0604(b), .0614(8) (2015).

The provisions of the Code of Conduct in question are "written work rules" and there is no dispute that they were also known to petitioner. As noted above, "written work rules" of this type are authorized by N.C. Gen. Stat. § 116-37(d)(2), and this authorization existed as of 31 October 1998 and has not changed. The order notes that the provisions petitioner had violated were the following:

> 3. Inappropriate or disruptive behavior defined by the policy includes: inappropriate words that are disrespectful, insulting, demeaning or abusive; making demeaning comments or intimidating remarks; having inappropriate arguments with staff; making negative comments about other health care team members; having outbursts of anger; acting in a manner that others would describe as bullying.
>
> 4. Inappropriate or disruptive behavior defined by the policy includes: inappropriate actions/inactions that includes refusing to comply with known and generally accepted practice standards such that the refusal inhibits staff from delivering quality care; failing to work collaboratively or cooperatively with others; creating rigid or inflexible barriers for requests for assistance/cooperation.

Petitioner does not challenge the specific findings of fact as to the instances of her behavior, which are obviously in violation of these policies. Because petitioner's conduct fell within the definition of unacceptable personal conduct, we hold that the reviewing agency did not err in concluding that there was just cause to terminate petitioner, and the trial court did not err in relying upon the Final Agency Decision.

Petitioner further contends that, as a career State employee, she possessed a constitutionally-protected property interest in her continued employment, which could not be taken from her absent proper application of law. However, her argument that her dismissal was in violation of law is based upon the same contention as her first argument, that the Code of Conduct was not applicable to her and thus we reach the same result. For the reasons stated above, proper legal procedure was followed in petitioner's termination.

[2] Petitioner also contends that her complaints about her treatment were constitutionally protected statements concerning her unfair treatment, and thus did not constitute a proper basis for the Final Agency Decision. She contends that termination for her complaints constituted retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e. However, petitioner presented no evidence that her complaints concerned any protected status, such as age, race, or sex discrimination, nor does she make such an argument to this Court.

Other courts have held that a mere complaint of harassment or discrimination in general, without any connection to a protected class, is insufficient to establish protected activity. *Bonds v. Leavitt*, 629 F.3d 369, 384 (4th Cir. 2011); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998). In *Dowe*, the Fourth Circuit held that "the employer's knowledge that the plaintiff engaged in a protected activity is absolutely necessary" to establish a claim of retaliation, and that "an employer cannot take action because of a factor of which it is unaware[.]" Dowe, 145 F.3d at 657. In the instant case, petitioner failed to put respondent on notice of any relevant factors concerning a protected class; as a result, respondent had no knowledge that petitioner was engaged in a protected activity, and could not have engaged in retaliation. We hold that, as petitioner failed to raise the issue of discrimination based upon a protected class, petitioner's conduct in her complaints was not protected, and respondent's termination based upon those complaints was not retaliation.

This argument is without merit.

IV. Burden of Proof

[3] Petitioner next contends that the agency and trial court erred in placing the burden of proof upon her, rather than upon respondent.

In 1998, an employee terminated for just cause pursuant to N.C. Gen. Stat. § 126-35 had the burden of proof in an action contesting the validity of that termination. *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998). In *Peace*, our Supreme Court observed that neither state nor federal constitution, nor statute, had explicitly placed the burden of proof in employment termination cases on either party; it held that, "[i]n the absence of state constitutional or statutory direction, the appropriate burden of proof must be judicially allocated on considerations of policy, fairness and common sense." *Id.* (citations and quotations omitted). Relying on the general principle that the burden is on the party asserting a claim to show the existence of that claim, the Court held that this placed the burden of proof upon the petitioner. *Id.*

Petitioner notes, however, that in 2001, N.C. Gen. Stat. § 126-35 was amended, providing that "[i]n contested cases conducted pursuant to Chapter 150B of the General Statutes, the burden of showing that a career

State employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer." N.C. Gen. Stat. § 126-35(d) (2013); 2000 N.C. Sess. Laws, c. 190, § 13 (eff. 2001). This statute has since been repealed, *see* 2013 N.C. Sess. Laws, c. 382, §6.1, and similar provisions can be found in N.C. Gen. Stat. § 126-34.02(d) (2013). But this statute, in its current form, is contained within Article 8 of Chapter 126 of the North Carolina General Statutes and does not apply to this case.

N.C. Gen. Stat. § 116-37(d), in addition to the provisions quoted above, provides in pertinent part as follows:

> (d) Personnel. -- Employees of the University of North Carolina Health Care System shall be deemed to be employees of the State and shall be subject to all provisions of State law relevant thereto; provided, *however, that except as to the provisions of Articles 5, 6, 7, and 14 of Chapter 126 of the General Statutes, the provisions of Chapter 126 shall not apply to employees of the University of North Carolina Health Care System*, and the policies and procedures governing the terms and conditions of employment of such employees shall be adopted by the board of directors; provided, that with respect to such employees as may be members of the faculty of the University of North Carolina at Chapel Hill, no such policies and procedures may be inconsistent with policies established by, or adopted pursuant to delegation from, the Board of Governors of The University of North Carolina.

N.C. Gen. Stat. § 116-37(d) (emphasis added).

Only four specific Articles of Chapter 126 are applicable to employees of the University of North Carolina Health System, and Chapter 8 is not one of them. Petitioner has failed to demonstrate that the burden of proof applicable to her case has changed, so it remains on the employee who is challenging just cause for termination, as held by our Supreme Court in *Peace*. We also note that the result would have been the same even if the burden of proof had been upon respondent, since petitioner did not deny that she behaved in the manner alleged by respondent and she has not challenged any of the findings of fact as unsupported by substantial evidence. Petitioner's claim is simply that she was entitled to behave as she did, essentially as a matter of law; the Hearing panel, the president of UNC Hospitals, the superior court, and this Court all disagree.

We hold therefore that the agency and trial court did not err in placing the burden of proof upon petitioner.

This argument is without merit.

V. Termination of Employment

[4] Lastly, petitioner contends that the trial court erred in concluding that respondent had just cause to terminate her employment. We disagree.

Petitioner contends that respondent lacked just cause to terminate her employment, because her actions did not fall within the definition of unacceptable personal conduct. The North Carolina Administrative Code defines unacceptable personal conduct as:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> (b) job-related conduct which constitutes a violation of state or federal law;
>
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;
>
> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a state employee that is detrimental to state service;
>
> (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
>
> (g) absence from work after all authorized leave credits and benefits have been exhausted; or
>
> (h) falsification of a state application or in other employment documentation.

N.C. Admin. Code 1J.0614(8).

Respondent contended that petitioner's conduct violated its Code of Conduct, and that doing so was prohibited disruptive behavior. As stated above, petitioner had the burden of proving that her conduct was not unacceptable personal conduct as defined in the statute. Petitioner did not deny that she had behaved in the manner respondent alleged.

She has not alleged on appeal that any of the facts below were unsupported by the evidence. Petitioner did not meet her burden at trial and has not done so upon appellate review. We hold, therefore, that the trial court did not err in upholding the Final Agency Decision's conclusion that respondent had just cause to terminate petitioner's employment.

AFFIRMED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
SAMEER IBN MUHAMMOD EDGAR

No. COA14-987

Filed 18 August 2015

1. Sentencing—prior record level—stipulation—questions of fact

On appeal from defendant's guilty plea to two counts of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the Court of Appeals dismissed defendant's argument that the trial court erred in sentencing him as a prior record level II offender. Defendant's stipulation that he had a prior out-of-state conviction and that the conviction was a felony in Michigan were questions of fact, not law. It would have been defendant's burden to demonstrate to the trial court that this prior conviction should be treated as a misdemeanor because of its substantial similarity with North Carolina's misdemeanor offense of carrying a concealed weapon.

2. Constitutional Law—effective assistance of counsel—direct appeal

On appeal from defendant's guilty plea to two counts of attempted first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the Court of Appeals dismissed without prejudice defendant's argument that his trial counsel rendered ineffective assistance by failing to present any evidence of the similarity between his out-of-state prior conviction and the corresponding North Carolina offense.

STATE v. EDGAR

[242 N.C. App. 624 (2015)]

Appeal by defendant from judgment entered 10 April 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 19 February 2015.

Roy Cooper, Attorney General, by James C. Holloway, Assistant Attorney General, for the State.

Anna S. Lucas for defendant-appellant.

DAVIS, Judge.

Sameer Ibn Muhammod Edgar ("Defendant") appeals from the judgment entered on his plea of guilty to two counts of attempted first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), and twenty-four counts of discharging a firearm into occupied property. On appeal, he contends that (1) the trial court erred in sentencing him as a prior record level II offender because its calculation of his prior record level was premised on a legally ineffective stipulation; and (2) he received ineffective assistance of counsel when his attorney at trial failed to present evidence demonstrating that his prior out-of-state conviction was substantially similar to a misdemeanor offense in North Carolina. After careful review, we dismiss Defendant's appeal.

Factual Background

On 5 September 2012, Defendant, his brother Kumani Regains ("Regains"), and an individual identified as Mr. Height ("Height") traveled from Kinston, North Carolina to Raleigh, North Carolina to see Defendant's and Regains' other brother, who had just been robbed by a man named Lamont Jones ("Jones") in a "drug deal gone bad." Defendant, Regains, and Height then drove back towards Kinston, stopping in Smithfield, North Carolina at approximately 8:00 p.m. They drove to an apartment complex on Towbridge Street in Smithfield, exited the vehicle, and approached apartment 38, the apartment where Jones lived. They knocked on the window of the apartment, calling out Jones' name, and a voice from inside the apartment replied that Jones "was not there."

Defendant, Regains, and an unnamed co-defendant[1] — each armed with a handgun — began firing shots into apartment 38. They then left

1. It is unclear from the record whether this unnamed co-defendant traveled with the others from Kinston or joined them at some other point.

the apartment complex and returned to Kinston. Several of the shots fired into the apartment struck two of the inhabitants, a 23-year-old woman and her 8-year-old son. The woman suffered a gunshot wound to her neck, and her son was rendered paralyzed from the waist down as a result of the gunshot wound he sustained to his spinal column.

On 3 December 2012, a grand jury returned bills of indictment charging Defendant with two counts of attempted first-degree murder, two counts of AWDWIKISI, and twenty-four counts of discharging a firearm into occupied property. Defendant pled guilty to all charges on 7 April 2014 pursuant to a plea agreement stating that he would "receive an active sentence of 180 to 228 months." The trial court entered judgment on his guilty plea, sentencing him as a prior record level II offender to 180 to 228 months imprisonment.

Analysis

I. Prior Record Level

[1] Defendant's primary argument on appeal is that the trial court erred in calculating his prior record level because it based its calculation on an ineffective stipulation. Defendant's sole conviction prior to the present offenses was a conviction in Michigan for carrying a concealed weapon, which he contends is substantially similar to the North Carolina offense of carrying a concealed weapon (a Class 2 misdemeanor for first-time offenders). For this reason, Defendant argues that he should have been assigned zero prior record level points and, therefore, been classified as a prior record level I offender.

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proven in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2013). Pursuant to N.C. Gen. Stat. § 15A-1340.14, Class A felony convictions are assigned ten points, Class B1 felony convictions are assigned nine points, Class B2, C, and D felony convictions are assigned six points, Class E, F, and G felony convictions are assigned four points, and Class H and I felony convictions are assigned two points. N.C. Gen. Stat. § 15A-1340.14(b)(1)-(4). Class A1 — and some Class 1 — misdemeanor convictions are assigned one point while all other misdemeanor convictions are assigned zero points. N.C. Gen. Stat. § 15A-1340.14(b)(5).

Where a defendant's prior conviction or convictions occurred outside of North Carolina, the following rules apply:

> [A] conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e).

N.C. Gen. Stat. § 15A-1340.14(f) permits various methods of proving the existence of a prior conviction, including the "[s]tipulation of the parties." The court then calculates the defendant's prior record level based on its determination of his prior convictions and addition of the applicable points stemming from these prior convictions. Prior record levels span from level I (which encompasses offenders with zero to one points) to level VI (which requires at least eighteen points). N.C. Gen. Stat. § 15A-1340.14(c).

Pursuant to N.C. Gen. Stat. § 15A-1444(a2), a defendant who pleads guilty to a criminal offense in superior court is entitled to an appeal as a matter of right as to the issue of whether the sentence imposed:

> (1) *Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14* or the defendant's prior conviction level under G.S. 15A- 1340.21;

> (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
>
> (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

N.C. Gen. Stat. § 15A-1444(a2)(1)-(3) (2013) (emphasis added).

Our Court has previously explained, however, that while "[a] plain reading of this subsection indicates that the issues set out may be raised on appeal by *any* defendant who has pled guilty to a felony or misdemeanor in superior court[,] . . . . the right to appeal granted by this subsection is not without limitation." *State v. Hamby*, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998). In *Hamby*, this Court specifically held that dismissal of the defendant's appeal was appropriate because she had stipulated during her plea negotiations to each of the matters addressed in N.C. Gen. Stat. § 15A-1444(a2), thereby mooting the issues she could have raised on appeal. *Id.* at 369-70, 499 S.E.2d at 197.

