243 N.C. App.—No. 2 Pages 211-507

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 27, 2017

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[5]Retired 31 December 2016 [6]Retired 24 April 2017

Clerk
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Leslie Hollowell Davis

Assistant Director
David Alan Lagos

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

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Appeal and Error—foreclosure—default—issue not raised at trial—not preserved—On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals did not consider the merits of respondent's argument that respondent had not personally defaulted on the loan. Respondent failed to raise the issue of default at trial, thereby failing to preserve the issue for appellate review. **In re Foreclosure of Rawls, 316.**

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Appeal and Error—preservation of issues—constitutional issue—not raised at trial—Defendant did not preserve for appeal the issue of whether "sex offender" is unconstitutionally vague where the issue was not raised below. **State v. Mastor, 476.**

Appeal and Error—preservation of issues—constitutional issue—not raised at trial—Defendant did not preserve for appeal the issue of whether "sex offender" is unconstitutionally vague where the issue was not raised below. **State v. Mastor, 476.**

Appeal and Error—preservation of issues—issue not asserted at trial— Defendant waived his right to appellate review of an alleged fatal variance between the indictment and the evidence where he did not assert the issue at trial. **State v. Hooks, 435.**

ARSON

Arson—burning private property—instruction—defendant's presence at scene—The trial court did not err in a prosecution for burning personal property by failing to instruct the jury regarding defendant's presence at the scene of the crime. Defendant's presence was not required to prove a fact necessary to establish any element of the crime or a lesser-included offense. **State v. Jefferies, 455.**

ATTORNEYS

Attorneys—professional conduct violation—notice to attorney—On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals rejected defendant's argument that, because he did not receive adequate notice of the conduct upon which the Bar ultimately

relied in finding a violation, his due process rights were violated. The factual allegations in the complaint gave defendant sufficient notice of the primary misconduct alleged, and the use of the client's name instead of the client's LLC's name in the complaint did not constitute a material difference depriving defendant of notice. Even assuming the allegations of the complaint were materially different from the findings in the order, the State Bar's pleading was amended by implied consent to conform to the proof presented at trial. **N.C. State Bar v. Merrell, 356.**

Attorneys—professional conduct violation—real estate transaction—misappropriation of funds—conflict of interest—On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals held that the Bar's findings of facts were supported by the evidence and that the conclusions of law were supported by the findings of fact. The evidence showed that defendant transferred funds without receiving the owner of the funds' permission and then failed to take steps to ensure that the funds were not misappropriated. Defendant also engaged in a conflict of interest and failed to provide full disclosure to one of the clients. **N.C. State Bar v. Merrell, 356.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—neglect adjudication—not sufficiently supported by evidence—An adjudication that a juvenile was neglected was reversed where some of the trial court's findings were not supported by competent evidence from the adjudicatory hearing. The trial court's findings focused primarily on contact between the child and his father, who had pled guilty to indecent liberties with a sibling, but the evidence and the findings did not show that the father's single contact with the child harmed him or created a risk of harm. Moreover, there was no evidence that the mother's housing instability impeded her care of the child or exposed him to an injurious environment. **In re J.R., 309.**

CHILD VISITATION

Child Visitation—mother in N.C.—father in Malawi—child's best interests—In a child custody case with a mother in North Carolina and the father in Malawi in which the mother contended that the trial court erred by allowing the father the discretion to exercise visitation in Malawi, the trial court was not required to make a finding or conclusion that it was in the best interest of the child to travel to Malawi. Rather, the trial court's task was to fashion a custody arrangement that was in the child's best interest in the context of extremely unusual circumstances, and the trial court's findings reflected appropriate awareness of the possible dangers to the child of travel to Malawi. The trial court found that "Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi" and this finding was amply supported by other findings tending to show that defendant was a person of good moral character who had assiduously sought to exercise his right to visitation and who had several years of experience with conditions in Malawi. **Burger v. Smith, 233.**

Child Visitation—mother in N.C.—father in Malawi—visitation schedule—not abuse of discretion—In a child custody case involving a mother in North Carolina and a father in Malawi, the trial court did not abuse its discretion by ordering a visitation schedule of alternating periods of a month with the father followed

by two months with the mother and by directing that when the minor child, who was eighteen months old at the time of the hearing, begins kindergarten, defendant would then have visitation during the school's summer break and during the winter and spring breaks. The trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents. To achieve this goal the trial court was necessarily required to deviate from the most commonly employed custody schedules, and the visitation schedule was an appropriate response to the parties' unusual living situation. If the child's future high school activities render a change of visitation advisable, a modification could be sought at that time. **Burger v. Smith, 233.**

CITIES AND TOWNS

Cities and Towns—public water system—challenge to legislation—condemnation—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated Article I, Sections 19 and 35 of the state constitution, as an invalid exercise of power to take or condemn property. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue. **City of Asheville v. State of N.C., 249.**

Cities and Towns—public water system—challenge to legislation—law of the land—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated the law of the land clause in Article I, Section 19 of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue. **City of Asheville v. State of N.C., 249.**

Cities and Towns—public water system—challenge to legislation—local act—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation was a local act related to health, sanitation, or non-navigable streams in violation of Article II, Sections 24(1)(a) and (e) of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue. **City of Asheville v. State of N.C., 249.**

Cities and Towns—public water system—challenge to legislation—standing—Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the City had standing to challenge the constitutionality of the legislation. The Court of Appeals rejected the State's argument to the contrary because the City had not accepted any benefit from the legislation. **City of Asheville v. State of N.C., 249.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral Estoppel and Res Judicata—federal and state rule 12(b)(6)—The trial court erred by denying defendants' motion for judgment on the pleadings as to plaintiffs' malicious prosecution claims based on collateral estoppel where plaintiffs' Rule 12(b)(6) motion had been granted in federal court. The standard under

COLLATERAL ESTOPPEL AND RES JUDICATA—Continued

Federal Rule 12(b)(6) is a different, *higher* pleading standard than mandated under the North Carolina General Statutes. **Fox v. Johnson, 274.**

CONSTITUTIONAL LAW

Constitutional Law—Fifth Amendment—domestic violence protective order—civil case—voluntary testimony not an automatic waiver—A domestic violence prevention order was vacated and remanded where the trial court asked defense counsel whether defendant would be claiming her Fifth Amendment right to remain silent and then indicated that she was not going to "do" the Fifth Amendment. The trial court went on to substitute its own questions for cross-examination, with many of those questions going beyond the scope of direct examination. A witness does not automatically waive her Fifth Amendment rights by voluntarily testifying in a civil case. The trial court must evaluate whether a real danger of self-incrimination exists given the implications of the question and the setting in which it was asked. **Herndon v. Herndon, 288.**

Constitutional Law—speedy trial—Barker factors—The trial court did not err by determining that the State did not violate defendant's state or federal constitutional right to a speedy trial where the nearly nine-year delay, while extraordinary, was not *per se* determinative. Applying the four factors in *Barker v. Wingo*, 407 U.S. 514, defendant failed to carry his burden of showing that negligence or willfulness by the State caused the length of delay in his trial. **State v. Carvalho, 394.**

CONTEMPT

Contempt—criminal—willful violation of consent order—not raised below—The finding in a criminal contempt proceeding that defendant willfully failed to comply with a consent order was supported by the unchallenged findings from the district court, to which the parties stipulated, and competent evidence in record and from the contempt hearing. Defendant argued that she did not willfully violate the consent order by allowing her children to be in the presence of a convicted sex offender because of the ambiguity of the term. The term "convicted sex offender" was not ambiguous. **State v. Mastor, 476.**

CONTRACTS

Contracts—non-compete covenant—parol evidence—contract silent on essential term—The Court of Appeals affirmed the trial court's preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. A payment of $100 to defendant in exchange for her signing the covenant not to compete rendered the covenant binding and enforceable. The parol evidence rule did not prohibit the trial court from considering parol evidence of the $100 consideration where the contract was silent as to this essential term. **Emp't Staffing Grp., Inc. v. Little, 266.**

CRIMINAL LAW

Criminal Law—closing arguments—conversation with another inmate—The State's closing arguments were not grossly improper and did not warrant a new trial where defendant was charged with first-degree murder and armed robbery, evidence was introduced of defendant's conversation with another inmate, and the State used

that evidence in its closing argument. The State did not ask the jury to use the challenged evidence to convict defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner. **State v. Carvalho, 394.**

Criminal Law—prosecutor's argument—no intervention ex mero motu—The trial court did not err when it did not intervene on its own motion during the prosecutor's closing argument in a prosecution for burning personal property where the prosecutor a made a flat statement that the victim's testimony was extraordinarily credible. Although the statement was improper, it did not undermine the integrity of the entire trial and did not rise to the level of gross impropriety. **State v. Jefferies, 455.**

DEEDS

Deeds—validity of deed—notarization—alteration after execution—There was no material issue of fact as to the validity of a contested deed where the deed was void, whether due to its notarization or due to the fact that it was altered after execution without plaintiff's knowledge or consent. **Quinn v. Quinn, 374.**

DISCOVERY

Discovery—sanctions order—date of entry—argument waived—The wife in a divorce case waived on appeal any argument regarding the date of the entry of a sanctions order where she essentially argued that she was not aware of her discovery obligations until it was too late. The wife's counsel did not mention any concerns about the entry of the sanctions order at the alimony trial, despite the discussion of various portions of the order at the hearing. **Khaja v. Husna, 330.**

Discovery—sanctions order—sanctions—abuse of discretion not argued or shown—There was no abuse of discretion in a divorce case in the exclusion of an affidavit as a discovery sanction where the wife did not introduce the affidavit, argue abuse of discretion, or demonstrate abuse of discretion. Moreover, considered in context, the trial court did not require her to do the impossible. **Khaja v. Husna, 330.**

DIVORCE

Divorce—alimony—prior findings—An alimony order was reversed and remanded where the trial court made it clear that it thought it was bound by all judgments and orders that had preceded the hearing. The trial court was not actually bound by the prior findings of fact. The trial court used findings from the divorce judgment that went beyond the facts needed to address the limited issues before it. Those unnecessary findings from the divorce judgment should have been irrelevant to the trial court when considering alimony. **Khaja v. Husna, 330.**

Divorce—marriage in India—procedural posture—issues addressed separately—An "incredibly complex" divorce case was organized by separately looking at the each of the issues addressed by the Divorce Judgment. Although the trial considered a motion to dismiss based upon subject matter jurisdiction, the wife chose not to pursue the motion and there were no arguments about it on appeal. The wife's motion to dismiss based upon Rule 12(b)(6) was converted to a motion for summary judgment, but only on the claim for absolute divorce. The wife did not contest the denial of the motion to dismiss based on an Indian annulment and also did not

contest the granting of the claim for absolute divorce, which was affirmed. The wife did, however, contest the trial court's use of findings from the divorce judgment in the alimony order. **Khaja v. Husna, 330.**

Divorce—preliminary injunction—findings—not binding—Findings from a preliminary injunction were not binding upon the trial court at an alimony hearing. **Khaja v. Husna, 330.**

Divorce—sanctions order—findings—Viewed within context, as an order addressing discovery issues and violations, a Sanctions Order in a divorce case remained binding on remand, including its prohibition on the wife's presentation of evidence of marital fault by husband. The order was remanded because the appellate court had no way of knowing exactly which prior findings of fact the trial court erroneously relied upon or whether the trial court might otherwise have found differently. **Khaja v. Husna, 330.**