> In her plea agreement, defendant admitted that her prior record level was II, that punishment for the offense could be either intermediate or active in the trial court's discretion and that the trial court was authorized to sentence her to a maximum of forty-four months in prison. By these admissions, defendant mooted the issues of whether her prior record level was correctly determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized. Therefore, defendant could not have raised any of the issues enumerated in N.C. Gen. Stat. § 15A-1444(a2) . . . in her appeal. Because defendant could not have raised those issues, she had no right to appeal in this case.

Id.

In the context of prior record level determinations, however, we have recently clarified that when the defendant's stipulation involves a question of *law*, the stipulation does not moot the issue of whether the prior record level was properly calculated. *See State v. Gardner*, ___ N.C. App. ___, ___, 736 S.E.2d 826, 830 (2013) ("A defendant's prior

convictions can be proved, *inter alia*, by stipulation of the parties. While such convictions often effectively constitute a prior record level, a defendant is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating that level." (internal citation omitted)). This is so because "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *Id.* at ___, 736 S.E.2d. at 831 (citation and quotation marks omitted).

In *State v. Burgess*, 216 N.C. App. 54, 715 S.E.2d 867 (2011), the defendant pled no contest pursuant to a plea agreement "that upon the defendant's pleas of no contest to 2nd degree kidnapping and crime against nature, the charges will be consolidated and defendant sentenced in [the] mitigated range of 36 months to 53 months (as a record level 4)." *Id.* at 54-55, 715 S.E.2d at 868 (quotation marks, brackets, and emphasis omitted). On appeal, he argued that the trial court erred in sentencing him as a prior record level IV offender based on several out-of-state convictions because the state failed to present sufficient evidence that these convictions were substantially similar to North Carolina offenses. *Id.* at 57, 715 S.E.2d at 870. We agreed and rejected the state's contention that the defendant was barred from raising any arguments concerning his prior record level because he had stipulated to it in his plea agreement. *Id.* at 58-59, 715 S.E.2d at 871.

> [T]he State's reliance on *State v. Hamby* for its contention that defendant cannot raise issues related to his sentence on appeal because he stipulated to his prior record level and agreed to his sentence in his plea agreement is misplaced. This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law.

Id. (internal citations omitted).

Here, however, Defendant's stipulation to his prior record level did not implicate any conclusions or questions of law. While *Burgess* is consistent with the well-established principle that a stipulation as to whether an out-of-state conviction is substantially similar to a North Carolina offense is legally ineffective because it implicates a question of law that the trial court is responsible for resolving, *id.* at 59, 715 S.E.2d at 871, in the present case, Defendant did not make any stipulation as to the similarity of his Michigan offense to a North Carolina offense. Instead,

Defendant's prior conviction was classified as a Class I felony — the default classification for an out-of-state conviction "if the jurisdiction in which the offense occurred classifies the offense as a felony." N.C. Gen. Stat. § 15A-1340.14(e); *see also State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009) ("According to the statute, the default classification for out-of-state felony convictions is Class I." (internal quotation marks omitted)). Indeed, our Court has expressly held that

> while a trial court may not accept a stipulation to the effect that a particular out-of-state conviction is "substantially similar" to a particular North Carolina felony or misdemeanor, it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction.

State v. Bohler, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010).

Here, Defendant's stipulation in the prior record level worksheet that (1) he had been convicted of carrying a concealed weapon in Michigan; and (2) this offense is classified as a felony in Michigan,[2] was sufficient to support the default classification of the offense as a Class I felony. *See id.* at 636, 681 S.E.2d at 805 (rejecting contention that defendant's stipulation was invalid and explaining that "[t]he fundamental flaw in Defendant's argument is his assumption that stipulations between the State and a criminal defendant as to the fact of an out-of-state conviction for either a felony or a misdemeanor and stipulations as to the 'substantial similarity' between an out-of-state offense and a North Carolina crime are equally ineffective. Such an argument . . . lacks support in our sentencing jurisprudence").

Accordingly, Defendant's stipulation as to his prior record level and his agreement to the sentence imposed in his plea arrangement were effective and binding. It would have been Defendant's burden to demonstrate to the trial court that his prior out-of-state felony conviction should be treated as a misdemeanor because the conviction was substantially similar to North Carolina's misdemeanor offense of carrying a concealed weapon. *See* N.C. Gen. Stat. § 15A-1340.14(e) ("If the offender proves by the preponderance of the evidence that an offense classified

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2. Michigan's penal code classifies the offense of carrying a concealed weapon as "a felony, punishable by imprisonment for not more than 5 years, or by a fine of not more than $2,500.00." Mich. Comp. Laws § 750.227(3) (2013).

as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points."). However, Defendant elected not to present any evidence on this issue, instead choosing to stipulate to the default classification of the offense as a Class I felony.

For the reasons explained above, the trial court did not err in accepting Defendant's stipulation that he had a prior out-of-state conviction and that this conviction was a felony in Michigan. Defendant's stipulation as to these questions of *fact* (as distinct from questions of *law*) mooted any contentions he may have raised as to the calculation of his prior record level under N.C. Gen. Stat. § 15A-1444(a2). We therefore dismiss Defendant's appeal as to this issue. *See Hamby*, 129 N.C. App. at 369, 499 S.E.2d at 196 ("[I]f during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised under subsection (a2) [of N.C. Gen. Stat. § 15A-1444], his appeal should be dismissed.").

II. Ineffective Assistance of Counsel Claim

[2] Defendant next asserts that he was deprived of effective assistance of counsel when his trial counsel failed to present evidence concerning the substantial similarity between the Michigan offense of carrying a concealed weapon and the North Carolina offense of carrying a concealed weapon. In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) 'counsel's performance was deficient' and (2) 'the deficient performance prejudiced the defense.' " *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 693 (1984)), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because on direct appeal, review is limited to the cold record, and the Court is "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Id.* at 554-55, 557 S.E.2d at 547 (internal citation and quotation marks omitted). Only when "the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing" will an ineffective assistance of counsel claim be decided on the merits on direct appeal. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

Here, Defendant argues that trial counsel's failure to present any evidence of the similarity between his out-of-state conviction and the corresponding North Carolina offense (1) was unreasonable and, therefore, deficient because "the reasonable course of action is to put forth evidence of the similarity to avoid a harsher sentence for the defendant"; and (2) prejudiced him because if such evidence "had been put forth showing the offenses are the same, [Defendant] would have been sentenced as a Prior Record Level I offender instead of a Prior Record Level II offender."

When assessing whether an attorney's performance was deficient for the purpose of analyzing a defendant's ineffective assistance of counsel claim, it is well established that the defendant's counsel "is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L.Ed.2d 73 (2002). Here, it is conceivable that Defendant's trial counsel had strategic reasons to accept the default classification of Defendant's prior out-of-state conviction as a Class I felony.

Thus, because we cannot discern from the record before us whether his trial counsel's failure to argue that Defendant's prior conviction should be assigned zero points (based on the contention that it was substantially similar to a misdemeanor in North Carolina) was

a matter of strategy in plea negotiations with the State, we conclude that Defendant's ineffective assistance of counsel claim should be dismissed without prejudice to his right to reassert it in a motion for appropriate relief. *See State v. al-Bayyinah*, 359 N.C. 741, 752-53, 616 S.E.2d 500, 509-10 (2005) (explaining that defendant's ineffective assistance of counsel claim was not reviewable on direct appeal because "[t]rial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test"), *cert. denied*, 547 U.S. 1076, 164 L.Ed.2d 528 (2006).

Conclusion

For the reasons stated above, we dismiss Defendant's appeal. Defendant's ineffective assistance of counsel claim is dismissed without prejudice to his right to reassert it through a motion for appropriate relief.

DISMISSED.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
STEPHANIE JEAN HOLANEK

No. COA14-951

Filed 18 August 2015

1. False Pretense—invoiced submitted by defendant—companies did not exist

In defendant's trial for charges stemming from alleged insurance fraud, the trial court did not err by denying defendant's motion to dismiss the charges of obtaining property by false pretenses. The State offered substantial evidence that the moving companies on the invoices submitted by defendant to State Farm did not exist, allowing the jury to determine that the invoices were fraudulent. The State was not required to show what happened to the money that defendant obtained from State Farm.

2. False Pretense—variance between indictment and evidence—estimate not "invoice"

In defendant's trial for charges stemming from alleged insurance fraud, defendant received ineffective assistance of counsel because her attorney failed to argue that one count of obtaining property by false pretenses should be dismissed based on a fatal variance between the facts alleged in the indictment and the evidence presented at trial. The indictment referred to a "fraudulent invoice," while the evidence showed that defendant submitted only an estimate of costs that would be incurred at the pet boarder. Defendant defrauded the insurance company by oral misrepresentation, not by a "fraudulent invoice."

3. Evidence—failure to appear for insurance examination—awareness of fraudulent claims

In defendant's trial for charges stemming from alleged insurance fraud, it was not plain error for the trial court to admit testimony that defendant had failed to appear for two scheduled examinations under oath required by her insurance policy and had failed to respond to requests to reschedule the examination. This testimony was relevant to show defendant's awareness that she had submitted fraudulent claims. The Court of Appeals rejected defendant's arguments that the testimony violated N.C.G.S. § 14-100(b) and Rule of Evidence 403.

4. False Pretense—jury instructions—failure to comply with contractual obligations of insurance policy

In defendant's trial for charges stemming from alleged insurance fraud, it was not plain error for the trial court to omit jury instructions regarding N.C.G.S. § 14-100(b). The jury was expressly instructed that, in order to return a guilty verdict, it had to find that defendant had intended to defraud State Farm through her submission of documents containing false representations. No reasonable juror would have thought that defendant could be found guilty based solely on her failure to comply with the contractual obligations of her insurance policy.

5. False Pretense—indictment—not required to allege "exact misrepresentation"

The indictments charging defendant with obtaining property by false pretenses were not fatally defective for failure to allege the "exact misrepresentation" defendant made to her insurance company regarding moving expenses. The indictments alleged the

essential elements of the crimes and the ultimate facts constituting those elements by stating that defendant obtained U.S. currency from State Farm through a false representation she made by submitting a fraudulent invoice which was intended to, and in fact did, deceive State Farm.

Appeal by defendant from judgment entered 7 March 2014 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 3 February 2015.

Roy Cooper, *Attorney General*, *by Hugh A. Harris*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Jason Christopher Yoder*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Stephanie Jean Holanek ("Defendant") appeals from her convictions for three counts of obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred in (1) denying her motion to dismiss the charges of obtaining property by false pretenses based on the insufficiency of the evidence; (2) its instructions to the jury concerning the elements of obtaining property by false pretenses; (3) admitting testimony that Defendant did not appear for an examination under oath in connection with the claims she filed with her insurance company; (4) failing to give a jury instruction pursuant to N.C. Gen. Stat. § 14-100(b) where the State introduced evidence of Defendant's breach of contract; and (5) entering judgment on her convictions because the indictments for each of the obtaining property by false pretenses charges were fatally defective. After careful review, we vacate in part and find no error in part.

Factual Background

The State's evidence at trial tended to establish the following facts: On 26 September 2009, Defendant's septic tank at her home in Wilmington, North Carolina backed up, causing the three toilets in her home to overflow and resulting in water damage to the first and second floors. Defendant filed a claim with her insurance company, State Farm Fire and Casualty Company ("State Farm"). A claims adjuster with State Farm, Jarred Norris ("Norris"), visited Defendant's house to document the damage. State Farm issued a check for $4,494.69 to Defendant in

November 2009 to pay for the expenses of moving the contents of the first floor of her house into a storage unit. State Farm arranged for one of its contractors, Service Master, to perform the job.

On 18 October 2009, Defendant faxed State Farm an invoice in the amount of $4,760.00 from an entity called M&M Movers that purported to be for the costs associated with moving the contents of the second floor of her house into storage. The invoice listed M&M Movers' business address as 817 West Rowan Avenue in Fayetteville, North Carolina.[1] Her fax coversheet stated that she had paid M&M Movers the amount listed on the invoice as well as an additional $474.00 for storage fees. State Farm issued a check to Defendant in the total amount of $5,234.00 to cover each of those expenses on 28 October 2009.

On 12 October 2009, Defendant checked four pets into Meadowsweet Pet Boarding and Grooming ("Meadowsweet") because the temporary rental home where she was living while her home was being repaired did not allow pets. Defendant initially made an electronic reservation for the pets to remain at Meadowsweet for only ten days (from 12 October to 22 October 2009), but the checkout date on the form was then changed to reflect the fact that the pets would remain at Meadowsweet through 12 November 2009.

Another claims adjuster, Chris Rowley ("Rowley"), informed Defendant that State Farm would cover pet boarding under her additional living expense coverage if she provided an estimate of the cost. Nevertheless, prior to her submission of such an estimate, State Farm issued a check to Defendant on 19 October 2009 for $2,040.00 in pet boarding expenses.