Divorce—wife's income—Bureau of Labor Statistics—In a divorce case remanded on other grounds, the trial court erred by taking judicial notice of Bureau of Labor Statistics information on salaries in defendant's occupation and relying so heavily upon these statistics for its finding of fact regarding her earning capacity. **Khaja v. Husna, 330.**

DRUGS

Drugs—methamphetamine—precursor chemical—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of possession of pseudoephedrine, a precursor chemical to methamphetamine. Although defendant contended that no pseudoephedrine was found on his person or premises, that there was no evidence that he actually made particular purchases, and that no chemical analysis was performed, substantial evidence was introduced that defendant possessed pseudoephedrine, and that pseudoephedrine is a precursor chemical, not a controlled substance, and the State was not required to present evidence that a chemical analysis was performed. **State v. Hooks, 435.**

EMPLOYER AND EMPLOYEE

Employer and Employee—non-compete covenant—$100 consideration—pressure to sign—The Court of Appeals affirmed the trial court's preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. The court rejected defendant's argument that a $100 payment by plaintiff was insufficient consideration to support the covenant not to compete. Even though defendant may have felt pressure to sign the agreement in order to continue her employment, the court has enforced non-compete agreements in similar circumstances in absence of fraud. **Emp't Staffing Grp., Inc. v. Little, 266.**

EVIDENCE

Evidence—affidavit not considered—waiver of privilege involved—affidavit ultimately not offered—There was no error in a complicated divorce case where the trial court did not consider the wife's affidavit in opposition to the motion for sanctions/in limine filed against the wife. Considered in the context of the entire hearing, the wife wanted to blame her prior attorneys for her failures to respond to discovery

EVIDENCE—Continued

requests, which she sought to do by her affidavit without waiving attorney-client privilege. When the trial court noted that she would be waiving attorney-client privilege if it accepted the affidavit, she chose not to waive the privilege, did not challenge the trial court's interpretation of the affidavit or its stance on privilege, and declined to present the affidavit. The affidavit was not admitted because the wife's attorney made the strategic decision not to offer it. **Khaja v. Husna, 330.**

Evidence—audiotape and transcript—redacted and limiting instruction— Defendant argued the trial court erred in a prosecution for first-degree murder and armed robbery by admitting portions of an audiotape and corresponding transcript of a conversation between defendant and another inmate (Anderson). Given the importance of the credibility of Anderson's testimony to the State's case, it could not be concluded that the trial court was manifestly unreasonable in determining that the relevance of the redacted version of the transcript, combined with a limiting instruction, substantially outweighed any unfair prejudice to defendant. **State v. Carvalho, 394.**

Evidence—victim's reputation for violence—introduced in defendant's case-in-chief—The trial court did not abuse its discretion in a prosecution for second-degree murder by waiting until the defendant's case-in-chief to allow testimony of the victim's reputation for violence rather than allowing that testimony during cross-examination. The trial court expressly permitted defendant to keep the witness under subpoena, and defendant was allowed to call numerous witnesses during his case-in-chief to provide the testimony. Defendant appeared to have chosen not to recall this witness and did not demonstrate that he was prejudiced by that decision in any way. **State v. Henry, 433.**

HOMICIDE

Homicide—closing arguments—suggestion that defendant and witness lied—ex mero motu intervention—On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court erred by failing to intervene ex mero motu when the State made improper arguments during closing arguments. The State argued that defendant lied on the stand in cooperation with defense counsel and that his expert witness lied because he was being paid to do so. Because defendant's defense was predicated upon his credibility and the credibility of his witnesses, the error was not harmless, and the Court of Appeals vacated defendant's conviction and remanded the case for a new trial. **State v. Huey, 446.**

Homicide—felony murder—discharge of weapon into occupied vehicle—merger doctrine not applied—The trial court did not err by refusing to dismiss a charge of felony murder where the underlying felony was discharging a firearm into an occupied vehicle in operation. Although defendant argued that the doctrine of merger applied, a person may be found guilty of this underlying offense even if there was no bodily harm to anyone. **State v. Juarez, 466.**

Homicide—felony murder—instructions—self-defense—The trial court committed plain error in a prosecution for first-degree felony murder by instructing the jury that defendant could not receive the benefit of self-defense if he was found to be the aggressor. Even assuming that defendant was the aggressor in the initial encounter, his withdrawal removed him from that role. **State v. Juarez, 466.**

Homicide—felony murder—self-defense—lesser offenses—The trial court erred in a first-degree felony murder prosecution by denying defendant's request

to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. A finding that defendant acted in reasonable self-defense would have rendered him not guilty of a charge of discharging a firearm into an occupied vehicle; however, the evidence would have been sufficient to support a lesser-included offense. **State v. Juarez, 466.**

Homicide—jury instructions—flight—On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court did not err by instructing the jury on flight. The evidence showed that defendant shot the victim, drove away for a short period of time, and then returned. **State v. Huey, 446.**

IDENTIFICATION OF DEFENDANTS

Identification of Defendants—photographic lineup—folder method—On appeal from defendant's conviction for armed robbery, the Court of Appeals held that the trial court did not err by admitting the testimony of a police detective concerning an eyewitness's identification of defendant from a photo lineup. The detective's administration of the photo lineup—in which he placed the photos in a folder and shuffled them before presenting them to the eyewitness—met the statutory requirements of the N.C. Eyewitness Identification Reform Act of 2007. The detective's inability to recall which "filler" photos he used did not render his testimony inadmissible. **State v. Gamble, 414.**

IMMUNITY

Immunity—sovereign—school grounds injury—maintenance—governmental function—In a case arising from an injury on school grounds, the trial court erred by denying the School Board's motion to dismiss. Under the controlling decision in *Bynum v. Wilson Cnty.*, 367 N.C. 355, the General Assembly's assignment of the ownership, maintenance, and repair of school property to the local school boards is dispositive of the question of whether the function performed by the Board in the present case is governmental. **Bellows v. Asheville City Bd. of Educ., 229.**

INDICTMENT AND INFORMATION

Indictment and Information—sexual offender registration—failure to report change of address in writing—There was no error in a prosecution for failure to register as a sex offender where defendant contended that the indictment was required to allege that he failed to report his change of address in writing and within three business days. Defendant had notice of the requirements of the statute, had complied on prior occasions, and did not argue that his trial preparation was prejudiced. The indictment in this case was couched in the language of the statute and sufficiently alleged this element of the offense. **State v. McLamb, 486.**

Indictment and Information—variance—indictment and instruction—not fatal—There was no fatal variance and no plain error in a prosecution for burning personal property where the trial court instructed the jury to find defendant guilty if it found that he set fire to the bedding of the victim while the indictment charged defendant with setting fire to the victim's bed, jewelry, and personal clothing. The jewelry and the clothing were surplusage and not necessary to establish defendant's guilt. The variance between bed and bedding was not material because there was no evidence to suggest that the bedding was located anywhere other than the bed. **State v. Jefferies, 455.**

INJUNCTIONS

Injunctions—preliminary—divorce—use of findings—A preliminary injunction in a divorce case was affirmed where the wife did not present any substantive challenge to the entry of the preliminary injunction itself but argued that the trial court erroneously relied on findings from the preliminary injunction in its Alimony Order. **Khaja v. Husna, 330.**

JUDGES

Judges—one not overruling another—Rule 12(c) and Rule 12b(6) motions— A Rule 12(c) order was not an improper "overruling" by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order where different materials and questions were considered. **Fox v. Johnson, 274.**

MORTGAGES AND DEEDS OF TRUST

Mortgages and Deeds of Trust—foreclosure—note indorsed in blank—On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals held that the trial court did not err by concluding that E*Trade (petitioner) was the holder of the note. Petitioner's production of the original note indorsed in blank established that petitioner was the holder of the note. **In re Foreclosure of Rawls, 316.**

PHYSICIANS

Physicians—peer review evaluation—private cause of action—Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Plaintiff could not pursue a claim under the federal peer review law because that law does not provide a private cause of action. In addition, even assuming the state peer review law provided a private cause of action, the allegations in the complaint established that defendants complied with the statute. **Shannon v. Testen, 386.**

Physicians—peer review evaluation—statutory immunity—Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Pursuant to N.C.G.S. § 90-21.22(f), which governs peer review agreements by the North Carolina Medical Board, defendants had statutory immunity absent allegations of bad faith. Plaintiff's complaint merely asserted that defendants' evaluation contained factual errors, and it failed to allege bad faith. **Shannon v. Testen, 386.**

PROBATION AND PAROLE

Probation and Parole—violation report filed after probation expired—subject matter jurisdiction—On appeal from the trial court's judgments revoking defendant's probation and activating five consecutive sentences, the Court of Appeals held that the trial court lacked subject matter jurisdiction. Even assuming the trial court that originally placed defendant on probation made a clerical error by failing to check the box to order that defendant's probation begin upon his release from incarceration, pursuant to Rule of Civil Procedure 60(a) the Court of Appeals did not have authority to correct a substantive error. Accordingly, the probation

officer filed his violation reports after defendant's probation expired and the trial court lacked subject matter jurisdiction under N.C.G.S. § 15A-1344(f) to revoke defendant's probation. **State v. Harwood, 425.**

REAL PROPERTY

Real Property—adverse petition—constructive ouster—summary judgment—Summary judgment for respondents was reversed and remanded in an action to petition property that had passed into three undivided interests by inheritance in the 1920s, and in which adverse possession was raised by respondents. The evidence, taken all together and viewed in the light most favorable to petitioner (the developer which had acquired an undivided half interest in the property), created a genuine issue of material fact as to whether the original owner and the heirs who lived on the property recognized the ownership interest of the Baxters (the remaining nonresident heirs, whose interest was acquired by the developer), thus defeating the presumption of constructive ouster. **Atl. Coast Props., Inc. v. Saudners, 211.**

SENTENCING

Sentencing—habitual felon—predicate felonies—ambiguous verdict—A conviction for burning personal property and being a habitual felon was remanded for a new trial on the habitual felon charge or for entry of a new judgment based solely on burning personal property where the indictment charging habitual felon status identified three predicate felonies but the trial court instructed on four felonies. The verdict sheet did not identify the felonies, so that it was impossible to tell whether any of the jurors relied on the fourth felony. **State v. Jefferies, 455.**

SEX OFFENDERS

Sexual Offenders—convicted sex offender—meaning within terms of consent agreement—In an action in which a mother was held in criminal contempt for violating a child custody consent order by allowing the children to be around a convicted sex offender (Kistrel), Kistrel was a "convicted sex offender" within the meaning of the consent order where the parties stipulated to the district court finding that Kistrel was a convicted sex offender as that term was agreed to by the parties and included in the consent order. **State v. Mastor, 476.**

SEXUAL OFFENSES

Sexual Offenses—convicted sexual offender—not synonymous with registered sexual offender—The superior court's findings of fact supported its determination that a mother was in indirect criminal contempt where she entered into a child custody agreement that included a provision forbidding contact between the children and "any convicted sex offender"; the mother entered into a relationship with a man convicted of felony secret peeping. (Kistel); and Kistel was in the presence of the children on New Year's Eve. Although the mother contended that Kistel was not a "convicted sex offender" because he was not required to register as a sex offender, the inherent sexual nature of Kistel's conduct was apparent, the trial court could have exercised its discretion to require Kistel to register as a sex offender, and the fact that the term "convicted sex offender" is not specifically defined in the North Carolina criminal statutes does not foreclose the Court of Appeals' ability to determine the intended meaning of the words. Kistel was a convicted sex offender. **State v. Mastor, 476.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—failure to pay for child's care—child not in foster home—The trial court erred by concluding that respondent's parental rights could be terminated for failing to pay a reasonable portion of the child's care under N.C.G.S. § 7B-1111(a)(3). This ground for termination applied only if petitioners' home qualified as a foster home, but it did not qualify because the child was not placed with petitioners by a child placing agency and because petitioners were related to the child by blood. **In re E.L.E., 301.**

Termination of Parental Rights—neglect—probability of repetition—findings inadequate—The trial court erred by concluding that grounds existed to terminated respondent-mother's parental rights based on neglect where it did not find that there was a probability of repetition of neglect. While there was arguably competent evidence in the record to support such a finding, the absence of the necessary finding required reversal. **In re E.L.E., 301.**

Termination of Parental Rights—no reasonable progress—conclusion not supported by findings—The trial court's findings of fact did not support its conclusion that respondent-mother had not made reasonable progress under the circumstances toward correcting the conditions that led to the removal of her child from her care, and the trial court erred by concluding that respondent's parental rights should be terminated. **In re E.L.E., 301.**

WITNESSES

Witnesses—expert—fire marshal—whether fire intentionally set—There was no error, much less plain error, in a prosecution for burning personal property where a fire marshal was allowed to testify. It has been held that a fire marshal may, with a proper foundation, offer an expert opinion as to whether a fire was intentionally set. **State v. Jefferies, 455.**

WORKERS' COMPENSATION

Workers' Compensation—additional treatment—anxiety and depression—Parsons presumption not applied—remanded—The Industrial Commission erred in a workers' compensation case by failing to apply the presumption from *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, to plaintiff's request for additional medical treatment and compensation for anxiety and depression. The *Parsons* presumption says that an employer must provide medical compensation for the treatment of compensable injuries, which includes additional medical treatment. It was evident from the Commission's opinion that the Commission did not apply the rebuttable *Parsons* presumption to plaintiff's psychological symptoms, and the matter was remanded for application of that presumption and a new determination. **Wilkes v. City of Greenville, 491.**

Workers' Compensation—asbestosis—last exposure prior to Security Association—not covered claims—The Full Industrial Commission's conclusion in a workers' compensation case that plaintiffs' claims for were not "covered claims" for purposes of compensation was affirmed where plaintiffs suffered from asbestosis, their last injurious exposure occurred prior to their employers becoming members of the North Carolina Self-Insurance Security Association, and their employer (Fieldcrest) became bankrupt. Because the Security Association was not created until 1 October 1986, after each of plaintiffs' last injurious exposure to asbestos occurred, these claims do not constitute "covered claims" within the scope

of the statutes. While the Workers' Compensation statutes must be liberally construed, the Court of Appeals must not enlarge the definition of "covered claims" beyond the clearly expressed language of the statutes. **Ketchie v. Fieldcrest Cannon, Inc, 324.**

Workers' Compensation—temporary total disability benefits—futility of job search—The Industrial Commission in a workers' compensation case erred by concluding that plaintiff was no longer entitled to temporary total disability benefits. Plaintiff demonstrated the futility of engaging in a job search and defendant made no attempt to show that suitable jobs were available to plaintiff. **Wilkes v. City of Greenville, 491.**

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.

ATLANTIC COAST PROPERTIES, INC., PETITIONER
v.
ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLETT, PATRICIA W. MOORE-PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. COA14-1278

Filed 6 October 2015

Real Property—adverse petition—constructive ouster—summary judgment

Summary judgment for respondents was reversed and remanded in an action to petition property that had passed into three undivided interests by inheritance in the 1920s, and in which adverse possession was raised by respondents. The evidence, taken all together and viewed in the light most favorable to petitioner (the developer which had acquired an undivided half interest in the property), created a genuine issue of material fact as to whether the original owner and the heirs who lived on the property recognized the ownership interest of the Baxters (the remaining nonresident heirs, whose interest was acquired by the developer), thus defeating the presumption of constructive ouster.

Chief Judge McGEE dissenting.

Appeal by Petitioner from order entered 29 May 2014 by Judge J. Carlton Cole in Currituck County Superior Court. Heard in the Court of Appeals 20 April 2015.

Hornthal, Riley, Ellis & Maland, LLP, by M.H. Hood Ellis, for petitioner-appellant.

Vandeventer Black LLP, by Norman W. Shearin, for respondent-appellees.

DIETZ, Judge.

In the early 1920s, three children inherited their father's 14-acre tract of land in Currituck County. One of the siblings remained on the property throughout his life and his descendants continue to live on the property today. The other two siblings moved out of state. Over time, interest in the property passed through inheritance until two families

each owned an undivided one-half interest in the property: the family still living on the Currituck County property and another family living out of state.

The two families did not keep in touch, and the out-of-state family never visited the property. But for decades, the family living on the land recognized the interest of their out-of-state relatives in various ways, even at one point suggesting that they partition the property to give the out-of-state relatives sole title to their share.

All that changed in 2005, when the out-of-state family sold their interest in the property to Petitioner Atlantic Coast Properties, a private developer with no connection to either family. Respondents—the descendants of the original heir who stayed on the land—then asserted for the first time that they acquired sole title to the property nearly 80 years earlier by adverse possession under the theory of constructive ouster.

The trial court granted summary judgment in favor of Respondents, concluding that Atlantic Coast Properties failed to forecast sufficient evidence to rebut Respondents' showing of constructive ouster. We disagree.

If one cotenant has been in "sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed." *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985). But if the occupying tenant "does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise." *Id.*

Here, one of the out-of-state heirs testified that she spoke to the family still living on the property as recently as 2004 and they recognized her interest. Moreover, a family member living on the property testified that her father—one of the original heirs of the property—recognized the interests of her out-of-state relatives while he was alive and "raised her up" to understand that recognizing her out-of-state relatives' interest in the property was "the right thing to do."

To be sure, all of the original heirs to this property are long dead, so no one can testify directly to what was said in the 1920s or 1930s. But under Supreme Court precedent, a reasonable jury *could* conclude from this evidence that the family living on the property always recognized their out-of-state relatives' interests. That is all that is required to defeat summary judgment.

Private property rights are the bedrock of liberty in our nation. In a case like this one, where a joint property owner's rights are threatened through the legal fiction of constructive ouster, without any actual ouster, we must be particularly vigilant in applying the well-settled summary judgment standard and permitting a jury to resolve fact disputes. To hold otherwise would expose well-intentioned property owners across our State to losses from the legal gamesmanship of their cotenants. Accordingly, for the reasons discussed below, we reverse the trial court's entry of summary judgment and remand for further proceedings.

Facts and Procedural History

M.C. "Mack" Moore acquired a 14-acre tract of land in Currituck County, North Carolina, on 15 August 1887. Mack Moore and his wife, Angeronia Moore, lived on the property and had three children during their marriage: John Sherman Moore, William Guthrie "W.G." Moore, and Parlie Mae Moore Baxter. Mack Moore died intestate on 29 March 1921 and the 14-acre tract of land passed to his three children equally with each child obtaining a one-third interest in the property as tenants in common.

John Sherman Moore moved to Pennsylvania where he stayed until his death in 1980. He died intestate with no wife and no children and his one-third interest in the Moore property passed to his two siblings, W.G. Moore and Parlie Mae Moore Baxter, leaving each surviving sibling with a one-half interest in the property.

Parlie Mae Moore Baxter left Currituck County and moved to New York. She married Leroy Baxter, Sr. and had one child, Leroy Baxter, Jr. When Parlie Mae Moore Baxter died intestate, her one-half interest in the Mack Moore property passed to Leroy Baxter Jr.'s wife and daughter, Susan and Valentis Baxter, who survived him.

W.G. Moore married Edna Norman Moore, and together they had four children: Sherman Malachi Moore, William Friley Moore, Respondent Edna Mae Moore Winslow,[1] and Respondent Angerona Lovie Moore Saunders. W.G. Moore was the only child of Mack Moore to continue to live on the Moore property. He lived on the property with his family and made improvements on the land over the years. W.G. Moore was still living on the Moore property when he died intestate in 1973 and his one-half interest in the property ultimately passed to his two surviving

1. Edna Winslow passed away during these legal proceedings and her heirs were substituted as Respondents.

children, Respondents Edna Winslow and Angerona Saunders, giving them each a one-fourth interest in the property.

In 2005, Petitioner Atlantic Coast Properties purchased the one-half undivided interest of Susan Pratt Baxter and Valentis Baxter by quit-claim deed.

On 7 April 2006, Atlantic Coast Properties filed a petition to partition the Moore property claiming a one-half undivided interest in the property.

Respondents Edna Winslow and Angerona Saunders filed their answer and counterclaims on 17 May 2006, asserting sole possession and title by adverse possession. On 28 September 2007, Respondents moved for summary judgment. The trial court held a hearing on 10 February 2014. In an order entered 29 May 2014, the trial court granted Respondents' motion and entered judgment, finding Respondents to be "the owners solely seized in fee simple of all right, title, and interest in the Moore tract." The trial court based this conclusion "on the exclusive possession by W.G. Moore, and his heirs, and the presumption of ouster arising therefrom." Atlantic Coast Properties timely appealed.

Analysis

Atlantic Coast Properties argues that the trial court erred in granting Respondents' motion for summary judgment because they forecasted evidence that, if accepted by the jury, would rebut the presumption of constructive ouster. We agree.

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). When ruling on a motion for summary judgment, "the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661 (1984). "[S]ummary judgment should be granted with caution and only where the movant has established the nonexistence of any genuine issue of fact." *Moye v. Thrifty Gas Co.*, 40 N.C. App. 310, 314, 252 S.E.2d 837, 841 (1979). This Court reviews a grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Ordinarily, "the entry and possession of one tenant in common are presumed not to be adverse to his cotenants." *Town of Winton v. Scott*, 80 N.C. App. 409, 413, 342 S.E.2d 560, 563 (1986) (internal quotation marks omitted). With this presumption, one tenant in common cannot

adversely possess against a cotenant without an ouster, either actual or constructive. *Collier v. Welker*, 19 N.C. App. 617, 620, 199 S.E.2d 691, 694 (1973).

Under the doctrine of constructive or presumptive ouster, "[i]f one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed, and the ouster relates back to the initial taking of possession by the tenant in possession." *Herbert v. Babson*, 74 N.C. App. 519, 522, 328 S.E.2d 796, 798 (1985). "Not only does 20 years of exclusive possession raise a presumption of ouster, but it also supplies all the elements necessary to support a finding that the possession was adverse and included elements of notice and hostility." *Collier*, 19 N.C. at 621, 199 S.E.2d at 695. But if the party claiming adverse possession "does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise." *Herbert*, 74 N.C. App. at 522, 328 S.E.2d at 798.

Atlantic Coast Properties argues that it forecast at least some admissible evidence that W.G. Moore and his heirs recognized the interests of the cotenants continuously from 1921 until the present, and therefore the presumption of constructive ouster does not arise. We agree.

First, Susan Baxter, one of the out-of-state heirs, testified that Respondent Edna Winslow contacted her by phone around 2004 and "asked [Susan] what [she] and her daughter, Valentis, wanted to do *with their interest* in the M.C. (Mack) Moore property" because Respondents were planning to subdivide it. Ms. Baxter's testimony is confirmed by Respondent Edna Winslow's deposition testimony, in which Ms. Winslow indicated that she believed the proposed subdivision would have included the Baxters. Respondents also admitted to hiring a surveyor around the same time to "assist with the subdivision" of the property, further confirming Susan Baxter's testimony.