Three days later, on 22 October 2009, Defendant submitted to State Farm a document that had been generated by Meadowsweet entitled "STATEMENT of CURRENT CHARGES — NOT a RECEIPT" listing the amount of $2,040.00, which reflected Meadowsweet's estimate of the pet boarding costs that would apply to the boarding of her two dogs and two cats from 12 October to 12 November 2009. On the document, Defendant wrote a handwritten note stating as follows:

1. It was later revealed that this was the home address of Mike Beasley, Defendant's father-in-law, and Mike Beasley, Jr., his son.

Please Reimburse for Pet Boarding

$2,040.00 (30 days)
$4,080.00 (60 days)

Thanks,
Stephanie Holanek

State Farm proceeded to issue monthly payments to her in the amount of $2,040.00 for pet boarding expenses for approximately six months. Defendant periodically called State Farm during this time period to make sure that State Farm was continuing to issue checks for the pet boarding services.

On 25 February 2010, Rowley's manager asked him to obtain confirmation that the pets were still at Meadowsweet before State Farm would issue any further checks for pet boarding expenses. On several occasions, Rowley asked Defendant to confirm that her pets were still being boarded at Meadowsweet, and Defendant told him that "she was too busy to get the information for [him] from the kennel . . . but she would try and get it." State Farm ceased providing payments in April 2010, and in May 2010, Defendant told Rowley that her pets were going to be evicted because of outstanding amounts owed to Meadowsweet. Rowley then contacted Meadowsweet and learned from an employee that the animals were no longer at Meadowsweet and had been checked out back on 22 October 2009.[2] When Rowley confronted Defendant with this information over the phone, Defendant told him that she had taken her pets out of Meadowsweet and sent them with her brother to be boarded in a kennel in Fayetteville. Rowley requested the contact information for the new kennel, but Defendant never provided it to him.

On 28 July 2010, Defendant faxed State Farm an invoice for moving services from a business called PJ's Moving Company, purportedly located at 6012 Oleander Drive in Wilmington, North Carolina, in the amount of $10,430.00. Defendant requested reimbursement for the moving expenses listed on the invoice, which consisted of three days of moving furniture from the temporary storage unit back into her home. A handwritten note at the top right corner of the invoice stated that the bill had been paid in full.

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2. A receipt from Meadowsweet introduced at trial dated 22 October 2009 showed that Defendant's pets had, in fact, been checked out of Meadowsweet on 22 October and that a bill of $845.00 had been paid by check. The receipt did not state who provided the check.

Kent Dawdy ("Dawdy"), a claims representative in State Farm's special investigative unit, was assigned to investigate Defendant's insurance claim on 15 September 2010. Dawdy contacted Defendant the following day and informed her that State Farm was going to invoke a contractual policy provision allowing it to require her to submit to an examination under oath for the purpose of resolving questions about her claims. State Farm retained an attorney, J. Thomas Cox, Jr. ("Cox"), to conduct the examination. Cox mailed a letter to Defendant on 24 September 2010 requesting that she appear for the examination at a court reporter's office on 20 October 2010, and Cox's paralegal gave her a reminder call on 19 October 2010. Dawdy, Cox, and the court reporter appeared for the examination on 20 October and waited for Defendant for thirty minutes, but she did not appear. Cox then sent Defendant a letter on 28 October 2010 giving her the opportunity to schedule a new date for the examination, but she did not respond. Cox sent a third letter on 16 November 2010 informing her that the examination had been rescheduled for 30 November 2010, but, once again, she failed to appear for the examination.

In the course of his investigation, Dawdy attempted to locate PJ's Moving Company but could not find the address contained in the invoice — 6012 Oleander Drive in Wilmington. He also attempted to find M&M Movers at 817 Rowan Avenue in Fayetteville and instead found a house located at that address. Dawdy did not observe moving equipment or trucks at the residence. In his trial testimony, he stated that he did not recall whether he had searched the Internet or used a phone book in an effort to locate either PJ's Moving Company or M&M Movers. He explained that he did not do a more extensive search because State Farm's attorney planned to ask Defendant to provide clarifying information about these entities at the examination.

On 9 December 2010, State Farm concluded that Defendant was not in compliance with the conditions of her policy based on her failure to appear for the scheduled examinations and denied her subsequent claims on that basis. Dawdy contacted the North Carolina Department of Insurance ("DOI") to report State Farm's suspicions that Defendant had committed insurance fraud. Mickey Biggs ("Biggs"), a criminal investigator with DOI, received the case on 12 December 2010 and began his investigation in May 2011. Biggs was unable to locate either M&M Movers or PJ's Moving Company through Internet searches, phone calls, or physical visits.

On 17 January 2012, a grand jury indicted Defendant on four counts of insurance fraud, three counts of obtaining property by false pretenses,

and one count of attempting to obtain property by false pretenses. The State voluntarily dismissed one count of insurance fraud and the charge of attempting to obtain property by false pretenses before trial.

The matter came on for a jury trial beginning 4 March 2014 in New Hanover County Superior Court before the Honorable Jay D. Hockenbury. Following the State's case-in-chief, Defendant offered evidence in her defense, calling her brother, Paul Thompson, Jr. ("Thompson"), as a witness. Thompson testified that he had moved to Wilmington in July 2010 to help Defendant because she had just opened a consignment store and given birth to triplets. He further testified that (1) he was operating PJ's Moving Company out of the back of the consignment store at 6012 Oleander Drive[3]; (2) he received referrals for his moving services from the consignment store; and (3) along with two other movers, he had moved the contents of the temporary storage unit back into Defendant's house and reassembled the furniture. Thompson also stated that he had prepared a handwritten invoice for the applicable expenses and charges that was then typed up by Defendant.

On 7 March 2014, the jury found Defendant guilty of all remaining charges — three counts of insurance fraud and three counts of obtaining property by false pretenses. The trial court arrested judgment on the three counts of insurance fraud, consolidated the three counts of obtaining property by false pretenses into a single judgment, and sentenced Defendant to a mitigated term of four to five months imprisonment. Defendant gave notice of appeal in open court six days after the conclusion of her trial.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must address the issue of whether appellate jurisdiction exists over Defendant's appeal. Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal from an order or judgment in a criminal action by (1) "giving oral notice of appeal at trial," or (2) "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]" N.C.R. App. P. 4(a).

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3. During his investigation, Biggs was able to find a consignment store next to a storefront bearing the address 6010 Oleander Drive, but the consignment store's address was not visibly marked on the signage and the store was not open when he visited the location.

In the present case, Defendant's trial counsel gave oral notice of appeal on 13 March 2014, six days after the conclusion of Defendant's trial, by appearing in open court before the judge who had presided over Defendant's criminal trial. However, because oral notice of appeal must be given *at trial*, Defendant's counsel's oral notice of appeal was legally ineffective. *See State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012) ("Rule 4 authorizes two modes of appeal for criminal cases. The Rule permits oral notice of appeal, but only if given at the time of trial or . . . of the pretrial hearing. Otherwise, notice of appeal must be in writing and filed with the clerk of court." (internal citation omitted)).

In recognition of the fact that her notice of appeal was defective, Defendant has filed a petition for writ of certiorari asking this Court to consider her appeal. Pursuant to Rule 21(a)(1) of the Appellate Rules, this Court may, in its discretion, grant a petition for writ of certiorari and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). Here, Defendant lost her right to appeal through no fault of her own but rather due to her trial counsel's failure to give proper notice of appeal. We therefore dismiss the appeal, exercise our discretion to grant Defendant's petition for writ of certiorari, and proceed to address the merits of her arguments. *See In re I.T.P-L*, 194 N.C. App. 453, 460, 670 S.E.2d 282, 285 (2008) (dismissing appeal based on defective notice of appeal but allowing petition for writ of certiorari pursuant to Rule 21), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009).

II. Denial of Motions to Dismiss

Defendant first argues that the trial court erred in denying her motions to dismiss each of the three counts of obtaining property by false pretenses, asserting that (1) there was insufficient evidence to support the two counts arising out of the payments she received based on the moving company invoices; and (2) with regard to the count stemming from the pet boarding expenses, there was a fatal variance between the indictment and the evidence introduced at trial. We address each of Defendant's arguments in turn.

A. Moving Company Invoices

[1] With regard to the counts stemming from the moving expenses, Defendant contends that the State failed to prove either that (1) the invoices contained a false representation; or (2) the movers were not paid by Defendant as she claimed. We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). The defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). When ruling on a motion to dismiss, the trial court should only be concerned with whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *Id.* at 67, 296 S.E.2d at 652.

The elements of the offense of obtaining property by false pretenses are: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Defendant argues that the State failed to prove that Defendant made a false representation because it "failed to prove that [Defendant] did not pay the invoices as claimed."

In making this argument, Defendant relies primarily upon *State v. Braswell*, ___ N.C. App. ___, 738 S.E.2d 229 (2013). In *Braswell*, the defendant was charged with obtaining property by false pretenses by means of an indictment alleging that he obtained $112,500.00 from William Irvin Greene and Ola Beth Greene "by the defendant guaranteeing

a six percent return on all invested monies from William Irvin Green [sic] and Ola Beth Green [sic], when in fact the defendant did not invest the monies into legitimate financial institutions." *Id.* at ___, 738 S.E.2d at 233. On appeal, this Court held that the trial court had erred in denying the defendant's motion to dismiss because the state failed to present evidence demonstrating that the defendant failed to invest the money he obtained from the Greenes in legitimate financial institutions and thus did not establish that "the representation that Defendant allegedly made to the Greenes was a false one." *Id.* at ___, 738 S.E.2d at 234. We noted that the state did not present any evidence concerning the defendant's financial records or offer any other "direct or circumstantial evidence tending to show that, instead of investing the money he borrowed from the Greenes, Defendant converted it to his own use." *Id.* at ___, 738 S.E.2d at 234. Because the state did not offer any evidence explaining what had happened to the money the defendant obtained from the alleged victims, we concluded that the state (1) failed to prove that the defendant never invested the money in legitimate financial institutions as he had promised and, consequently, (2) did not establish the "key element of the offense . . . that the representation be intentionally false and deceptive." *Id.* at ___, 738 S.E.2d at 233. Indeed, we observed that the evidence at trial suggested that the defendant had actually invested the Greenes' money but then lost the funds when "his investment activities had gone catastrophically awry." *Id.* at ___ n. 2, 738 S.E.2d at 234 n.2.

Defendant contends that the same result should apply here because the State neither introduced any of her financial records nor otherwise proved that she did not, in fact, pay the invoices as she had represented. She further argues that the State failed to establish that M&M Movers or PJ's Moving Company did not exist and, therefore, the evidence did not support the conclusion that Defendant made a false representation to State Farm by submitting to it the invoices for the moving expenses in order to obtain payment. We are not persuaded.

The State presented evidence that during their respective investigations, neither Dawdy nor Biggs were able to uncover any evidence that M&M Movers or PJ's Moving Company were operating as moving companies in North Carolina. Both investigators testified that the companies (1) were not physically located at the addresses listed on the invoices; (2) were unreachable at the telephone numbers provided therein; and (3) could not be located through an Internet search. Moreover, Defendant resisted State Farm's attempts to afford her an opportunity

to demonstrate the legitimacy of these expenses by repeatedly failing to appear for scheduled examinations under oath.[4]

By offering substantial evidence that the moving companies did not exist, the State was able to raise a question for the jury as to whether Defendant's submission of the invoices to State Farm claiming that payment had been made by her to these companies constituted a false representation. Because the State offered evidence sufficient to allow the jury to determine that these invoices were fraudulent, it was not obligated to show what happened to the money Defendant obtained from State Farm in order to prove her guilt.

Conversely, in *Braswell*, evidence of what had transpired with the funds obtained from the alleged victims *was* essential to proving the falsity of the defendant's representation in that case. In *Braswell*, the false representation alleged to have been made by the defendant was that he had promised to "invest the monies into legitimate financial institutions." *Id.* at ___, 738 S.E.2d at 233. In order to prove that this representation was false and intended to defraud the alleged victims, the state was required to show that the defendant did not actually invest the money at issue. The state did not do so and, therefore, failed to establish that the defendant made a false representation. Thus, *Braswell* is distinguishable from the present case, and Defendant's reliance on it is misplaced.

We conclude that sufficient evidence existed to support a finding by the jury that the two moving companies were fictitious and that by submitting the invoices, Defendant falsely represented that the invoices were legitimate in an effort to defraud State Farm and receive payment from it. Her submission of these invoices ultimately resulted in her obtaining $15,190.00 from State Farm. Accordingly, the trial court did not err in denying her motion to dismiss as to these two counts.