Second, Respondents conceded that their recognition of the Baxters' interests also was a view shared by their father, W.G. Moore, one of the three original heirs of the Moore property. Respondent Edna Winslow testified as follows when asked about the proposed subdivision of the property:

> [Ms. Winslow]: [W]hat we was trying to do was get the property - - *everybody's interest in the property* could get their own deeds. That was the main interest, so we didn't have to pay taxes all the time.

. . .

Q. Okay. And tell me - - the same thing I asked your sister was *who is everybody*? In other words, who was included in this subdivision?

[Ms. Winslow]: Well, along then when we first started it was my brothers and my sister, and their wife.

Q. *Were the Baxters included in this*?

[Ms. Winslow]: *Yeah. Everybody that had an interest in it.*

Q. Okay. And why were you going to include the Baxters if you had no relationship with them?

[Ms. Winslow]: Because that's the way we were raised up and that's the law.

. . .

Q. Okay. And what I was asking was, *is the reason the Baxters were included because your mom and your dad had raised you all to do the right thing*?

[Ms. Winslow]: *Yes*.

Q. *And they had acknowledged the Baxters' ownership interest*, and that's why you and your sister thought that you should; is that fair?

[Ms. Winslow]: *Yes*.

Ms. Winslow also testified that she had known of the Baxters' interests "since growing up in [her] mom and dad's house" because family members often talked about these out-of-state heirs to the property. Ms. Winslow's sister, Angerona Saunders, also testified that she recognized the Baxters' interests because "that's something [she] felt like [her] mother and father would have wanted [her] to do" and "something that they would have done."

Finally, Susan Baxter testified that it was not until after the Baxters sold the property to Atlantic Coast Properties that Edna Winslow first contacted her and told her that "[she] and her daughter had no interest in the M.C. (Mack) Moore property because [she] and her daughter had not paid any of the property taxes."

All of this evidence, taken together and viewed in the light most favorable to Atlantic Coast Properties, creates a genuine issue of

material fact as to whether W.G. Moore and his heirs recognized the ownership interest of the Baxters, thus defeating the presumption of constructive ouster.

The dissent contends that, although there is evidence that Respondents and their father, W.G. Moore, recognized the ownership interest of the Baxters generally, "there is only speculation that W.G. Moore did anything to recognize the Baxters' interest in the property during the twenty year period from 1921 to 1941." The dissent contends that all evidence after 1941 is essentially irrelevant because, once W.G. Moore obtained sole title by adverse possession, recognition of the Baxters' interests by him or his daughters could not divest him of that sole interest.

Our Supreme Court considered and rejected this precise argument in a nearly identical context, holding that evidence from outside a particular twenty-year period can be used to infer a consistent position within that twenty-year period. *See Clary v. Hatton*, 152 N.C. 107, 67 S.E. 258, 259 (1910). In *Clary*, three siblings inherited property from their parents in 1872. *Id.* The brother lived on the property during his lifetime; his two sisters did not. When the brother died in 1908, his heirs claimed the entire property by adverse possession. *Id.* Although there was no evidence that the brother recognized his sisters' interests from 1872 to 1892, the sisters presented evidence that their brother acknowledged their interest in 1900, telling another man that "he only claimed or owned one third of the lot and his sister each owned a third." *Id.* The Supreme Court held that the brother's "declaration in 1900 in acknowledgement and recognition of his sisters' title is evidence that prior to then he had never claimed adversely to them." *Id.* This was sufficient evidence "to go to a jury that the possession of [the brother] was never adverse to the rights of his sisters . . . and that consequently [the brother] acquired no title by reason of his possession." *Id.*

Here, too, W.G. Moore's recognition and acknowledgement of the Baxters' interests is sufficient to send the case to a jury. There is testimony that W.G. Moore recognized the Baxters' interest, that he taught his two daughters about the Baxters' interests when they were children, that the family talked about the Baxters' interests at family gatherings, and that W.G. Moore instilled in his daughters the belief that recognizing that interest—despite the fact that the Baxters never came to visit the property—was "the right thing to do."[2] From this testimony, a jury

2. The dissent has a different interpretation of some of this testimony, one that is considerably more favorable to Respondents. That interpretation is a perfectly reasonable

readily could infer that W.G. Moore recognized the interests of the Baxter family consistently throughout his lifetime, including the period from 1921 to 1941. *See Clary*, 152 N.C. at 107, 67 S.E. at 259. This is particularly true here, because there is no evidence in this record indicating that W.G. Moore had a change of heart after 1941, or that he felt differently about the Baxters (his own sister and her family) in the 1920s and 1930s than he did for the rest of his life. Thus, under *Clary*, Atlantic Coast Properties has forecast sufficient evidence to survive summary judgment.

Finally, there are important policy reasons for following *Clary* and reversing the entry of summary judgment in this case. As this Court previously has observed, a rule requiring specific, concrete evidence from each twenty-year time period could encourage a cotenant "to deal with his fellow tenants in a less than open and honest manner." *Sheets v. Sheets*, 57 N.C. App. 336, 338, 291 S.E.2d 300, 301 (1982). An occupying tenant could repeatedly reassure his cotenants that their interests are secure and then, after the passage of time has removed the records or witnesses, abruptly change position and claim title by constructive ouster occurring decades, or even centuries, ago.

Private property rights are the bedrock of liberty. It is one thing to lose property rights to the open and notorious adverse possession of another. But in a case like this one, where a joint property owner's rights are threatened through the legal fiction of constructive ouster without any actual ouster, courts must be particularly vigilant in applying the well-settled summary judgment standard and permitting a jury to resolve fact disputes about who told what to whom.

Accordingly, we hold that Respondent Edna Winslow's direct testimony that her father W.G. Moore recognized the Baxters' interest during his lifetime (although without specifying any particular time frame) and that he raised her up to do the same, together with the complete absence of any evidence suggesting W.G. Moore ever felt differently at any point in his life, constitutes "more than a scintilla" of evidence from which the jury could conclude that Moore recognized his sister's interest throughout his entire life, including from 1921 to 1941.[3] Accordingly, we reverse

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one as well. But this is summary judgment, so we must interpret all testimony in the light most favorable to Atlantic Coast Properties, the non-moving party. *Singleton*, 280 N.C. at 465, 186 S.E.2d at 403.

3. The dissent also contends that Ms. Winslow's deposition testimony in which she testified that her father, W.G. Moore, recognized the Baxters' interest during his lifetime was the product of an objectionable deposition question and was inadmissible hearsay:

the trial court's entry of summary judgment and remand this case for further proceedings.

Conclusion

Atlantic Coast Properties forecasted sufficient evidence to create a genuine issue of material fact on the issue of whether W.G. Moore and his heirs recognized the title of their cotenants and defeated any claim of constructive ouster. Accordingly, we reverse the trial court's order granting summary judgment in favor of Respondents.

REVERSED AND REMANDED.

Judge HUNTER, JR. concurs.

Chief Judge McGEE dissents in a separate opinion.

McGEE, Chief Judge, dissenting.

Because I believe the trial court properly granted summary judgment in favor of Respondents, I dissent.

"On appeal, an order allowing summary judgment is reviewed *de novo*." *Park East Sales, L.L.C. v. Clark-Langley, Inc.*, 186 N.C. App. 198, 202, 651 S.E.2d 235, 238 (2007) (citation omitted). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

> "Summary judgment is appropriate when 'there is no genuine issue as to any material fact' and 'any party is entitled to a judgment as a matter of law.' " Our Supreme Court has

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> Q. And they [Ms. Winslow's mother and father] had acknowledged the Baxters' ownership interest, and that's why you and your sister thought that you should; is that fair?
>
> [Ms. Winslow]: Yes.

There is nothing improper about the form of this question—it is not a compound question and it is not vague or confusing. *See, e.g.*, *State v. Hughes*, 159 N.C. App. 229, 582 S.E.2d 726 (2003). And the response is a statement by a party-opponent, Respondent Edna Winslow, manifesting her adoption or belief in the truth of her father's statement, thus qualifying it under one of the most fundamental and commonly invoked hearsay exceptions. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d). Lastly, these are evidentiary arguments not raised by Respondents in their summary judgment papers or at the hearing. Appellate courts ordinarily do not address evidentiary arguments not raised and preserved in the trial court. *See Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 206 (1972).

> held that "an issue is genuine if it is supported by substantial evidence, and [a]n issue is material if the facts alleged . . . would affect the result of the action[.]" Furthermore, "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference[.]"

Andresen v. Progress Energy, Inc., 204 N.C. App. 182, 184, 696 S.E.2d 159, 160-61 (2010) (citations omitted); *see also Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 682, 443 S.E.2d 114, 122 (1994) .

In *Herbert v. Babson* this Court stated:

> A tenant in common may . . . acquire the title of cotenants by constructive ouster. If a cotenant occupies the entire property for twenty years to the exclusion of a cotenant it is presumed there was an ouster at the time of the entry and it is presumed the action of the occupying cotenant during this period includes everything necessary to establish adverse possession.

Herbert v. Babson, 74 N.C. App. 519, 521, 328 S.E.2d 796, 798 (1985) (citations omitted). This Court further stated that:

> If one tenant in common has been in sole and undisturbed possession and use of the property for twenty years, without any demand for rents, profits or possession by the cotenants, constructive ouster of the cotenants is presumed, and the ouster relates back to the initial taking of possession by the tenant in possession. However, if the tenant in possession does anything to recognize title of the cotenants during the twenty-year period, the presumption of ouster does not arise.

Id. at 522, 328 S.E.2d at 798 (citations omitted).

> The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this Court, and is a most reasonable inference of the law and justified under the circumstances, first, because men do not ordinarily sleep on their rights for so long a period, and, second, because a strong presumption arises that actual proof of the original ouster has become lost by lapse of time.

Dobbins v. Dobbins, 141 N.C. 210, 216, 53 S.E. 870, 872 (1906); *see also Collier v. Welker*, 19 N.C. App. 617, 621-22, 199 S.E.2d 691, 695 (1973).

W.G. Moore lived on the disputed real property ("the property") from 1921 until his death in 1973. During that time, W.G. Moore farmed the property. His children, including Angerona Moore Saunders ("Angerona Saunders") and Edna Moore Winslow ("Edna Winslow") (together, "Respondents"), were born on the property. W.G. Moore built a new home on the property in 1952 and then demolished the original house. Both W.G. Moore and his wife, Edna, are buried on the property, along with other family members. Neither Parlie Moore Baxter, nor any of her heirs ("the Baxters"), occupied the property after 1921. The Baxters never paid taxes on the property nor demanded rents, profits or possession at any time. *Herbert*, 74 N.C. App. at 522, 328 S.E.2d at 798. In fact, there is no evidence of any communication whatsoever between the Baxters and the W.G. Moore family until the early 1980s when Respondents attempted to contact the Baxters, but received no response.