B. Pet Boarding Expenses

[2] Defendant next argues that there was a fatal variance between the facts alleged in the indictment and the evidence presented at trial for the count of obtaining property by false pretenses concerning the Meadowsweet pet boarding charges. She acknowledges that her trial counsel did not specifically argue fatal variance as the basis for the motion to dismiss this count and thus failed to preserve this issue for

4. While Defendant challenges the trial court's admission of the evidence concerning her failure to appear for the examination under oath, this evidence was properly admitted by the trial court as discussed *infra*.

appellate review. *See State v. Redman*, 224 N.C. App. 363, 367-68, 736 S.E.2d 545, 549 (2012) ("To preserve the issue of a fatal variance for review, a defendant must state at trial that a fatal variance is the basis for the motion to dismiss."). However, she contends that her counsel's failure to identify the fatal variance between the indictment and the evidence at trial constitutes ineffective assistance of counsel because the motion to dismiss would have been granted if her trial counsel had expressly made a motion to dismiss on this specific ground. We agree.

In order to establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

"It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State's proof must conform to the specific allegations contained therein." *State v. Henry*, ___ N.C. App. ___, ___, 765 S.E.2d 94, 102 (2014) (citation, quotation marks, and brackets omitted). "A variance occurs where the allegations in an indictment . . . do not conform to the evidence actually established at trial." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). In order for it to be material, and therefore require reversal, the variance must involve an essential element of the crime charged. *See State v. Glynn*, 178 N.C. App. 689, 696, 632 S.E.2d 551, 556 ("Only a material variance warrants reversal, as it involves an essential element of the alleged crime."), *appeal dismissed and disc. review denied*, 360 N.C. 651, 637 S.E.2d 180-81 (2006).

The purposes of an indictment are: "(1) to identify the crime with which defendant is charged, (2) to protect defendant against being

charged twice for the same offense, (3) to provide defendant with a basis on which to prepare a defense, and (4) to guide the court in sentencing." *State v. Wright*, 200 N.C. App. 578, 585, 685 S.E.2d 109, 114 (2009) (citation and quotation marks omitted), *appeal dismissed*, 363 N.C. 812, 693 S.E.2d 142 (2010). "When a variance exists between allegations in the indictment and evidence presented at trial, the defendant may be deprived of adequate notice to prepare a defense." *Glynn*, 178 N.C. App. at 696, 632 S.E.2d at 556.

Here, the indictment for this count of obtaining property by false pretenses alleged the following:

> [T]he defendant named above unlawfully, willfully, and feloniously did knowingly and designedly with intent to cheat and defraud, obtain $11,395.00 in U.S. currency from State Farm Fire and Casualty Company by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: this property was obtained when the defendant submitted an invoice for services rendered by Meadowsweet Pet Boarding & Grooming, seeking reimbursement from State Farm Fire and Casualty Company under the terms of the defendant's Home Owner Insurance Policy, when in fact the invoice submitted was a fraudulent invoice.

Thus, the theory of the offense alleged in the indictment was that Defendant submitted a fraudulent invoice for pet boarding services rendered by Meadowsweet to State Farm, which caused State Farm to issue payment to her in the amount of $11,395.00. The evidence at trial, however, tended to show that the document at issue was an *estimate* — not "an invoice for services rendered" — for the cost of boarding the four pets for one month, which was generated by Meadowsweet on 12 October 2009 (the day of the pets' arrival at Meadowsweet). Leanna Willard ("Willard"), the owner of Meadowsweet, testified as follows:

> [Prosecutor]: I want to show you what's previously been admitted as State's Exhibit 16. Do you recognize this document?
>
> [Willard]: It is an estimate of charges for Stephanie Holanek's four animals from October 12th, 2009 to November 12th, 2009.
>
> Q. At what facility?

> A. Meadowsweet Pet Boarding and Grooming.
>
> Q. Your facility, correct?
>
> A. Yes.
>
> Q. And, again, let's go through it again. An estimate, how do you know this is an estimate, not a receipt?
>
> A. Because it says "Statement of current charges," not "Receipt" at the top. And at the bottom it has a total of $2,040.00 where a receipt would show the paid amount and it would show how it was paid: check, credit card, cash, et cetera.
>
> Q. Does this appear to be legitimate?
>
> A. Yes, it's an estimate for a 30-day stay for the four animals, yes.[5]

We note that because this document was generated on the same date the pets were checked into Meadowsweet, it could not logically have been an invoice "for services *rendered* by Meadowsweet" as alleged in the indictment. (Emphasis added.) Indeed, the evidence at trial showed that Rowley, the State Farm claims adjuster, was aware that the document was an estimate as Rowley testified that (1) Defendant had provided this document to him after he requested information "on what it would cost to board her pets during the time she was out of the home"; and (2) it was his understanding that "this was an estimate . . . since her dogs hadn't been boarded there for more than 30 days." For similar reasons, Defendant's handwritten note on the document requesting reimbursement could not have been construed by State Farm as a request for payment as to services that had actually been rendered given that the document was faxed by Defendant only ten days after the 12 October 2009 date reflected on the document as the date the pets were *first placed* with Meadowsweet.

Furthermore, there was no evidence at trial suggesting that the written estimate was anything other than a document created in good faith by Meadowsweet that accurately itemized the costs to be incurred

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5. We observe that the prosecutor referred to this document as an "estimate" throughout the trial, at one point directing the court reporter to strike his own question to Rowley as to whether State Farm continued "to pay pet boarding based upon this *invoice*" and then rephrasing the question to ask if State Farm continued to pay pet boarding "based upon this *estimate*." (Emphasis added.)

— prospectively — for the boarding of Defendant's pets from 12 October 2009 to 12 November 2009. Thus, in addition to the fact that the document Defendant submitted from Meadowsweet was not an invoice, it was also not fraudulent.

Notably, this document was faxed to State Farm on 22 October 2009, three days *after* State Farm issued a check to Defendant. Therefore, the issuance of this payment by State Farm could not logically have been triggered by Defendant's submission of the document. *See State v. Childers*, 80 N.C. App. 236, 241, 341 S.E.2d 760, 763 (explaining that offense of obtaining property by false pretenses requires "a causal connection between the alleged false representation and the obtaining of the property or money"), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986).

In addition, the State's evidence at trial tended to show that it was not the written estimate that falsely led State Farm to believe that her pets remained at Meadowsweet long after they had been removed from Meadowsweet's care but rather the *oral* misrepresentations made by Defendant during the time period between 22 October 2009 and April 2010. Thus, contrary to the allegations contained in the indictment that Defendant obtained payments for pet boarding expenses from State Farm through the false pretense of submitting a "fraudulent invoice," the evidence introduced at trial showed that (1) Defendant submitted a valid estimate of the expenses that would have been incurred had her four pets stayed at Meadowsweet for a full month; and (2) Defendant subsequently obtained payments from State Farm through *oral* misrepresentations that were made by her over the next six months to the effect that she was entitled to continue receiving such payments despite the fact that she had removed her pets from Meadowsweet on 22 October 2009.

Our Supreme Court has explained that with regard to the offense of obtaining property by false pretenses, "[t]he state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged" and that "[i]f the state's evidence fails to establish that defendant made this misrepresentation but tends to show *some other misrepresentation was made*, then the state's proof varies fatally from the indictments." *State v. Linker*, 309 N.C. 612, 615, 308 S.E.2d 309, 311 (1983) (emphasis added).

Indeed, we find the present case analogous to *Linker*. In *Linker*, the defendant was charged with two counts of obtaining property by false pretenses. The indictments alleged that the defendant, whose name was Barry *L.* Linker and who was not an accountholder at Wachovia Bank,

had committed the false pretense of "represent[ing] himself as Barry *W.* Linker who did have a valid account and attempted to cash a check for $120.00" in order to obtain property from Wachovia. *Id.* at 613, 308 S.E.2d at 310 (emphasis added). The evidence at trial, however, showed that the defendant presented the bank tellers with a valid driver's license identifying himself as Barry L. Linker and when questioned about the differing middle initial between his driver's license and the information on the account stated that the initial on the account was incorrect. *Id.* at 614, 308 S.E.2d at 310.

The Supreme Court determined that the trial court erred in denying the defendant's motion to dismiss based on a fatal variance because the evidence at trial did not support the misrepresentation alleged in the indictment. *Id.* at 616, 308 S.E.2d at 311. While the Supreme Court acknowledged that the evidence presented at trial would have supported a charge of obtaining property by false pretenses based on the defendant misrepresenting the fact that he had a Wachovia account when he did not actually possess one, that misrepresentation was not the misrepresentation alleged in the indictment. *Id.* at 615 n. 2, 308 S.E.2d at 311 n. 2.

> The indictments explicate the alleged misrepresentation in clear and unequivocal terms: Defendant "represented himself as Barry W. Linker." The record clearly reflects that the state failed to prove that defendant represented himself as Barry W. Linker. Without exception, each of the state's witnesses testified that defendant never represented himself as Barry W. Linker. Instead, he gave each bank employee his driver's license which established that he was, in fact, Barry L. Linker. Simply put, defendant never made the misrepresentation charged in both indictments.

Id. at 615, 308 S.E.2d at 311. The Supreme Court concluded that because the defendant "positively identified himself [as Barry L. Linker] with his driver's license to each bank official. . . . the state's proof varied fatally from the allegations in the indictment." *Id.* at 616, 308 S.E.2d at 311.

The same reasoning applies here. Unlike the evidence supporting the counts relating to the moving company charges, the evidence did not support a finding that the document Defendant submitted to State Farm with regard to pet boarding services at Meadowsweet was a "fraudulent invoice" as alleged in the indictment. While Defendant's repeated oral misrepresentations that allowed Defendant to improperly obtain payments from State Farm over the next six months — consisting of

her false assurances that her pets remained boarded at Meadowsweet beyond 22 October 2009 — *could have* given rise to the offense of obtaining property by false pretenses if contained within the indictment, the indictment as to this count did not allege them.

In short, the document at issue was not a "fraudulent invoice" purporting to be from an entity that was actually fictitious (as was the case regarding the moving expenses) but rather a genuine estimate prepared by a legitimate business. It could not have been construed as an invoice for services previously rendered because it was generated the first day Defendant placed her pets with Meadowsweet. The initial payment of $2,040.00 was issued by State Farm before it ever received the written estimate. The remaining payments comprising the $11,395.00 figure listed in the indictment were induced by Defendant's false oral representations over the next six months that her pets continued to be boarded at Meadowsweet. Accordingly, there was a fatal variance between the allegations of the indictment and the evidence presented at trial to establish this count of obtaining property by false pretenses. For this reason, we must vacate Defendant's conviction on this count. *See State v. Gayton-Barbosa*, 197 N.C. App. 129, 136-37, 676 S.E.2d 586, 591 (2009) (vacating defendant's larceny conviction due to fatal variance between indictment and evidence presented at trial).[6]

III. Admissibility of Evidence Concerning Defendant's Failure to Attend Scheduled Examinations

[3] Defendant next contends that the trial court erred in admitting testimony that she did not appear for two scheduled examinations under oath as required by her insurance policy and failed to respond to State Farm's request to reschedule the examination. Defendant acknowledges that she failed to object to the introduction of this evidence and that, consequently, this Court's review of the admission of this evidence is limited to plain error.

In order to establish plain error, Defendant bears the burden of showing that a fundamental error occurred at trial. *State v. Lawrence*,

6. Defendant also asserts that the trial court either (1) deprived her of her constitutional right to a unanimous verdict; or, alternatively, (2) committed plain error, by instructing the jury that it could find her guilty of obtaining property by false pretenses if it found that Defendant had made *either* written *or* oral misrepresentations to State Farm concerning the pet boarding expenses at Meadowsweet. However, we need not address these contentions nor the remaining arguments in her brief as applied to the pet boarding count because we are vacating her conviction on this count due to the fatal variance discussed above.

365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

Defendant makes three arguments challenging the admissibility of this evidence. First, she asserts that this evidence was irrelevant and, therefore, inadmissible under Rules 401 and 402 of the North Carolina Rules of Evidence. Second, she contends that the evidence violated N.C. Gen. Stat. § 14-100(b). Third, she argues that the evidence should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence. We address each of these issues in turn.

A. Relevance

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Irrelevant evidence, conversely, is evidence "having no tendency to prove a fact at issue in the case." *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992). Rule 402 provides that relevant evidence is generally admissible at trial while irrelevant evidence is not admissible. N.C.R. Evid. 402.

We do not agree with Defendant's assertion here that the evidence concerning her failure to appear for an examination under oath pursuant to the terms of her insurance policy with State Farm was not relevant. In order to establish the offense of obtaining property by false pretenses, the State was required to prove that Defendant's acts were done "knowingly and designedly . . . with intent to cheat or defraud." *State v. Hines*, 54 N.C. App. 529, 532-33, 284 S.E.2d 164, 167 (1981) (quotation marks omitted); *see also* N.C. Gen. Stat. § 14-100 (2011). As this Court has previously observed, "a person's intent is seldom provable by direct evidence, and must usually be shown through circumstantial evidence." *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000) (citation, quotation marks, and brackets omitted). "In determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and general circumstances existing at the time of the alleged commission of the offense charged[.]" *Id.* at 332, 536 S.E.2d at 634 (citation, quotation marks, and brackets omitted).