Approximately eighty-five years passed between the time W.G. Moore and his family became the sole occupants of the property in 1921 and the filing of this action in 2006. In order for Respondents to prevail, there need only have been one uninterrupted twenty-year period within those eighty-five years to satisfy the requirements set forth in *Herbert*. *See Ellis v. Poe*, 73 N.C. App. 448, 451, 326 S.E.2d 80, 83 (1985) (events occurring after the twenty-year period was complete could not "constitute an acknowledgment of cotenancy" by the occupier). Once the requirements of adverse possession by constructive ouster have occurred, title has passed. *Id.* Petitioner acknowledges that all the requirements for constructive ouster were present except, Petitioner contends, "[W.G.] Moore and his family recognized the title of his brother and sister in the . . . property thus . . . rebutting any presumption of ouster." Our Supreme Court has acknowledged the strong presumption that the requirements of adverse possession have been satisfied in situations where the sole possession of the property in question by a cotenant was far shorter than is the case here:

> *Justice Aston* [reasoned] in that case: "Now, in this case, there has been a sole and quiet possession for 40 years, by one tenant in common only, without any demand or claim for an account by the other, and without any payment to him during that time. What is adverse possession or ouster, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?" And by

> *Justice Willes*: "This case must be determined upon its own circumstances. The possession is a possession of 16 years above the 20 prescribed by the statute of limitations, without any claim, demand, or interruption whatsoever; and therefore, after a peaceable possession for such a length of time, I think it would be dangerous now to admit a claim to defeat such possession."
>
> The proof in this case showed an exclusive, quiet, and peaceable possession by the defendants and those under whom they claim for more than 20 years – indeed for more than 40 years – and the law presumes that there was an actual ouster, not at the end of that period, but at the beginning, and that the subsequent possession was adverse to the cotenants who were out of possession. This converted the estate in common, as between the former cotenants, into one in severalty, in the defendants, and defeated plaintiffs' right to partition or to an ejectment.

Dobbins, 141 N.C. at 218, 53 S.E. at 873 (citations omitted).

Assuming, *arguendo*, that Respondents "recognized the title" of the alleged cotenants, this "recognition" is immaterial if full title had already passed to W.G. Moore at some earlier date. W.G. Moore would have obtained full title to the property so long as he did not do anything to recognize title in the Baxters for any continuous twenty-year period between 1921 and his death in 1973. Once the requirements for constructive ouster for a twenty-year period were met, W.G. Moore obtained sole title to the property pursuant to adverse possession. *Dobbins*, 141 N.C. at 217, 53 S.E. at 873. Once W.G. Moore, along with his wife, became sole owners of the property, they could do with it as they pleased – including deciding to give a portion of it to the Baxters. *Beck v. Beck*, 125 N.C. App. 402, 406, 481 S.E.2d 317, 320 (1997). I believe Petitioner fails to forecast sufficient evidence to rebut the presumption of ouster. Choosing a twenty-year period during W.G. Moore's occupancy of the property, there is only speculation that W.G. Moore did anything to recognize the Baxters' interest in the property during the twenty year period from 1921 to 1941.

Angerona Saunders was asked at her deposition:

> [Petitioner's Attorney]: And the reason you and your sister were, I take it, honoring that interest [the Baxters' purported interest] was that that's something you felt like your mother and father would have wanted you to do?

> [Saunders]: Yes.
>
> [Petitioner's Attorney]: And something that they would have done?
>
> [Saunders]: Yes, I believe they would have done that.

Petitioner's attorney asked Angerona Saunders if it was true that she "would not even have contacted [the Baxters] had you not thought that was consistent with your mother's and father's desires?" Angerona Saunders responded that she believed in "doing things the right way" and in "doing it fair." Angerona Saunders acknowledged that that was how her parents "raised [her]."

Initially, Angerona Saunders nowhere stated that her parents at any time did anything to acknowledge the Baxters' interest in the property. Angerona Saunders merely stated that she believed her parents would have wanted the Baxters to share in ownership of the property because it was the "right thing" to do. This is merely Angerona Saunders "belief," it does not forecast the presence or absence of any fact. Further, there is no indication of when Angerona Saunders' parents might have decided that they would share ownership of the property – assuming *arguendo* they ever made such a decision. There is certainly nothing indicating that Angerona Saunders' parents held this belief or in any way did anything acknowledging the Baxters' interest in the property between 1921 and 1941. Angerona Saunders' "belief" in what her parents would have wanted her to do does not constitute evidence sufficient to rebut the presumption of ouster.

In addition, Angerona Saunders was born in 1948, seven years after the relevant period ended. Angerona Saunders could not have had any personal knowledge of what occurred between 1921 and 1941. When Angerona Saunders was asked "[d]o you ever remember your dad discussing anything about his interest in the property[,]" she answered, "No." Angerona Saunders testified that she knew that Parlie Moore Baxter "lived in New York. I knew nothing about her, not one thing about" the Baxters other than that W.G. Moore's sister had married a Baxter and had a son named Leroy.[1] Angerona Saunders testified that W.G. Moore never talked to her about why he never tried to contact his sister or her family. When asked if there was "[a]nything else that you can recall

1. Though the "family tree" included in the record indicates that Parlie Moore Baxter died in 1980, both Angerona Saunders and Edna Winslow testified that Parlie Moore Baxter died before either of them was born.

your dad or your mom saying about the Baxters[,]" Angerona Saunders answered, "[n]ope." When Angerona Saunders was asked if W.G. Moore had "ever indicate[d] to you all that he was aware that [the Baxters] had an ownership interest in the property[,]" Angerona Saunders answered: "He just told us that it was his father and just told us who they was. But that's about it, what he said." When asked who she thought owned the property when she was growing up, Angerona Saunders answered that "we was under the impression that [W.G. Moore] was the one that owned it then, that nobody else was there or showed up, no more than he and [his brother] Uncle Sherman." Angerona Saunders testified that she never heard W.G. Moore and her Uncle Sherman discuss the property, and she never heard her mother or "anyone else" "mention anything about anyone else owning any interest in the property[.]" Angerona Saunders never "conceded that [her] recognition of the Baxters' interests also was a view shared by [her] father[.]" Concerning the survey that was conducted in 2007 showing a division of the property into plots, Angerona Saunders stated they had the survey done because "[w]e were going to convey them [some of the plots] to [the Baxters]."

Edna Winslow also gave deposition testimony in which she acknowledged that her parents had "raised [her] to do the right thing." The following exchange occurred at her deposition:

> [Petitioner's Attorney]: And [your parents] had acknowledged the Baxters' ownership interest, and that's why you and your sister thought that you should [partition the property]; is that fair?
>
> [Winslow]: Yes.
>
> [Respondents' attorney]: Objection. Object to the form of the question.
>
> [Petitioner's Attorney]: Well, tell me in your own words why you felt like you needed to recognize the Baxters' interest by including them in the division?
>
> [Winslow]: Well, at the time we were going by what, you know . . . we were doing it because it was Mack Moore's heirs.

Edna Winslow's testimony demonstrates her belief that including the Baxters was "the right thing" to do, and that that was "how her parents had raised her." The portion of Edna Winslow's testimony where she answered affirmatively to Petitioner's attorney's leading question concerning her parent's acknowledgment of "the Baxters' interest" was

objected to, and Petitioner's attorney rephrased the question as a non-leading question. Edna Winslow's subsequent testimony was that she and Angerona Saunders were planning on including the Baxters in the partition of the property because the Baxters were "Mack Moore's heirs."

Edna Winslow was born in 1943, two years after W.G. Moore had continuously occupied the property for twenty years. Edna Winslow did not have any personal knowledge of how either W.G. or Edna Moore treated the property during that time period. When Edna Winslow was asked: "So about the only conversation you ever heard your dad say about [Parlie Moore Baxter] was that she had married a Baxter[,]" Edna Winslow answered: "Right." Edna Winslow testified that she didn't even know if W.G. Moore knew that the Baxters lived in New York and that she learned most of what she knew about the Baxters "from Uncle Sherman." Edna Winslow stated that her Uncle Sherman told her about the Baxters, but that her mother "never talked about" any interest the Baxters might have had in the property. Edna Winslow knew that Parlie Moore Baxter was the daughter of Mack Moore "by Uncle Sherman telling us; and daddy told us he had a sister, but she was dead." I do not understand Edna Winslow's testimony to have been "that she had known of the Baxters' interest 'since growing up in [her] mom and dad's house' because family members often talked about these out-of-state heirs to the property." Edna Winslow testified in the following manner:

> [Winslow]: [The Baxters] were Mack Moore's heirs, I guess.
>
> [Petitioner's Attorney]: Okay. And that's something that you had known since growing up in your mom and dad's house?
>
> [Winslow]: Yeah. Uncle Sherman told us a lot about them.
>
> [Petitioner's Attorney]: What did he tell you a lot about?
>
> [Winslow]: He just told us that [Parlie Moore Baxter] had died and she had one son, and he was in a wheelchair.

Edna Winslow then agreed with Petitioner's attorney's question: "[T]hat's where your deceased aunt's interest had ended up, was either with her husband or her son?" Unfortunately, as the trial court was informed, Edna Winslow died before the summary judgment hearing and would not be available to testify were this matter to proceed to trial.

There is nothing in Edna Winslow's testimony constituting evidence that W.G. Moore ever did anything acknowledging any interest of the

Baxters' in the property, much less that he did so in the period between 1921 and 1941. Further, even if we were to consider this portion of the deposition as proof that W.G. Moore acknowledged the Baxters' interest in the property, there is no evidence allowing us to determine when he did so. Because over eighty years have passed and Petitioner presented no evidence to the trial court that W.G. Moore did anything to acknowledge the Baxters' interest in the property from 1921 to 1941, "a strong presumption arises that actual proof of the original ouster has become lost by lapse of time." *Dobbins*, 141 N.C. at 216, 53 S.E. at 872.

I can find no testimony that "W.G. Moore . . . taught his two daughters about the Baxters' interests when they were children, [or] . . . talked about the Baxters' interests at family gatherings[.]" The only testimony supporting the statement in the majority opinion that "W.G. Moore recognized the Baxters' interest" is the objected to statement of Petitioner's attorney at Edna Winslow's deposition to which Edna Winslow initially agreed. None of Edna Winslow's personal deposition statements indicate she ever discussed any interest the Baxters might have had in the property with her father. Angerona Saunders testified that W.G. Moore never discussed such matters with her, and growing up she understood her father to have owned the property. Petitioner has produced no witness testimony from anyone who was alive before 1941, nor any testimony from anyone who witnessed W.G. Moore do or say anything recognizing the Baxters' interest in the property during that time period.

It is correct that our Supreme Court in *Clary* considered testimony of a witness to defeat a presumption of ouster. In *Clary*, a witness testified, concerning the cotenant brother John Hatton ("Hatton"), who had resided on the property in question for over twenty years before his death, and who had told the witness that

> eight years before he died, and while [Hatton] was then living on the lot, that he only claimed or owned one-third of the lot, and his sisters each owned a third, and for that reason he had not improved it and did not wish to spend any money on it.
>
> These declarations of John Hatton are inconsistent with a claim of sole ownership or exclusive possession, and are competent, not to impeach any title that he had already acquired by twenty years' possession, but to show that *in reality he had never acquired any title by such possession*, because his possession during the entire period it continued, from 1872 to the day the declaration was made,

> was of a permissive and not of an adverse character; and that is was with his sisters' consent. This would tend to rebut any presumption of an ouster at any time prior to such declaration.

Clary v. Hatton, 152 N.C. 107, 109, 67 S.E. 258, 259 (1910) (emphasis added). I emphasize the portion of the quote above because I want to make clear that once title is acquired through adverse possession, no subsequent acknowledgment to the contrary will defeat it. I do not maintain that "all evidence after 1941 is essentially irrelevant." The holding in *Clary* stands for the proposition that an occupying cotenant's statements may be used to prove he never acquired sole title in the first instance.

I disagree that the situation in *Clary* is nearly identical to the one before us. In *Clary*, the witness testified that he had had a conversation with Hatton in 1900, and that Hatton expressly stated that his occupation was permissive. The witness in *Clary* was alive and testified to this conversation directly, and Hatton's statement was made only eight years after the relevant period. Further, Hatton died in 1908, and the action was brought against his heirs in early 1909. In the present case, Edna Winslow was not yet alive in the relevant period; because she passed away following her deposition, she can make no clarification concerning her understanding of the Baxters' "interest" beyond the clarification discussed above; and the Baxters never brought suit against Defendants. Further, the statement made by Hatton in *Clary* was unequivocal. In the present case we can only speculate concerning whether W.G. Moore even made a statement, much less what his meaning and intent might have been. Finally, the Baxters did not act immediately to protect their interest. They did nothing for approximately eighty-five years until Petitioner purchased whatever interest they might have had. Now Petitioner is attempting to determine what W.G. Moore's state of mind was approximately sixty-five years ago.

In my opinion it is the "strong presumption . . . that actual proof of the original ouster has become lost by lapse of time" that defeats Petitioner's challenge to the granting of summary judgment. W.G. and Edna Moore are deceased. Without any tangible evidence of an acknowledgment of the Baxters' interest during the relevant period, and with no testimony raising more than a permissible inference that there was no twenty-year period in which Moore failed to acknowledge the Baxters' interest, I would hold that summary judgment was correct. The evidence presented to the trial court could only allow the jury to infer that W.G. Moore might have recognized an interest in the Baxters at some unknown time. The presumption in *Dobbins* is tailored for the situation

before us. The presumption is that evidence of W.G. Moore's intent to solely possess the property has been lost due to the passing of approximately eighty-five years in which the Baxters failed to assert their rights.

> The sole enjoyment of property for a great number of years, without claim from another, having right and under no disability to assert it, becomes evidence of a title to such a sole enjoyment; and this not because it clearly proves the acquisition of such right, but because from the antiquity of the transaction, *clear proof cannot well be obtained to ascertain the truth, and public policy forbids a possessor to be disturbed by stale claims when the testimony to meet them cannot easily be had.* Where the law prescribes no specific bar from length of time, 20 years has been regarded in this country as constituting the period for a legal presumption of such facts as will sanction the possession and protect the possessor.

Dobbins, 141 N.C. at 216-217, 53 S.E. at 872 (citation and quotation marks omitted) (emphasis added); *see also id.* at 216, 53 S.E. at 872 (" 'The possession of one tenant in common is in law the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and where it has so continued for twenty years, the law raises a presumption that it is rightful, and will protect it. *This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time.*' ") (citation omitted) (emphasis added). Our Supreme Court has already addressed the policy considerations inherent in this type of property dispute involving "stale claims when the testimony to meet them cannot easily be had." *Id.*

The Baxters did nothing to claim any right in the property for approximately eighty-five years, and the testimonies of Angerona Saunders and Edna Winslow do not constitute "more than a scintilla [of evidence] or a permissible inference" that W.G. Moore ever did anything to recognize the Baxters' interest in the property. *Id.* (citation omitted). This constituted a constructive ouster.

> [Constructive ouster] is a disseizin by one tenant of his cotenant, the taking by one of the possession and holding it against him by an act or series of acts which indicate a decisive intent and purpose to occupy the premises to the

> exclusion and in denial of the right of the other. This is what the law presumes, whether it be in exact accordance with the real facts or not. It is a presumption the law raises to protect titles, and answers in the place of proof of an actual ouster and a supervening adverse possession. The presumption includes everything necessary to be proved when the title can be ripened only by actual adverse possession as defined by this [c]ourt[.]

Dobbins, 141 N.C. at 215-16, 53 S.E. at 872. I would hold that there is no genuine issue of material fact and that summary judgment was proper.

GAILLARD BELLOWS AND HER HUSBAND, JON BELLOWS, PLAINTIFFS
v.
ASHEVILLE CITY BOARD OF EDUCATION DBA ASHEVILLE HIGH SCHOOL AND SKA CONSULTING ENGINEERS, INC., FORMERLY SUTTON-KENNERLY & ASSOCIATES, INC., AND ZEBULON W. WELLS, JR., INDIVIDUALLY, DEFENDANTS

No. COA15-131

Filed 6 October 2015

1. Appeal and Error—immediate appealabilty—sovereign immunity

In a case arising from an injury on school grounds, allegedly from an unsafe condition, only the trial court's ruling on the School Board's motion to dismiss on sovereign immunity grounds was immediately reviewable.

2. Immunity—sovereign—school grounds injury—maintenance—governmental function

In a case arising from an injury on school grounds, the trial court erred by denying the School Board's motion to dismiss. Under the controlling decision in *Bynum v. Wilson Cnty.*, 367 N.C. 355, the General Assembly's assignment of the ownership, maintenance, and repair of school property to the local school boards is dispositive of the question of whether the function performed by the Board in the present case is governmental.

Appeal by Defendants from order entered 13 November 2014 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 3 June 2015.

Northup McConnell & Sizemore, PLLC, by Isaac N. Northup, Jr., Elizabeth E. McConnell, and Katherine M. Pomroy, for the Plaintiff-Appellees.

Campbell Shatley, PLLC, by Christopher Z. Campbell and John F. Henning, Jr., for the Defendant-Appellant, Asheville City Board of Education.

Smith Moore Leatherwood LLP, by Patrick M. Kane, Bruce P. Ashley, and Lisa W. Arthur, for the Defendant-Appellants, SKA Consulting Engineers, Inc. and Zebulon W. Wells, Jr.

Christine T. Scheef and Allison B. Schafer, for Amicus Curiae, the North Carolina School Boards Association.

DILLON, Judge.

Asheville City Board of Education (the "Board"), SKA Consulting Engineers, Inc. ("SKA Consulting"), and Zebulon W. Wells, Jr., appeal from an order denying motions to dismiss Gaillard Bellows and Jon Bellows' claims for negligence, willful negligence, and loss of consortium. We reverse the trial court's denial of the Board's motion to dismiss and dismiss SKA Consulting and Mr. Wells' appeals.

I. Background

Plaintiffs filed a complaint asserting claims arising out of an incident at Asheville High School in which Plaintiff Ms. Bellows fell from her wheelchair and sustained injuries, allegedly due to unsafe conditions on the school grounds. Defendants made motions to dismiss, which the trial court denied by an order entered 13 November 2014. Defendants entered written notice of appeal.

II. Analysis

[1] The order being appealed is interlocutory because it does not dispose of all claims and all parties. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldstone v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, our Supreme Court has held that "the denial of

summary judgment on grounds of sovereign immunity is immediately appealable[.]" *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009). Thus, while interlocutory, the Board's appeal from the order denying its motion to dismiss based on sovereign immunity is immediately appealable.[1]

Unlike denials of motions to dismiss based on sovereign immunity, however, our Supreme Court has held that "no immediate appeal may be taken" from denials of motions to dismiss for failure to state a claim upon which relief can be granted. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982). Furthermore, in an appeal from an order denying multiple motions to dismiss made on different bases, only one of which is sovereign immunity, only the ruling on sovereign immunity is immediately reviewable; other rulings in the same order being appealed are not. *Lake v. State Health Plan for Teachers and State Employees*, ___ N.C. App. ___, ___, 760 S.E.2d 268, 271 (2014). Therefore, only the trial court's ruling on the Board's motion to dismiss on sovereign immunity grounds is immediately reviewable.[2] Accordingly, the appeals of SKA Consulting and Mr. Wells are dismissed.

[2] On the merits of the Board's sovereign immunity defense, we agree that the trial court erred in denying the Board's motion to dismiss. Specifically, we find our Supreme Court's recent decision in *Bynum v. Wilson Cnty.*, 367 N.C. 355, 758 S.E.2d 643 (2014), controlling on this question. In *Bynum*, the Supreme Court clarified the contours of the defense of sovereign immunity under our law, reiterating that its availability depends on the nature of the function of the relevant governmental unit. *Id.* at 358, 758 S.E.2d at 646. "Immunity applies to acts committed pursuant to governmental functions but not proprietary functions," the court explained. *Id.* The court reasoned that the General Assembly's designation of an activity as governmental is dispositive to this question, and after identifying several statutes assigning the relevant governmental unit the responsibility of performing the function at issue, the court

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1. Our Supreme Court has noted that the immunity possessed by a local school board "is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 335 n. 3, 678 S.E.2d 351, 353 n. 3 (2009). However, as it applies to the present case, as in *Craig*, "the distinction is immaterial." *Id.*

2. Recognizing that they have no right to appeal, SKA Consulting and Mr. Wells have petitioned our Court for *certiorari*. However, *certiorari* is an extraordinary writ. *See, e.g.*, *State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1962). In support of their petition, SKA Consulting and Mr. Wells argue generally that consolidated review would promote the administration and interests of justice. We are not persuaded. We hereby deny the petition.

concluded that sovereign immunity applied.[3] *Id.* at 359-60, 758 S.E.2d at 646-47.

Applicable to the present case, N.C. Gen. Stat. §§ 115C-40 and -521(c) designate the responsibility of the several boards of education in our State with the ownership and control of all school real and personal property, entrusting the boards of education with the maintenance and care thereof. *See* N.C. Gen. Stat. §§ 115C-40, -521(c) (2014). In relevant part, N.C. Gen. Stat. § 115C-40 provides:

> The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, of building and repairing schoolhouses, of selling and transferring the same for school purposes, and of prosecuting and defending suits for or against [themselves].

Id. § 115C-40. N.C. Gen. Stat. § 115C-521(c) further provides that "[t]he building of all new school buildings and the repairing of all old school buildings shall be under the control and direction of, and by contract with, the board of education for which the building and repairing is done." *Id.* § 115C-521(c). Therefore, under the controlling decision of our Supreme Court in *Bynum*, the General Assembly's assignment of the ownership, maintenance, and repair of school property to the local school boards of our State is dispositive to the question of whether the function performed by the Board in the present case is governmental.[4]

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3. Justice (now Chief Justice) Martin authored a separate concurrence in *Bynum*, in which he noted that the reasoning of the majority "would seem to create a categorical rule barring any premises liability claims against counties or municipalities for harms that occur on government property." *Bynum v. Wilson Cnty.*, 367 N.C. 355, 361, 758 S.E.2d 643, 647 (2014) (Martin, J., concurring in result). Plaintiffs contend that the standard advocated by the minority in now-Chief Justice Martin's concurrence is met in the present case. However, we are not free to disregard the majority's reasoning. *See, e.g.*, *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 157, 731 S.E.2d 800, 811 (2012) (observing that the existence of a dissenting opinion does not undermine the precedential value of a majority opinion).

4. Plaintiffs argue at length that the so-called sidewalks doctrine was not affected by our Supreme Court's decision in *Bynum*. As a general matter, "[w]hile the maintenance of public roads and highways is generally recognized as a governmental function," the so-called sidewalks doctrine "imposes liability upon a municipality for damages resulting from failure to exercise ordinary care in keeping its streets and sidewalks in a reasonably safe condition[.]" *Millar v. Town of Wilson*, 222 N.C. 340, 342, 23 S.E.2d 42, 44 (1942). However, we base our conclusion that the ownership, maintenance, and repair of the walkway at issue in the present case – a walkway located on a school campus – was a governmental function on the unequivocal direction of our Supreme Court in *Bynum* that a statutory designation by the General Assembly is dispositive to this question, and do not reach the effect, if any, of *Bynum* on theses prior decisions.

Accordingly, we reverse the trial court's denial of the Board's motion to dismiss.

III. Conclusion

For the reasons stated herein, the trial court's denial of the Board's motion to dismiss is reversed. SKA Consulting and Mr. Wells' appeals are dismissed.

REVERSED IN PART; DISMISSED IN PART.