In the present case, Dawdy testified that Defendant's insurance claim was referred to him as a potential fraud case because of "indicators [of

fraud] with respect to the unresolved pet boarding charges" and a supplemental claim for additional personal property losses totaling $59,000.00. When he received the case, Dawdy contacted Defendant, apprised her of his role with State Farm, and informed her that State Farm had questions concerning her submitted claims and would be invoking "a policy provision called an examination under oath," which he explained as "an opportunity for [the] policyholder to come in and under oath give testimony to us about the questions we have" concerning the claim at issue.

Dawdy further testified that the examination was initially scheduled for 20 October 2010 but that Defendant did not appear for the examination on that date. Defendant was then sent a "second chance letter" requesting that she contact Cox, State Farm's attorney, within ten days to reschedule the examination. When she did not respond, Cox sent another letter on 16 November 2010 informing her that the examination had been rescheduled for 30 November 2010, but she did not show up for the examination on that date. Defendant's failure to appear for any of the scheduled examinations as well as the fact that she did not contact Dawdy or Cox to reschedule the examination constituted circumstantial evidence tending to show that her submission of requests for payments to which she was not entitled was done "knowingly and designedly . . . with intent to cheat or defraud." N.C. Gen. Stat. § 14-100(a). Because Defendant was informed that the purpose of the examination under oath was to enable State Farm to further investigate the legitimacy of her insurance claims, her failure to respond and to attend or reschedule the examination raised a reasonable inference as to her awareness that her claims were fraudulent. Accordingly, because this evidence was relevant to an essential element of an offense for which she was charged, its admission did not violate Rule 402.

B. N.C. Gen. Stat. § 14-100(b)

Defendant also contends that the trial court's admission of this evidence constituted plain error because it violated subsection (b) of N.C. Gen. Stat. § 14-100 (the statute codifying the crime of obtaining property by false pretenses), which states that "[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud." N.C. Gen. Stat. § 14-100(b). However, nothing in N.C. Gen. Stat. § 14-100(b) renders this type of evidence inadmissible. Rather, subsection (b) simply makes clear that such evidence — without more — is insufficient to satisfy the intent to defraud element of this offense. Thus, her argument that N.C. Gen. Stat. § 14-100(b) served as a bar to the *admissibility* of this evidence lacks merit.

C. Rule 403

Finally, Defendant contends that even if the evidence of her failure to appear for an examination under oath possessed some degree of relevance, it nevertheless should have been excluded under Rule 403 because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to her. Pursuant to Rule 403, the trial court may, in its discretion, exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403.

However, as we explained in *State v. Cunningham*, 188 N.C. App. 832, 656 S.E.2d 697 (2008), "[t]he balancing test of Rule 403 is reviewed by this court for abuse of discretion, and we do not apply plain error to issues which fall within the realm of the trial court's discretion." *Id.* at 837, 656 S.E.2d at 700 (citation and quotation marks omitted). Therefore, Defendant's attempt to rely on Rule 403 as to this issue is misplaced.

IV. Jury Instruction on Breach of Contract

[4] In a related argument, Defendant also contends that the trial court erred by failing to instruct the jury that pursuant to N.C. Gen. Stat. § 14-100(b), "[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud." Defendant did not request this instruction, and therefore, we review the trial court's failure to give this instruction solely for plain error. *See Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (explaining that alleged instructional errors that are unpreserved only rise to the level of plain error where "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty" (citation and quotation marks omitted)).

In *Hines*, we rejected a similar argument. The defendant in *Hines* had been charged with two counts of obtaining property by false pretenses arising out of allegations that he had obtained money from the victims by representing that he would arrange the incorporation of a proposed business venture between them and secure a site for the business at a local shopping mall. *Hines*, 54 N.C. App. at 531-32, 284 S.E.2d at 166. Contrary to his representations, the defendant did not actually take steps to incorporate the business nor did he use the money he obtained from them as a rental deposit for a storefront. *Id.* at 532, 284 S.E.2d at 166. On appeal, the defendant argued that the trial court erred by failing

to expressly inform the jury that, based on N.C. Gen. Stat. § 14-100(b), the element of intent to defraud could not, without more, be established by the breach of a contractual obligation. *Id.* at 536, 284 S.E.2d at 169. This Court disagreed, explaining that (1) the trial court "instructed on all essential elements of obtaining property by false pretense" and "all substantial features of the case"; and (2) "[t]he jury could not have been misled by the instructions given to find defendant guilty solely on the ground that he did not fulfill his contractual obligations." *Id.* (citation and quotation marks omitted). The same is true in the present case.

Here, the trial court instructed the jury that it could only find Defendant guilty of each of the two counts of obtaining property by false pretenses concerning the moving company invoices if it found that (1) Defendant "made a representation by presenting a written statement to State Farm Fire and Casualty Company for services rendered" by (a) M&M Movers in the amount of $4,760.00, or (b) PJ's Moving Company in the amount of $10,430.00; (2) the representation was false; (3) the representation was calculated and intended to deceive; (4) State Farm was in fact deceived by it; and (5) Defendant obtained the property at issue from State Farm as a result of making the representation.

Thus, the jury was expressly informed that it was required to determine that Defendant intended to defraud State Farm through her submission of documents containing false representations in order to return a guilty verdict. Therefore, no reasonable juror could have been left with the mistaken belief that she could be found guilty based solely on her failure to comply with contractual obligations under her insurance policy. For this reason, her argument on this issue is without merit.

V. Alleged Failure of Indictments to Adequately Apprise Defendant of Charges

[5] In her final argument, Defendant argues that the indictments were fatally defective because they did not allege the "exact misrepresentation" she made with sufficient precision. We disagree.

The failure of a criminal pleading to charge the essential elements of the stated offense is an error of law that is reviewed *de novo*. *State v. Sturdivan*t, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). As discussed above, a primary purpose of an indictment "is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused . . . ." *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (citation and quotation marks omitted). Thus, in order to be valid, "[a]n indictment . . . charging a statutory offense must allege

all of the essential elements of the offense." *State v. Crabtree*, 286 N.C. 541, 544, 212 S.E.2d 103, 105 (1975). Because the indictments concerning the moving company expenses did not specifically allege how, or in what manner, the invoices Defendant submitted were fraudulent, she argues that they were fatally defective.

"The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Harris*, 219 N.C. App. 590, 592-93, 724 S.E.2d 633, 636 (2012) (citation and quotation marks omitted). Furthermore, in alleging the essential elements of the charge, an indictment "need only allege the ultimate facts constituting each element of the criminal offense." *Id.* at 592, 724 S.E.2d at 636 (citation and quotation marks omitted). "Pursuant to N.C. Gen. Stat. § 14-100, our Supreme Court has defined the offense of [obtaining property by] false pretenses as (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *Walston*, 140 N.C. App. at 332, 536 S.E.2d at 633 (citation and quotation marks omitted).

We believe the indictments for the two counts relating to the moving expenses were legally sufficient. Each alleges both the essential elements of the offense and the ultimate facts constituting those elements by stating that Defendant obtained U.S. currency from State Farm through a false representation she made by *submitting a fraudulent invoice* which was intended to — and, in fact, did — deceive State Farm. Therefore, it was clear from the indictments that the false invoices she submitted purporting to be from PJ's Moving Company and M&M Movers formed the basis for these counts. Thus, Defendant's argument on this issue is overruled.

Conclusion

For the reasons stated above, we vacate Defendant's conviction on the count of obtaining property by false pretenses arising from the pet boarding expenses. We find no error as to Defendant's remaining convictions. Because the count we are vacating was consolidated for judgment with the two other counts of obtaining property by false pretenses, we remand for resentencing so that the trial court may enter a new judgment on the convictions being upheld. *See State v. Williams*, 150 N.C. App. 497, 506, 563 S.E.2d 616, 621 (2002) (remanding for resentencing after vacating one offense in consolidated judgment because

whether remaining offense "warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider").[7]

VACATED IN PART; NO ERROR IN PART.

Judges ELMORE and TYSON concur.

STATE OF NORTH CAROLINA

v.

THEDFORD ROY RORIE, JR.

No. COA14-886

Filed 18 August 2015

1. Evidence—rape of child—child seen watching pornographic video—evidence excluded

The trial court erred in a prosecution for rape of a child and indecent liberties by excluding evidence that defendant had found the child watching a pornographic video, which defendant had sought to admit to establish an alternate basis for her sexual knowledge. The trial court erred whether it excluded the evidence based on relevance or under Rule 412. Without the evidence suggesting an alternative source of A.P.'s sexual knowledge in this case, it is likely the jury concluded A.P.'s allegations were true because A.P. was a critical witness against defendant and there was no known basis from which she could have had the knowledge to fabricate the allegations.

2. Evidence—prior allegations and inconsistent statements by child—admissible to attack credibility

In an appeal remanded on other grounds, the trial erred by excluding evidence that the prior allegations and inconsistent statements by a child regarding sexual abuse were covered by Rule 412. The statements were not within the purview of Rule 412 and were admissible to attack her credibility. However, whether they should be admitted at retrial was not determined.

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7. We note, however, that it appears from the record that Defendant has already served the sentence of imprisonment imposed in the consolidated judgement.

Appeal by defendant from judgments entered 23 July 2014 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 19 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

McCULLOUGH, Judge.

Thedford Roy Rorie, Jr. ("defendant") appeals from judgments entered upon his convictions for one count of rape of a child in violation of N.C. Gen. Stat. § 14-27.2A, one count of indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1, attaining habitual felon status as defined in N.C. Gen. Stat. § 14-7.1, and three counts of sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4A. For the following reasons, we grant defendant a new trial.

I. Background

Defendant was arrested by the Winston-Salem Police Department in October 2012 on charges of first degree rape and taking indecent liberties with a child. In indictments returned by Forsyth County Grand Juries on 7 January 2013, 3 June 2013, and 8 July 2013, defendant was indicted on one count of rape of a child, one count of taking indecent liberties with a child, attaining habitual felon status, and three counts of sexual offense with a child.[1] Defendant pled not guilty to all charges.

Prior to the case coming on for trial, defendant filed a notice of a potential Rule 412 issue and the State filed a motion in limine to exclude any evidence of the alleged victim's, A.P.'s[2], prior sexual activity pursuant to Rule 412. These pre-trial matters were among the first issues considered after the offenses were joined and called for trial in Forsyth County Superior Court before the Honorable A. Moses Massey on 15 July 2013.

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1. On 3 June 2013, a Forsyth County Grand Jury also returned a superseding indictment changing the date range of the rape of a child and the taking indecent liberties with a child offenses in the 7 January 2013 indictment.

2. Initials are used throughout the opinion to protect the identities of minor children.

Concerning defendant's notice of a potential Rule 412 issue, defendant argued prior inconsistent statements or false allegations by A.P. against two young boys living in the same house as A.P. that were similar in nature to the allegations in the present case should be allowed into evidence to attack A.P.'s credibility. In response, the State asserted A.P.'s prior statements regarding the two boys should be excluded because the statements did not amount to false allegations, but were merely the result of a misunderstanding. Moreover, the State asserted the evidence was irrelevant to the charges against defendant. Despite the disagreement over the admissibility of the evidence, both parties acknowledged they did not necessarily believe there was a Rule 412 issue because Rule 412 concerns activity, not statements. Following an in camera review of the interview in which A.P. made the statements at issue, the trial court made a tentative ruling that the evidence was irrelevant and inadmissible. Yet, emphasizing the ruling was tentative, the trial court added that some portion of the evidence may become relevant for impeachment purposes. Lastly, the trial court noted the evidence was covered by Rule 412 and the exceptions to Rule 412 did not appear to apply. The jury was empaneled and the trial proceeded the following day.

The evidence presented at trial tended to show the following: Sometime in the spring or summer of 2011, A.P.'s mother ("Ms. Williams") allowed defendant and defendant's girlfriend ("Ms. Jones"), both of whom she was good friends with, to rent a room for themselves and Ms. Jones' baby in the four-bedroom house in which Ms. Williams, A.P., A.P.'s younger brother T.P., A.P.'s father ("Mr. Payne"), and, from time to time, others lived. A.P. was six years old at the time.

Ms. Williams testified defendant was sweet to her kids, noting that A.P. referred to defendant as "Uncle Peanut." Ms. Williams recalled that defendant and A.P. sometimes called each other boyfriend and girlfriend, but she did not think it was serious and she never observed anything that caused her to believe there was an inappropriate relationship. Although Ms. Williams indicated defendant was not a normal babysitter for her kids, Ms. Williams testified defendant was left alone with A.P., T.P., and Ms. Jones' baby one night in November 2011 while she and Ms. Jones went to play bingo. The evidence tended to show that Ms. Williams and Ms. Jones were away from the house from six or seven o'clock that evening until approximately two o'clock the next morning.

A.P. testified that while Ms. Williams and Ms. Jones were at bingo and her dad was at work, defendant "raped [her] in both parts." When asked more specifically what defendant did, A.P. testified that "[defendant] put his private in [her] private and put his private in [her] butt."

A.P. then described in more detail how defendant came into her and T.P.'s bedroom while they were asleep, woke her up, raped her in both parts, let her go back to sleep, and then woke her up a second time and repeated the acts. A.P. also testified that on days prior to the night of the alleged rape, defendant put his private in her mouth. A.P. testified this happened in defendant's bedroom with the door locked while the other adults were outside or somewhere else.