Judges CALABRIA and ELMORE concur.

EMILY JEAN BURGER, Plaintiff
v.
MATTHEW GEOFFREY SMITH, Defendant

No. COA15-180

Filed 6 October 2015

1. Child Visitation—mother in N.C.—father in Malawi—child's best interests

In a child custody case with a mother in North Carolina and the father in Malawi in which the mother contended that the trial court erred by allowing the father the discretion to exercise visitation in Malawi, the trial court was not required to make a finding or conclusion that it was in the best interest of the child to travel to Malawi. Rather, the trial court's task was to fashion a custody arrangement that was in the child's best interest in the context of extremely unusual circumstances, and the trial court's findings reflected appropriate awareness of the possible dangers to the child of travel to Malawi. The trial court found that "Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi" and this finding was amply supported by other findings tending to show that defendant was a person of good moral character who had assiduously sought to exercise his right to visitation and who had several years of experience with conditions in Malawi.

2. Child Visitation—mother in N.C.—father in Malawi—visitation schedule—not abuse of discretion

In a child custody case involving a mother in North Carolina and a father in Malawi, the trial court did not abuse its discretion by ordering a visitation schedule of alternating periods of a month with the father followed by two months with the mother and by directing that when the minor child, who was eighteen months old at the time of the hearing, begins kindergarten, defendant would then have visitation during the school's summer break and during the winter and spring breaks. The trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents. To achieve this goal the trial court was necessarily required to deviate from the most commonly employed custody schedules, and the visitation schedule was an appropriate response to the parties' unusual living situation. If the child's future high school activities render a change of visitation advisable, a modification could be sought at that time.

Appeal by plaintiff from order entered 29 August 2014 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 9 September 2015.

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

J. Albert Clyburn for defendant-appellee.

ZACHARY, Judge.

Emily Burger (plaintiff) appeals from a permanent child custody order awarding her the primary physical care and custody of the parties' minor child and Matthew Smith (defendant) secondary physical care and custody with visitation privileges with the parties' minor child. On appeal, plaintiff argues that the trial court erred and abused its discretion in the trial court's award of visitation privileges to defendant. We disagree.

I. Background

Defendant is a Canadian citizen and resident of Ontario. Plaintiff is a resident of Brunswick County, North Carolina. In 2006 defendant traveled to Malawi, Africa, to work as a construction manager for a

missionary group. In addition to construction work, defendant assisted with the mission's orphanage and worked with the children in the mission's care. Defendant has a long-term personal and religious commitment to his work in Malawi. In 2010 plaintiff traveled to Malawi to teach English at the orphanage. Initially, plaintiff volunteered for a three month term; later, she and defendant began a romantic relationship and plaintiff decided to remain in Malawi indefinitely. On 29 August 2011, plaintiff and defendant held a marriage ceremony in Malawi. On 15 October 2011, they were married in North Carolina and then returned to Malawi. In 2012, the parties conceived a child while living in Malawi. They traveled to the United States for the birth of their son, which occurred on 24 January 2013, and in April 2013 the family returned to Malawi.

On 9 July 2013, when the parties' son was about six months old, plaintiff returned to North Carolina with the child. On 14 September 2013, plaintiff informed defendant that she wanted to separate. On 17 January 2014, plaintiff filed a complaint seeking sole custody of the child, asking the court to order that defendant have no overnight visits with the child until he was two years old, and requesting that all visitation between defendant and the child take place in North Carolina. On 5 February 2014, defendant filed an answer, a motion to dismiss plaintiff's complaint for lack of jurisdiction, and a counterclaim for custody of the child. On 23 April 2014, the trial court entered an order denying defendant's motion to dismiss plaintiff's complaint. Following a hearing conducted on 7 March 2014, the trial court entered a temporary custody order on 9 May 2014. In its temporary custody order the trial court awarded the parties joint custody of the child, with plaintiff to have primary physical custody and defendant secondary physical custody with visitation privileges. The order also provided that defendant was not to take the child to Malawi. On 2 June 2014, defendant filed a motion to show cause asserting that plaintiff was in contempt of the temporary custody order by failing to allow him visitation with the child as ordered by the court. On 9 June 2014, the trial court granted plaintiff's motion for psychological evaluations of the parties.

On 7 August 2014, the trial court conducted a hearing on the issue of permanent child custody and on defendant's show cause motion. On 29 August 2014, the trial court entered an order denying defendant's motion to show cause and awarding the parties joint legal care and custody of the child. The court awarded plaintiff primary physical care and custody of the parties' minor child, and defendant secondary physical care and custody of the minor child, with visitation privileges. Additional details of the trial court's order are discussed below. Plaintiff has appealed from the permanent custody order.

II. Standard of Review

The standard of review "when the trial court sits without a jury is 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Barker v. Barker*, __ N.C. App. __, __, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)) (other citation omitted). "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted). " 'If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order.' " *Respess v. Respess*, __ N.C. App. __, __, 754 S.E.2d 691, 695 (2014) (quoting *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)).

In addition, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [its order] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

III. Discussion

A. Introduction

As a preliminary matter, it is helpful to clarify the extent of plaintiff's challenge to the permanent custody order. Plaintiff does not assert that the trial court erred by awarding the parties joint legal custody, by giving plaintiff primary physical custody and defendant secondary physical custody with visitation privileges, or by concluding that it was in the child's best interest to have visitation with defendant. Plaintiff's sole challenge on appeal is to certain features of the trial court's order respecting defendant's visitation with the child. Specifically, plaintiff challenges the provisions that establish the visitation schedule and that allow defendant to exercise visitation with the minor child in Malawi. Because plaintiff does not contend that the trial court's findings of fact

were not supported by record evidence, the trial court's findings of fact are conclusively established on appeal. Therefore, the issue before this Court is whether the trial court's findings of fact support its conclusions of law and the provisions of its order with regard to the trial court's award of visitation.

B. Defendant's Discretion to Exercise Visitation in Malawi

[1] Plaintiff argues first that the trial court erred by allowing defendant discretion to exercise his visitation privileges with the child in Malawi. Plaintiff contends that some of the trial court's findings of fact are simply recitations of witness testimony, that the trial court's findings of fact do not reflect its consideration of the dangers of Malawi, and that the trial court's findings of fact cannot support an "ultimate finding" or conclusion of law "that it is in the best interest of the minor child to travel to Malawi." We conclude that the trial court was not required to make a finding or conclusion that "travel to Malawi" was, as an abstract proposition, in the child's best interest. Instead, the trial court's task was to fashion a custody arrangement that was in the child's best interest in the context of the extremely unusual factual circumstances of the parties' lives. We further conclude that, disregarding any findings that consisted of a summary of witness testimony, the trial court's remaining findings of fact demonstrate its consideration of the possible dangers of travel to Malawi and reflect an appropriate custody award, including the trial court's award of visitation.

Under N.C. Gen. Stat. § 50-13.1(a) "the word 'custody' shall be deemed to include custody or visitation or both." N.C. Gen. Stat. § 50-13.2(a) provides in relevant part that:

> An order for custody of a minor child . . . shall award the custody of such child to such person . . . as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors . . . and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child.

Moreover, it is undisputed that:

> Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusions of law. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

Steele v. Steele, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). Regarding the necessity for findings, N.C. Gen. Stat. § 1A-1 Rule 52(a)(1) provides in relevant part that in "all actions tried upon the facts without a jury" the trial court "shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." In *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982), however, our Supreme Court held that

> Rule 52(a) does not, of course, require the trial court to recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. . . . "There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense, and evidentiary facts are those subsidiary facts required to prove the ultimate facts. [N.C. Gen. Stat. § 1A-1 Rule 52(a)] requires the trial judge to find and state the ultimate facts only."

(quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) (internal citations omitted). Thus, "[a]lthough a custody order need not, and should not, include findings as to each piece of evidence presented at trial, it must resolve the material, disputed issues raised by the evidence." *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013). Applying Rule 52 in the context of visitation rights in a child custody order, we have held that "[t]o support an award of visitation rights the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child." *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 29 (1977) (citations omitted).

In this case, the trial court's conclusions of law included, in relevant part, the following:

> 1. That Plaintiff and Defendant are properly before this Court; that the Court has jurisdiction over the parties and of the subject matter; and that the claim for child custody was properly filed and noticed for hearing in this matter.
>
> 2. Joint legal care and custody of the minor child is appropriate and in the best interests of the minor child.

3. Plaintiff is a fit and proper person to exercise primary care and custody of the minor child.

4. Defendant is a fit and proper person to exercise secondary care and custody of the minor child, by way of visitation.

5. The visitation schedules and provisions ordered herein below are reasonable, the parties are fit and appropriate to exercise the visitation as ordered, and the visitation is in the best interests of the minor child.

We conclude that the trial court made the appropriate conclusions of law required under N.C. Gen. Stat. § 50-13.2. On appeal, plaintiff challenges only Conclusion of Law No. 5, respecting visitation, arguing that the trial court's findings of fact do not support this Conclusion. We have carefully considered, but ultimately rejected, plaintiff's arguments concerning the trial court's findings and conclusions.

" '[T]he trial courts have the duty to decide domestic disputes, guided always by the best interests of the child and judicial objectivity. To that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them.' " *Lovallo v. Sabato*, 216 N.C. App. 281, 285, 715 S.E.2d 909, 912 (2011) (quoting *Glesner v. Dembrosky*, 73 N.C. App. 594, 598, 327 S.E.2d 60, 63 (1985)) (internal citation omitted). In this case, it is important to remember that the trial court's decision to allow defendant to exercise visitation with the child in Malawi was reached in the context of the extraordinarily uncommon circumstances of the parties' relationship. It is not disputed that plaintiff and defendant met when plaintiff traveled to Malawi to teach English at the mission where defendant had been living and working for several years. Plaintiff became involved with defendant, a Canadian citizen who has a long term commitment to his work in Africa. Plaintiff remained in Malawi and the parties conducted a wedding ceremony in Malawi as well as in North Carolina. Their child was conceived in Malawi and, after returning to the United States for his birth, the family went back to Malawi. The child lived in Malawi until he was about six months old, with no ill effects reported by either party. Plaintiff then decided to separate from defendant and live in Brunswick County, North Carolina. On appeal, plaintiff argues that the trial court erred by allowing defendant the option of exercising his right to visitation with the minor child in Malawi. Plaintiff fails to acknowledge that the factual circumstances of the parties' lives, which arose from their personal decisions, would not permit a conventional

visitation schedule in which, for example, defendant had visitation with the child every Wednesday and every other weekend.

Essentially, plaintiff argues that the trial court's findings of fact do not demonstrate proper consideration of the dangers of allowing defendant to take the child to Malawi. We do not agree. Plaintiff urges that in resolving this issue we must disregard findings that consist of recitation of witness testimony without making findings based on that testimony. We conclude that the following findings, which do not consist of the recitation of witness testimony, establish that the trial court considered the factors relevant to the child's best interest, including the characteristics of the parties and the plaintiff's concerns about the child's travel to Malawi:

> 1. Plaintiff is a citizen and resident of Brunswick County, North Carolina, and has resided [there] since July 9, 2013[.] . . .
>
> 2. Defendant is a citizen and resident of Canada, residing . . . [in Ontario], Canada.
>
> 3. The Defendant went to Malawi, Africa to work for Iris Ministries Africa on a full time basis in 2006 as a missionary, working as a construction manager. In addition to that work he has assisted in the care of children living at the orphanage and/or attending school there, serving as a role model and mentor.
>
> 4. The parties met in January of 2010 when the Plaintiff went to volunteer at the orphanage in Malawi for three (3) months to teach English. Plaintiff then decided to stay on as a full-time missionary and teacher, and did so until July 2013.
>
> 5. Plaintiff and Defendant held a marriage ceremony on August 29, 2011 in Malawi, Africa. The parties . . . were [also] married in Brunswick County, North Carolina on October 15, 2011. . . . The parties have lived separate and apart since July 9, 2013 . . . [and have] stipulated that they separated for purposes of divorce on September 14, 2013, the date Plaintiff notified Defendant that she wanted a separation.
>
> 6. There was one (1) minor child born of the marriage of Plaintiff and Defendant, to wit: Eli James Smith, born on January 24, 2013, in the state of Maryland. . . .