A.P. did not immediately tell Ms. Williams, or anyone else, about what defendant did because she thought Ms. Williams would get angry. Various witnesses testified they did not notice a change in the interactions between defendant and A.P. following the bingo night in question in November 2011.

Ms. Jones became pregnant with defendant's child during the time they lived in the house and gave birth in February 2012. Defendant and Ms. Jones moved out shortly thereafter. It was not until after defendant and Ms. Jones moved out that A.P. told others what had happened.

Soon after defendant and Ms. Jones moved out of the house in March 2012, another man ("Mr. Coles"), his girlfriend, and his girlfriend's three children, all older than A.P., moved in. Sometime thereafter in May 2012, A.P. mentioned to the kids that defendant had raped her. One of the kids then told Mr. Coles, who questioned A.P. and called Ms. Williams to inform her of A.P.'s accusations. Ms. Williams came home upon receiving the call from Mr. Coles, questioned A.P. about the allegations, and took A.P. to the emergency department of the hospital, where A.P. was examined and interviewed.

The sexual assault nurse examiner who examined A.P. reported a "5:00 hymenal notch that [she] was concerned about." The nurse testified that the notch could be consistent with a penetrating injury. The nurse, however, was not certain because the alleged rape had purportedly occurred months earlier. The evidence further revealed that on 13 December 2011, A.P. was previously taken to the emergency department at the hospital complaining of pain while urinating. At that time, the attending physician in the pediatric emergency department performed only an external vaginal examination because there was no report of sexual abuse. Upon observing no abnormalities, the physician diagnosed A.P. with vaginitis. The physician, however, testified at trial that one of the potential causes of vaginitis is sex.

Following the State's evidence, defendant took the stand in his own defense and denied all of A.P.'s allegations. Defendant's recollection of the night in November 2011 when he watched A.P. and T.P. while Ms.

Williams and Ms. Jones went to bingo differed from other witnesses' recollection. Particularly noteworthy, defendant testified that Ms. William's sister was at the house the entire time and stayed with the children while he left the house on three separate occasions to deliver marijuana. Defendant also testified that his niece came to the house around eleven o'clock that night and left shortly after midnight. Defendant recalled that he went to check on A.P and T.P. several times throughout the course of the night and each time they were asleep in their bedroom.

Defendant also sought to present evidence of A.P.'s sexual knowledge by introducing evidence that he found A.P. watching a pornographic video. Specifically, on *voir dire*, defendant testified he caught A.P. and T.P. watching a pornographic DVD of "[a]dults naked having sex[]" one morning while the other adults in the house were still asleep. Defendant stated that he asked A.P. what she was watching and A.P. replied "[she] was trying to find cartoons." Defendant then "immediately cut it off, found them a cartoon movie, [and] put it in." Defendant testified he told Ms. Williams and Mr. Payne what he had seen when they woke up, which caused Mr. Payne to go through and remove all of the adult DVDs. Upon considering the arguments from both sides, the trial court initially overruled the State's objection to the evidence. The trial court, however, later reversed its decision and sustained the State's objection on the basis that the evidence was "irrelevant and is not admissible, particularly given the fact that in this case there is evidence consistent with sexual abuse, physical evidence consistent with sexual abuse."

On 22 July 2013, the jury returned guilty verdicts for the rape of a child, taking indecent liberties with a child, and sexual offense with a child offenses. The following day the jury returned a verdict finding the presence of an aggravating factor, defendant entered a guilty plea to attaining the status of a habitual felon, and the trial court consolidated the offenses between the two judgments for sentencing. Finding the factors in aggravation outweighed the factors in mitigation, the trial court sentenced defendant in the aggravated range to two consecutive terms of 345 to 426 months imprisonment. Furthermore, the trial court ordered defendant to register as a sex offender for life and enroll in satellite based monitoring for life upon his release from imprisonment. Defendant gave notice of appeal in open court following sentencing.

II. Discussion

On appeal, defendant raises the following three issues: whether (1) the trial court erred by excluding evidence that he found A.P. watching the pornographic video; (2) the trial court erred by excluding evidence

of A.P.'s prior allegations and inconsistent statements regarding sexual assaults by two boys living in the house; and (3) the trial court's cumulative evidentiary errors deprived him of a fair trial.

Evidence of Pornography

[1] Defendant first contends the trial court erred in excluding the evidence that he found A.P. watching a pornographic video. Defendant argues the evidence was relevant and admissible to establish an alternative basis for A.P.'s sexual knowledge, from which A.P. could fabricate the allegations against defendant. Defendant contends this evidence was important to his case because absent the evidence, a jury would assume a child of A.P.'s age would not have the sexual knowledge to fabricate such allegations.

Expanding on the background, defendant's counsel recognized there was a potential issue with this evidence during the trial and requested to discuss the matter out of the presence of the jury. Following a brief bench conference, the trial court excused the jury and conducted a *voir dire*. After initially ruling that the defendant could testify about finding A.P. watching the pornographic video, the trial court reconsidered its decision and ruled that the evidence was irrelevant and inadmissible based on its interpretation of *State v. Yearwood*, 147 N.C. App. 662, 556 S.E.2d 672 (2001).

At the outset of our analysis, we note that it is not clear from the record whether the trial court excluded the evidence solely on the basis of relevance or whether the trial court considered Rule 412. Upon consideration of both on appeal, we hold the trial court erred in either instance.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000). In a sexual abuse case, evidence regarding the victim's prior sexual behavior is severely restricted pursuant to N.C. Gen. Stat. § 8C-1, Rule 412 (2013) (the "Rape Shield Statute" or "Rule 412"), which provides the sexual behavior of the complainant, defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial[,]" is irrelevant unless the behavior falls under specified exceptions. N.C. Gen. Stat. § 8C-1, Rule 412 (a) and (b). Rule 412 is applicable in trials on charges of rape and sex offense, *see* N.C. Gen. Stat. § 8C-1, Rule 412(d), and

thus clearly applies in this case involving charges of rape of a child and sexual offense with a child. Yet, there is no North Carolina case law interpreting the admission of this particular type of evidence in a child sex offense case.

The State argues A.P.'s viewing of pornography is evidence of A.P.'s sexual activity other than with defendant and, therefore, should be excluded pursuant to Rule 412. In support of its argument, the State relies on *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996), and contends the trial court's consideration of *Yearwood* indicates the trial court analyzed the relevancy of the evidence pursuant to Rule 412. Upon review, we find the present case distinguishable from *Bass* and *Yearwood*.

The State contends *Bass* is "[t]he closest case in North Carolina that deals with the issue of 'sexual knowledge.' " In *Bass*, a defendant charged with taking indecent liberties with a child and first degree statutory sexual offense sought to show the six year old complainant had the sexual knowledge to fabricate the allegations by introducing evidence "that the [complainant] had been assaulted in a similar manner some three years earlier." *Bass*, 121 N.C. App. at 308-09, 465 S.E.2d at 335. The trial court excluded the evidence pursuant to Rule 412 and the defendant appealed the ruling following his convictions. *Id.* at 309, 465 S.E.2d at 335. Although this Court granted a new trial based on an improper closing argument by the prosecution, it upheld the trial court's exclusion of the evidence of prior abuse concluding "the prior abuse alleged . . . [was] 'sexual activity' within the ambit of Rule 412." *Id.* at 309-10, 465 S.E.2d at 336.

In *Yearwood*, relied on by the trial court, an expert in child psychology testified that the twelve year old complainant was extremely distressed and agitated when they met four days after the assault and opined that the complainant's behavior was consistent with patterns observed in a sexually assaulted victim. *Yearwood*, 147 N.C. App. at 664, 556 S.E.2d at 674. Yet, following *voir dire* in which the expert "admitted to some knowledge of alleged incidents involving [the child] and her father, where the father would allegedly strip in front of [the child] and expose her to pornographic material[,]" the trial court denied the defendant the opportunity to explore the purported sexual abuse by the child's father, which occurred four to seven years earlier. *Id.* at 664-65, 556 S.E.2d at 674. On appeal, the defendant argued the trial court erred because "the evidence [was] relevant to cast doubt on the credibility of [the expert]" because "this exposure may have been the cause of [the complainant's] behavior which led [the expert] to conclude that [the complainant] had been sexually assaulted." *Id.* at 665, 556 S.E.2d

at 675. This Court rejected defendant's argument, noting the defendant "made no showing that the trial court's limitation of the cross examination of [the expert] could have improperly influenced the jury's verdict." *Id.* This Court further noted that "although the evidence . . . was not excluded by [Rule 412], . . . the trial court nevertheless did not abuse its discretion in refusing to permit defendant from introducing such evidence because there is no indication in the record that [the] evidence was relevant to [the complainant's] credibility." *Id.* at 667, 556 S.E.2d at 676.

We find the present case distinguishable. In both *Bass* and *Yearwood*, the evidence excluded was evidence of sexual abuse of the complainants occurring years earlier. Furthermore, this Court's holding in *Yearwood* was primarily based on the fact that "there was abundant evidence, even without the testimony of [the expert], that [the complainant] had been sexually assaulted." *Id.* at 666, 556 S.E.2d at 675. In this case, the evidence was not evidence of prior sexual abuse but evidence that A.P. was discovered watching a pornographic video, which defendant sought to introduce to explain an alternative source of A.P.'s sexual knowledge. Without the evidence suggesting an alternative source of A.P.'s sexual knowledge in this case, it is likely the jury concluded A.P.'s allegations were true because A.P. was a critical witness against defendant and there was no known basis from which she could have had the knowledge to fabricate the allegations.

Although there is no controlling case law specific to pornography evidence, we find cases from North Carolina and other jurisdictions persuasive. In *State v. Guthrie*, this Court granted the defendant a new trial upon holding the trial court erred in limiting cross-examination of the victim about a letter she voluntarily wrote to a school friend requesting sex. *Guthrie*, 110 N.C. App. 91, 428 S.E.2d 853 (1993). This Court explained that the testimony regarding the sexually suggestive letter was not the type of evidence which Rule 412 seeks to exclude because the letter was not evidence of sexual activity, but evidence of language. *Id.* at 93, 428 S.E.2d at 854. "Therefore, [the] testimony concerning the letter [was] not deemed irrelevant by Rule 412 and was improperly excluded on that basis." *Id.* at 94, 428 S.E.2d at 854. More closely analogous to this case, in *People v. Mason*, the Illinois Appellate Court, Fourth District, held the Illinois' Rape Shield Statute, which is similar to North Carolina's, did not bar the admission of evidence that a seven year old victim had viewed sexually explicit videotapes. *Mason*, 578 N.E.2d 1351, 1353 (Ill. App. 4 Dist. 1991). In so holding, the court explained:

> that the rape-shield statute does not [bar the evidence] for two reasons. First, the rape-shield statute applies to

> "prior sexual activity" or "reputation." The viewing of pornographic videotapes by a curious seven year old does not constitute evidence of either. Second, the policies behind the rape-shield statute were the prevention of harassment and humiliation of victims and the encouragement of victims to report sexual offenses. Those policies cannot justify denying a defendant the right to refute evidence which tends to establish sexual abuse took place. The right to confront and call witnesses on one's own behalf are essential to due process.

Id. (internal citation omitted).

Considering *Guthrie* and *Mason*, we now hold the evidence that A.P. was discovered watching a pornographic video, without anything more, is not evidence of sexual activity barred by the Rape Shield Statute. Although Rule 412 is applicable in trials involving charges of rape and sex offense, we do not believe it was intended to exclude this type of evidence. Moreover, this evidence was relevant to explain an alternative source of A.P.'s sexual knowledge, from which she could have fabricated the allegations.

The only way this evidence would be excluded is under a proper Rule 403 analysis. Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2013). There is no indication the trial court excluded the evidence of A.P. watching the pornographic video in this case based on Rule 403.

Additionally, we hold defendant was prejudiced by the exclusion of the evidence because A.P. was a key witness in the case against defendant and attacking her credibility was central to defendant's defense. Because it is unlikely a child A.P.'s age would have sufficient sexual knowledge to make accusations such as those in this case absent actual abuse, the evidence that A.P. was discovered watching a pornographic video was important to explain an alternative basis for A.P.'s sexual knowledge. Excluding the evidence limited defendant's defense.

Prior Inconsistent Statements

[2] On appeal, defendant also contends the trial court erred in excluding evidence of A.P.'s prior allegations and inconsistent statements about sexual assaults committed by two young boys living in the house as irrelevant under Rule 412. Although we reverse defendant's conviction

based on the first issue, we address the merits of this second argument because the issue is likely to recur.

Defendant primarily relies on the following three cases in support of his argument that the trial court erroneously excluded evidence of A.P.'s prior allegations and inconsistent statements: *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982), *State v. Ginyard*, 122 N.C. App. 25, 468 S.E.2d 525 (1996), and *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982). In each of those cases, this State's appellate courts granted new trials to defendants convicted of sexual offenses because the trial courts excluded evidence of prior allegations and inconsistent statements by the alleged victims that the defendants proffered for impeachment purposes. *See e.g.*, *Younger*, 306 N.C. at 697, 295 S.E.2d at 456) (Applying a prior version of the Rape Shield Statute, the Court recognized "[w]e have repeatedly held that prior inconsistent statements made by a prosecuting witness may be used to impeach his or her testimony when such statements bear directly on issues in the case. It is our belief that the statute was not designed to shield the prosecutrix from the effects of her own inconsistent statements which cast a grave doubt on the credibility of her story. . . . In other words, the statute was not intended to act as a barricade against evidence which is used to prove issues common to all trials. Inconsistent statements are, without a doubt, an issue common to all trials.") (internal citations omitted). Upon review of those cases, we agree the trial court erred in this case.

As this Court has recognized,

> [T]he "rape shield statute . . . is only concerned with the sexual activity of the complainant. Accordingly, the rule only excludes evidence of the actual sexual history of the complainant; it does not apply to false accusations, or to language or conversations whose topic might be sexual behavior." Therefore, false accusations do not fall under the ambit of Rule 412 and are admissible if relevant.

In re K.W., 192 N.C. App. 646, 650, 666 S.E.2d 490, 494 (2008) (quoting *State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000)) (emphasis and alterations omitted). Accordingly, the trial court's determination in this case that A.P.'s prior allegations and inconsistent statements were "covered by Rule 412" was error. Although these statements involve the mention of sexual behavior, A.P.'s prior allegations and inconsistent statements are not within the purview of Rule 412 and may be admissible to attack A.P.'s credibility.

We do not, however, hold the statements necessarily should have been admitted into evidence at trial. As the Court indicated in *Younger*, "the relevance and probative value . . . must be weighed against [the] prejudicial effect." *Younger*, 306 N.C. at 697, 295 S.E.2d at 456. Thus, whether A.P.'s prior allegations and inconsistent statements come into the evidence at trial should be determined on retrial subject to a proper Rule 403 analysis.

Cumulative Error

In the event we held neither of the evidentiary errors standing alone was sufficient to warrant a new trial, defendant argues the cumulative effect of the errors deprived him of a fair trial. Since we reverse and remand for a new trial on both of the evidentiary issues, we need not further address the effect of cumulative error.

III. Conclusion

For the reasons discussed above, we hold the trial court erred in excluding the evidence that defendant discovered A.P. watching a pornographic video and erred in determining A.P.'s prior allegations and inconsistent statements were irrelevant under Rule 412. Thus, we grant defendant a new trial.

NEW TRIAL.

Chief Judge McGEE and Judge DIETZ concur.

TOTAL RENAL CARE OF NORTH CAROLINA, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, RESPONDENT
AND
BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC., RESPONDENT-INTERVENOR

No. COA14-1076

Filed 18 August 2015

1. Hospitals and Other Medical Facilities—certificate of need—competing applications—same service area—deference to agency

In an action involving two certificate of need applications to provide dialysis stations, the Court of Appeals deferred to the Department of Health and Human Services' interpretation of "similar proposals within the same service area" where that interpretation was reasonable and a permissible construction of the applicable statue. There were more regulatory hurdles to overcome in moving dialysis stations from one county to another than in moving stations within the same county, and the agency created categories for each. Under the deferential standard of review, the agency's schedules and review categories satisfied the statutory requirement that "similar proposals in the same service area" be reviewed together.

2. Hospitals and Other Medical Facilities—certificate of need—competing applications—review periods

In an action involving two applications for certificates of need for dialysis stations, the Department of Health and Human Services properly interpreted its own regulations concerning review periods. Reviews for each category of application lasted several months and there was overlap between the review periods in this case. In the agency's view, overlapping review periods were simply overlapping review periods, not the same review period.

3. Hospitals and Other Medical Facilities—certificates of need—review process—constitutional requirements

In a certificate of need action involving two applications for dialysis stations, the review process established by the General Assembly satisfied the requirements of *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327, 333 (1945).

4. Hospitals and Other Medical Facilities—certificate of need—findings by ALJ—supported by substantial evidence

In a certificate of need case involving two applications for additional dialysis stations, a series of challenged findings by the administrative law judge (ALJ) were supported by substantial evidence and the court could not substitute its judgment for that of the ALJ.

Appeal by petitioner from final decision entered 23 June 2014 by Administrative Law Judge Craig Croom in the Office of Administrative Hearings. Heard in the Court of Appeals 3 March 2015.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, and Tobias S. Hampson, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for respondent-appellee.

Smith Moore Leatherwood LLP, by Marcus C. Hewitt and Elizabeth Sims Hedrick, for respondent-intervenor-appellee.

DIETZ, Judge.

This appeal challenges the process by which the Department of Health and Human Services determines whether two certificate-of-need applications are "competitive," meaning they must be reviewed together.

The certificate of need law directs DHHS to "establish schedules for submission and review of completed applications" and further directs that "[t]he schedules shall provide that applications for similar proposals in the same service area will be reviewed together." N.C. Gen. Stat. § 131E-182(a) (2013). The agency also promulgated its own regulation stating that applications must be reviewed together if "the approval of one or more of the applications may result in the denial of another application reviewed in the same review period." 10A N.C. Admin. Code 14C.0202(f) (2013).

As part of the 2013 State Medical Facilities Plan, DHHS determined that Franklin County needed 10 additional dialysis stations. Petitioner Total Renal Care of North Carolina, LLC (TRC) and Respondent-Intervenor Bio-Medical Applications of North Carolina, Inc. (BMA) both applied to fill this need.

This case arose because the two companies did *not* file their applications in the same "review period." BMA proposed moving ten existing

dialysis stations from Wake County to Franklin County and, under the schedules established by the agency, was required to file its application on 15 March 2013. TRC proposed moving two dialysis stations from Wake County and another eight stations from a different site within Franklin County. Because TRC's application involved moving stations both from another county and from within the same county, TRC *could* have filed its application on 15 March 2013, but it also could wait and file it in a separate review period beginning 15 April 2013. TRC chose the latter. As a result, the agency's schedules did not treat the two applications as "similar proposals for the same service area," and thus the agency did not review them together. On appeal, TRC argues that DHHS's failure to review the applications together violates the certificate-of-need statute, the agency's own regulations, and TRC's due process rights.

As explained below, we reject these arguments. Our precedent requires us to defer to the agency's reasonable interpretation of an ambiguous statute and to an agency's interpretation of its own rules and regulations. In the context of medical services, the statutory term "similar proposals" is ambiguous. Medical services that appear "similar" to a layperson (or an appellate judge) might be entirely dissimilar to experts in the field. That is precisely why the General Assembly tasked DHHS, the state agency with expertise in this area, with determining what is, and is not, a similar proposal. Because we conclude that the agency's interpretations of the statute and its regulations are reasonable, we must defer to those interpretations. Accordingly, we affirm the final decision of the Office of Administrative Hearings.

Facts and Procedural Background

In January 2013, the Department of Health and Human Services published its Semiannual Dialysis Report, identifying a need for ten additional dialysis stations in Franklin County. DHHS publishes this report in January and July of each year as part of its State Medical Facilities Plan, cataloguing surpluses and deficits of stations by county and forecasting the number of stations that will be needed to serve dialysis patients in the future.

Private providers seeking to fill a deficit of medical facilities in our State must apply for and obtain "certificate of need" approval. N.C. Gen. Stat. § 131E-178(a); *see also id.* § 131E-176(16). The Certificate of Need Section of DHHS reviews all certificate of need applications for conformity with the statutory review criteria set forth in the applicable statute. *Id.* § 131E-183(a). To facilitate this process, the statute authorizes DHHS

to adopt rules governing the orderly administration of certificate of need applications. *See*, *e.g.*, *id.* §§ 131E-177(1); 131E-182.

The statute requires the agency to establish review schedules under which "similar proposals in the same service area will be reviewed together." *Id.* § 131E-182(a). Additionally, the agency's review is limited to a period of 90 days,[1] starting "on the day established by rule as the day on which applications for the particular service in the service area shall begin review." *Id.* § 131E-185(a1).

As the statute instructs, the agency has adopted schedules setting forth deadlines for the filing and review of various categories of medical services. *See* 10 N.C. Admin. Code 14C.0202(e). These categories and filing dates are contained in the State Medical Facilities Plan each year, and applicants must comply with the filing deadlines to ensure consideration in any particular period of review. *Id.*; *see also id.* § 14C.0203(a)-(b) (mandating that the agency "shall not . . . review[ ]" applications unless they are "filed in accordance with this Rule").

The categories relevant to this appeal are Category D and Category I. Category D includes applications proposing the "relocation of existing certified dialysis stations *to another county* pursuant to Policy ESRD-2." N.C. Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Med. Facilities Planning Branch, *North Carolina 2013 State Medical Facilities Plan*, N.C. Dep't of Health & Human Servs., 18 (January 1, 2013), http://www.ncdhhs.gov/dhsr/ncsmfp/2013/2013smfp.pdf. (emphasis added). Policy ESRD-2, which governs dialysis services, permits an applicant to relocate dialysis stations into a contiguous county only if there is a surplus in the "giving" county and a deficit in the "receiving" county. *Id.* at 36. Category I, on the other hand, covers applications seeking to relocate existing certified dialysis stations *within the same county*. *Id.* at 20.

On 15 March 2013, BMA submitted its application to develop a ten-station dialysis facility in Louisburg, Franklin County. BMA's application proposed moving ten dialysis stations from two of its existing facilities in Wake County, which is contiguous to Franklin County. As a result, BMA's application fell within Category D. *See id.* at 18. BMA timely submitted

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1. The statute provides that the Agency "may extend the review period for a period not to exceed 60 days and provide notice of such extension to all applicants." N.C. Gen. Stat. § 131E-185(c); *see also* 10A N.C. Admin. Code 14C.0205(b) ("Except in the case of an expedited review, the period for review may be extended for up to 60 days by the agency if it determines that . . . it cannot complete the review within 90 days.").

its proposal by the deadline for Category D applications, as set forth in the State Medical Facilities Plan, to be reviewed in the period beginning 1 April 2013. *Id.* at 21-22.

One month later, on 15 April 2013, TRC submitted its application to develop a ten-station dialysis facility in Youngsville, Franklin County. Unlike BMA, which did not have an existing facility in the county, TRC proposed moving eight stations from its existing facility within Franklin County. TRC also proposed moving two additional stations from one of its facilities in Wake County, for a total of ten stations. Because TRC's application involved moving stations both from another county and from within Franklin County, TRC's application met the criteria of both a Category D and a Category I application. TRC missed the deadline for Category D applications but timely submitted its proposal by the deadline for Category I applications, to be reviewed in the period beginning on 1 May 2013.[2] *Id.*

Nearly a month after filing its application, on 13 May 2013, TRC submitted a letter to the agency requesting that it conduct a competitive review of the BMA and TRC applications. In a competitive review, the agency undergoes a two-step process: first, it reviews each application standing alone for conformity with the applicable review criteria, standards, and plans; and second, it compares the applications against each other to determine which is comparatively superior and therefore will be approved. *See Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 384, 455 S.E.2d 455, 460 (1995). The agency designates applications as competitive "if they, in whole or in part, are for the same or similar services and the agency determines that the approval of one or more of the applications may result in the denial of another application *reviewed in the same review period*." 10A N.C. Admin. Code 14C.0202(f) (emphasis added).

The agency determined that BMA and TRC submitted applications in different review periods and therefore declined to review the applications competitively. On 27 August 2013, the agency issued a decision approving BMA's application, thereby eliminating the ten-station deficit

2. DHHS envisioned there would be times when applications fell into more than one category. The State Medical Facilities Plan requires that "[f]or proposals which include more than one category, an applicant must contact the Certificate of Need Section prior to submittal of the application for a determination regarding the appropriate review category or categories and the applicable review period in which the proposal must be submitted." *Id.* at 18. TRC conceded at oral argument that it did *not* contact the agency regarding the appropriate review category for its application and that it missed the deadline for filing a Category D application.

identified in the State Medical Facilities Plan. The following month, on 25 September 2013, the agency issued its decision denying TRC's application. The agency determined that TRC's application could not be granted because the ten-station deficit had been eliminated by the approval of BMA's earlier application and, therefore, TRC's proposal to relocate two stations from Wake County to Franklin County would result in a surplus of two stations in Franklin County in violation of the State Medical Facilities Plan.

TRC then initiated a contested case before the Office of Administrative Hearings. The administrative law judge (ALJ) granted BMA's motion to intervene. On 23 June 2014, the ALJ entered partial summary judgment concluding that the agency did not err in declining to review the two applications competitively. That same day, the ALJ entered a final decision concluding that BMA's application conformed to the applicable review criteria. The ALJ therefore upheld the agency's decision. TRC timely appealed to this Court.

Analysis

On appeal, TRC argues that the ALJ erred in affirming the agency's decision because (1) the agency failed to conduct a competitive review of the TRC and BMA applications, substantially prejudicing TRC's rights, and (2) the agency erroneously approved BMA's application. For the reasons set forth below, we reject TRC's arguments and affirm the ALJ's final decision.

I. Requirement of Competitive Review

a. Compliance with the Statute

[1] TRC first argues that the agency violated Section 131E-182(a) of the General Statutes when it reviewed BMA's application in an earlier, separate review period from TRC's application.

Section 131E-182(a) directs the Department of Health and Human Services to "establish schedules for submission and review of completed applications" and further directs that "[t]he schedules shall provide that applications for similar proposals in the same service area will be reviewed together." TRC argues that the statutory term "similar proposals in the same service area" is unambiguous, and under its plain meaning the two companies' applications were similar proposals in the same service area. Thus, because the schedules established by the agency caused those two applications to be reviewed at different times, TRC contends the agency violated the statute. For the reasons discussed

below, we reject this argument and hold that the agency's schedules comply with the statute.

The interpretation of a statute is a question of law and thus is reviewed *de novo* in an administrative appeal. N.C. Gen. Stat. § 150B-51 (2013). But because this statute instructs a state agency to promulgate regulations to administer it, there is an additional layer of review. If the statutory language is unambiguous and the statutory intent clear, this Court must give effect to that unambiguous language regardless of the agency's interpretation. *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, 771 S.E.2d 537, 549 (2015). But if the statute is silent or ambiguous on an issue, this Court must defer to the agency's interpretation "as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Id.* at ___, 771 S.E.2d at 543.

Here, the statute does not define "similar proposals for the same service area" and we do not believe that term is so plainly unambiguous that the agency has no role in determining what is and is not a "similar proposal." For example, one hospital's request to purchase an MRI scanner and another's request to purchase a CT scanner or PET scanner could be viewed as "similar proposals" in the sense that both providers are requesting medical imaging technologies used to diagnose medical conditions. But those applications also could be viewed as entirely dissimilar proposals because they concern different types of medical scanning technology used for different diagnostic purposes. Indeed, medical services that appear entirely "similar" to a layperson may be quite dissimilar to a medical expert. Because the term "similar proposals" with regard to healthcare services is open to multiple interpretations, we hold that the Department of Health and Human Services is entitled to deference in interpreting its meaning. *AH N.C. Owner LLC*, ___ N.C. App. at ___, 771 S.E.2d at 543. As a result, our role is to determine if the agency's interpretation is reasonable and a permissible construction of the statute. *Id.*

To ensure that its schedules "provide that applications for similar proposals in the same service area will be reviewed together," the agency created "categories" of medical services and corresponding review periods that are listed in the applicable State Medical Facilities Plan. *See* 10A N.C. Admin. Code 14C.0202(e). Relevant here, the agency created a category, Category D, that includes all proposals to move dialysis stations from one county to another, contiguous county. A separate category, Category I, covers proposals to move dialysis stations to a new location within the same county. *See* 2013 SMFP at 18-20.

An agency official testified about why the agency created these two distinct categories. The official explained that the State Medical Facilities Plan examines needs based on counties. Proposals to transfer dialysis stations across county lines, which fall under Category D, affect need assessments for both the county losing the facilities and the county gaining them. As a result, there are more regulatory hurdles to overcome before dialysis stations may be moved from one county to another. *See id.* at 36.

By contrast, proposals to relocate dialysis stations within the same county, which fall under Category I, have no impact on overall county need assessments because the number of certified stations in that county will remain the same. As a result, proposals to move stations within the same county have fewer implications under the State Medical Facilities Plan and thus fewer regulatory hurdles to overcome.

In light of these distinctions, the agency concluded that Category D and Category I proposals are not "similar proposals in the same service area" and need not be reviewed together. The 2013 review schedule established by the agency in the State Medical Facilities Plan reflects this determination. For the health service area that includes the counties at issue in this case, Category D applications are not reviewed in the same review period as Category I applications.

Under the deferential standard of review applicable here, we must conclude that the agency's schedules and review categories satisfy the statutory requirement that "similar proposals in the same service area" be reviewed together. The agency provided an explanation of why proposals seeking to move dialysis stations across county lines are not "similar" to proposals merely relocating stations within a county under the medical plan established by state regulators. Because the agency's interpretation of "similar proposals within the same service area" is reasonable, and a permissible construction of the statute, we are required to defer to that interpretation. *See AH N.C. Owner LLC*, ___ N.C. App. at ___, 771 S.E.2d at 543. Accordingly, we reject TRC's statutory argument.

b. Compliance with the Applicable Regulations

[2] TRC next contends that the agency's schedules with respect to dialysis services violate its own regulations, which require that applications must be reviewed together if the agency determines "that the approval of one or more of the applications may result in the denial of another application *reviewed in the same review period*." 10A N.C. Admin. Code 14C.0202(f) (emphasis added). It is undisputed here that approving one of the parties' applications may have resulted in denial of the

other application. TRC argues that the two applications were "reviewed in the same review period" because the time frame in which Category D and Category I applications were reviewed overlapped. Thus, TRC argues that the agency's own regulations required it to review the two applications simultaneously. For the reasons discussed below, we reject this argument and hold that the agency properly interpreted its own regulations.

An administrative agency's interpretation of its own regulations is entitled to deference unless it is plainly erroneous or inconsistent with the regulation's plain text. *York Oil Co. v. N.C. Dep't of Env't*, 164 N.C. App. 550, 554-55, 596 S.E.2d 270, 273 (2004). Here, the agency interprets the term "review period" to mean the specific time frame in which a particular category of applications are reviewed. Because reviews for each category last several months, there is overlap between these review periods—here for example, while the agency was still reviewing its Category D applications, it began receiving Category I applications, the filing deadline for which was one month later. But the agency does not consider those Category I applications to be filed in the same "review period" as the Category D applications. In the agency's view, *overlapping* review periods are not the *same* review period, they are simply overlapping review periods.

As with TRC's statutory argument, we are constrained to reject TRC's regulatory argument under the deferential standard of review. The agency's interpretation "is neither plainly erroneous nor inconsistent with the regulation." *Id.* When one speaks of a "review period," it is certainly permissible to interpret that phrase as a distinct period of time, with a beginning and an end, as the agency does here, and to treat proposals as being in different "review periods" if they have some overlap in time frame but are not reviewed entirely at the same time from beginning to end. This is particularly true with respect to this regulatory regime, where the agency has established categories for different types of proposals, with different filing deadlines for each category. Accordingly, we reject TRC's regulatory argument.

c. Constitutionality of Review Categories and Schedules

[3] Finally, TRC argues that failing to review its application with BMA's application violates its due process rights, citing the U.S. Supreme Court's decision in *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327, 333 (1945). In *Ashbacker*, which involved federal statutes and regulations, the U.S. Supreme Court held that "where two *bona fide* applications are mutually exclusive the

grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* Although *Ashbacker* did not directly reference constitutional principles, some courts have suggested the opinion is grounded in due process principles. *See*, *e.g.*, *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 349 F.2d 587, 590 (10th Cir. 1965).

Even if we assume *Ashbacker* imposes a constitutional requirement that certain administrative applications submitted to state agencies be reviewed simultaneously by that agency, TRC's argument fails because this Court previously has held that the statutory review process established by the General Assembly satisfies the requirements of *Ashbacker*. *See Britthaven*, 118 N.C. App. at 384-85, 455 S.E.2d at 460. Because, as explained above, the agency's review categories do not violate the statute, and ensure that "similar proposals" are reviewed together, those categories also satisfy whatever due process requirements are encapsulated in *Ashbacker*. Accordingly, we reject TRC's argument.

II. Agency's Final Decision

[4] TRC next argues that a series of findings by the administrative law judge are not supported by the record.

We review a challenge to the ALJ's findings to determine whether the findings are supported by substantial evidence. N.C. Gen. Stat. § 150B-51(b), (c). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Surgical Care Affiliates v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 762 S.E.2d 468, 470 (2014) (internal quotation marks omitted). Even if the record contains evidence that could also support a contrary finding, we may not substitute our judgment for that of the ALJ and must affirm if there is substantial evidence supporting the ALJ's findings. *Id.*

a. Criterion 5

TRC first argues that the ALJ erred in concluding that BMA's application satisfied N.C. Gen. Stat. § 131E-183(a)(5) (Criterion 5). Criterion 5 requires, in relevant part, that an applicant demonstrate the long-term financial feasibility of its proposed project based upon reasonable projections of costs and charges for services. *See id.* TRC maintains that BMA's projected payor mix for home hemodialysis services was unreasonable, and therefore its proposal is inconsistent with Criterion 5. We reject this argument because the ALJ's findings are supported by substantial evidence.

An applicant's anticipated "payor mix" refers to the breakdown in the percentage of total projected dialysis treatments for which the applicant expects to be reimbursed by each payor category, including, for example, Medicare, Medicaid, and commercial insurance. In its application, BMA projected to serve 34 in-center patients, four home hemodialysis patients, and four home peritoneal dialysis patients by the end of the second operating year. With respect to the four home hemodialysis patients, BMA projected that commercial insurance would reimburse 87% of treatments. TRC contends that BMA grossly overestimated this percentage, and "[t]he high levels of projected commercial reimbursement served to inflate BMA's revenue projections." Thus, TRC argues, BMA's application was nonconforming with Criterion 5.

Substantial evidence in the record supports the ALJ's conclusion that BMA's proposed payor mix was reasonable and satisfied Criterion 5. There is detailed evidence and testimony in the administrative record regarding the reasonableness of BMA's projected reimbursements for services. At the hearing, BMA identified trends suggesting higher use of home hemodialysis by commercially insured patients, and witnesses for all parties agreed that working people tend to prefer home hemodialysis and also are more likely to have commercial insurance coverage. This evidence is sufficient for a reasonable mind to accept BMA's projected payor mix and therefore constitutes substantial evidence. *Surgical Care Affiliate*s, ___ N.C. App. at ___, 762 S.E.2d at 470.

b. Criterion 4

TRC next challenges the ALJ's finding that BMA satisfied N.C. Gen. Stat. § 131E-183(a)(4) (Criterion 4) "[b]ecause the BMA Application did not demonstrate conformity with Criterion 5." This argument turns entirely on TRC's success in its challenge to Criterion 5. Because we reject that argument, we likewise reject this argument.

c. Criterion 13c

Finally, TRC argues that BMA's application does not satisfy N.C. Gen. Stat. § 131E-183(a)(13)c (Criterion 13(c)). Criterion 13(c) requires an applicant to demonstrate that "the elderly and the medically underserved groups . . . will be served by the applicant's proposed services and the extent to which each of these groups is expected to utilize the proposed services." *Id.* TRC contends that the ALJ should have adopted the view of its expert witness, who testified that "Medicaid patients would [not] have adequate access to home hemodialysis and peritoneal dialysis, because BMA projected lower utilization for these services by

medically underserved patients, as compared to its projections of utilization for in-center services by these patients."

The ALJ's decision on this issue is supported by substantial evidence. BMA provided data and projections showing an expected 91% of its in-center patients would be drawn from underserved populations. BMA also showed that it would provide services to all patients without regard to income, race or ethnicity, gender, ability to pay, or any other factor that would classify a patient as underserved. Relying on this record evidence, the ALJ made detailed findings about BMA's compliance with Criterion 13(c). Because this evidence is sufficient for a reasonable mind to accept BMA's projections, the ALJ's findings are supported by substantial evidence and we must reject TRC's argument.

Conclusion

We affirm the final decision of the Office of Administrative Hearings.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 AUGUST 2015)

STATE V. BENTON No. 13-1204-2	Guilford (12CRS74220)	Affirmed
CARTER NEIGHBORS LTD. v. EDWIN RECTOR 1995 CHARITABLE TR. No. 14-1212	Catawba (12CVS47)	Dismissed
ELLIS v. KEY CITY FURN., INC. No. 15-78	N.C. Industrial Commission (W14258)	Affirmed
IN RE A.W. No. 15-167	Transylvania (11JA6) (14JA19) (14JA20)	Affirmed
IN RE K.L. No. 15-349	Cumberland (14JA12) (14JA13)	Affirmed in part; remanded in part.
IN RE L.B.B. No. 15-164	Harnett (13JA29)	Affirmed
IN RE N.R.C. No. 15-291	Beaufort (12JA34) (12JA35) (13JA13)	Dismissed in part; Affirmed in part.
IN RE V.D. No. 15-226	Orange (13JT97)	Affirmed
NEWELL v. JAMES E. ROGERS, P.A. No. 14-1412	Northampton (11CVS147)	Affirmed
STATE v. ALARCON No. 14-1147	Union (10CRS56091-92) (11CRS51036)	No Error
STATE v. BROWN No. 14-1190	New Hanover (04CRS58275)	No Error
STATE v. GRAHAM No. 14-1260	Craven (12CRS50304) (12CRS50323) (12CRS508-09) (13CRS1244-45)	No Prejudicial Error

STATE v. MOORE No. 15-52	Mecklenburg (11CRS229597) (11CRS229821)	No Error
STATE v. PATEL No. 14-1120	Gaston (13CRS50532) (13CRS50588)	No Prejudicial Error
STATE v. YOUNG No. 14-1215	Mecklenburg (12CRS254000)	Affirmed

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