7. The parties' minor child has resided with Plaintiff in Brunswick County, North Carolina since July 9, 2013, . . . [and] North Carolina is the home state of the minor child.

8. The parties remained in the state of Maryland from the minor child's birth until March 1, 2013[,and then stayed] . . . for a month with the Defendant's parents in [Canada.] . . . [On April 8, 2013] they flew back to Malawi.

9. On July 9, 2013, the Plaintiff returned to the United States with the minor child, with the Defendant planning to follow a few weeks later[.] . . .

10. On August 16, 2013, Plaintiff notified Defendant by Email that she had decided that she could not return with the child to Malawi. From August 24 - 31, 2013, the Defendant travelled to Ocean Isle Beach, North Carolina, and had daytime visits with Plaintiff and [the] minor child, who at that time was seven months old.

11. From August 2013 until May 15, 2014, Defendant continued to reside at his parents' home in Canada. He then returned to Malawi for four weeks.

12. On September 14, 2013, the Plaintiff expressed to Defendant her desire to separate. The Defendant returned to Brunswick County, North Carolina to visit with the minor child from November 9 - 23, 2013. At this time, Plaintiff arranged for him to have daily daytime visits ranging from three to six hours in length with the baby but refused any overnight visits, citing the fact that the baby still was nursing at night. Defendant had no choice but to oblige with any and all of her demands.

. . .

14. By agreement of the Defendant, Plaintiff has been breastfeeding the minor child since birth. She has been the child's primary caregiver since birth. During the three months the child resided with both parties in Malawi, Plaintiff didn't work but rather devoted herself full-time to the child's care. . . .

15. The court conducted a temporary hearing on March 7, 2014. . . . The Court's Order, entered on May 9, 2014, placed the minor child in the parties' temporary joint legal custody

and ordered that Defendant would visit for ten days each month with fourteen days written notice to Plaintiff of the dates he wished to visit The visits were to occur within either the United States or Canada and Defendant was ordered not to take the minor child to Malawi during the term of the temporary custody order.

16. After the temporary custody hearing, Defendant opted to remain in Canada rather than return to his work in Malawi in order to exercise all visitations that were allowed to him under the Order.

17. Pursuant to the Temporary Order, Defendant had the minor child for a seven-day visit here in North Carolina from March 9 - 16[.] . . . Defendant then had the minor child for visitation with him in Canada from March 20th through March 27th, and April 17th through April 27th.

18. Pursuant to the Temporary Order, Defendant notified Plaintiff that he wished to have his May visit from May 3 to May 13, 2014. Plaintiff objected . . . [and] refused to allow the Defendant to exercise his visitation as ordered. . . .

19. Plaintiff did allow the Defendant to exercise his visitation for the months of June and July.

20. Since March of 2014, Defendant has incurred approximately $5,500.00 in travel expenses to exercise his visitation with the minor child.

21. The minor child has been more "clingy" with the Plaintiff after the ten (10) day visits with the Defendant[.] . . .

22. The Plaintiff is 26 years old. Plaintiff graduated from college in December 2009[, and] was employed . . . as a Teacher's Assistant from April until June, 2014, earning high praises from . . . a first grade teacher at the school who testified on Plaintiff's behalf. Plaintiff will begin working as a Teacher's Assistant . . . for this upcoming school year, and has enrolled in graduate school . . . to earn a Master's degree in teaching.

23. Plaintiff has a close and loving relationship with her parents, with whom she has resided in a very nice home in Ocean Isle Beach, North Carolina since . . . July 2013. Plaintiff is scheduled to move into a two (2) bedroom

condo she will be renting in the same neighborhood as her current residence[.] . . .

24. The Defendant is 36 years old. He is a citizen of Canada, but has been living in Malawi since 2006. Defendant testified that his faith is extremely important to him, and that he has been involved in church and church activities all of his life. Defendant appears to be a man of character, integrity, and commitment, who has a strong love for the less fortunate.

25. Defendant has a close and loving relationship with his parents. His parents have been married to each other for forty-four (44) years and reside in Canada.

26. Defendant has always demonstrated a strong commitment to his family and marriage.

. . .

28. Plaintiff is concerned about the minor child traveling to Malawi to visit with the Defendant due to health reasons, parasite disease, the threat of malaria, the presence of poisonous snakes, extreme heat, and the unreliability of the hospitals located there. When the parties lived together with the minor child in Malawi, they took extra precautions to guard themselves against mosquitos[.] . . .

29. The Court believes that Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi.

30. Malawi does have a high death rate for infants and children as compared to [the] United States. Malaria is common in Malawi . . . [and the] U.S. State Department recommends that travelers to Malawi take a course of Malaria prophylaxis medication which should be initiated prior to travel and taken while there. It is recommended that the minor child be vaccinated for Hepatitis A, Hepatitis B, rabies and typhoid before any visits to Malawi.

31. The healthcare is not as good in Malawi as it is in the United States.

32. Defendant is a citizen of Canada, and due to the immigration laws of the United States, relocating to North Carolina to be closer to the child is not an option for him.

33. The Plaintiff is currently breastfeeding the minor child and has been doing so since his birth.

. . .

37. Plaintiff made allegations that Defendant had anger management issues and requested a psychological evaluation of both parties. Plaintiff testified that she separated from the Defendant due to him being controlling, angry, impossible to please, and having rages toward her during the marriage, however the court did not find this testimony persuasive. . . .

. . .

43. Both parties are excellent parents and both have provided exceptional care for the minor child. Both parties have strong support systems from family and friends. Both parties had adequate housing arrangements. Both parties are very connected to the minor child.

44. Both parties are fit and proper persons to have custody of the minor child. It is in the child's best interest to be placed in the primary physical custody of the Plaintiff-Mother, with the Defendant-Father having secondary physical custody by way of visitation.

We hold that the trial court's findings demonstrate its evaluation of a complex and unusual domestic situation and reflect appropriate awareness of the possible dangers to the child of travel to Malawi. In the decretal portion of its order the trial court further demonstrated its concern for the child's health and safety by directing in relevant part that:

6. During the times that the minor child is in the custody of the Defendant, it is at the Defendant's discretion whether he wants to have the visit take place in Canada or Malawi. If he chooses to bring the minor child to Malawi, Defendant is to take all necessary precautions that have previously been taken for protection of the child.

7. Plaintiff is to have the minor child vaccinated in order to prepare for his trip to Africa, if the Defendant shall choose to exercise his visitation in Malawi.

. . .

> 14. Both parties shall keep the other party apprised of the minor child's medical conditions, treatment, and any other relevant information pertaining to the child's wellbeing and activity.
>
> . . .
>
> 20. Each party shall have direct access to the child's doctor, dentist or other physical or mental health care provider. . . as if the parent were the sole custodian of the child. . . .
>
> . . .
>
> 22. Medical care providers, educational personnel and any other person deemed by law to have a confidential relationship to the minor child as patient or pupil are hereby authorized to discuss with both Plaintiff and Defendant all matters regarding the child's health, education, religious rearing and general welfare as if he or she was the full legal custodian of the child.
>
> 23. Each party shall promptly inform the other of any serious injury or illness sustained by the child requiring medical treatment. Each party shall inform the other of any medical or health problem that arose while the child was in their respective custody. . . .

Plaintiff asserts, however, that the trial court's "findings of fact do not support the trial court's ultimate decision that it is in the best interest of the minor child to travel to Malawi." We disagree with plaintiff's premise that the trial court's "ultimate decision" was that "it is in the best interest of the minor child to travel to Malawi." The trial court's "ultimate decision" was that it was in the child's best interest for his parents to have shared custody, with plaintiff having primary physical custody and defendant secondary physical custody with visitation privileges. Plaintiff also argues that the trial court's "ultimate" findings of fact are not supported by its "evidentiary" findings of fact. As discussed above, our task is to determine whether the trial court's unchallenged findings of fact support its conclusions of law. We conclude that the "ultimate finding" that is challenged by plaintiff is supported by the trial court's other findings of fact. Plaintiff identifies the following as "ultimate" findings of fact:

> 29. The Court believes that Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi.
>
> 43. Both parties are excellent parents and both have provided exceptional care for the minor child. Both parties have strong support systems from family and friends. Both parties had adequate housing arrangements. Both parties are very connected to the minor child.
>
> 44. Both parties are fit and proper persons to have custody of the minor child. It is in the child's best interest to be placed in the primary physical custody of the Plaintiff-Mother, with the Defendant-Father having secondary physical custody by way of visitation.

Plaintiff has not made any arguments challenging Findings Nos. 43 or 44. Plaintiff's appeal is instead focused exclusively on Finding No. 29, in which the trial court found that "Defendant will provide carefully for the protection and safety of the minor child if visitation is allowed in Malawi." We conclude that this finding is amply supported by other findings tending to show that defendant is a person of good moral character who has assiduously sought to exercise his right to visitation and who has several years of experience with the conditions in Malawi. While we appreciate plaintiff's concerns about the child's health and safety, we conclude that the trial court's findings of fact reflect its consideration of this issue and support its conclusions of law.

Plaintiff also contends that in assessing whether the trial court's findings of fact support its conclusions of law we should apply the factors that are used to evaluate cases in which one parent seeks to permanently relocate a child. Plaintiff has not articulated a rationale for treating visitation of one or two months as the equivalent of a permanent relocation, and we conclude that we do not need to determine this issue as if it were a permanent relocation. We hold that plaintiff is not entitled to relief on the basis of this argument.

C. Visitation Schedule

[2] Plaintiff argues next that the trial court abused its discretion by ordering a visitation schedule of alternating periods of a month with defendant followed by two months with plaintiff and by directing that when the minor child, who was eighteen months old at the time of the hearing, begins kindergarten, defendant will then have visitation during the school's summer break and during the winter and spring breaks.

Plaintiff contends that this schedule is so "harsh" and "arbitrary" that it constitutes an abuse of discretion. We disagree.

The decretal portion of the trial court's order for permanent child custody provides in relevant part that:

> 4. The visitation schedule for the minor child will consist of one month custodial period with Defendant-Father, followed by two months of custodial time with Plaintiff-Mother. This schedule will continue until the summer before the minor child is scheduled to begin kindergarten.
>
> . . .
>
> 8. When the minor child is scheduled to start school and for the summer prior to school commencing, during the summer every year the Defendant will have custodial time with the minor child from the day after school ends for the summer until one week (consisting of seven (7) days) prior to when school starts. For every year thereafter, Defendant will have custodial time with the minor child from the day after school is released for the year until the one week prior to when school recommences.
>
> 9. In addition to the summer visitation, after the minor child starts school, the Defendant will exercise custodial time with the minor child for Christmas Break and Spring Break every year from the day school recesses until the day before school recommences.

On appeal, plaintiff contends that the visitation schedule is so arbitrary that it "could not have been the result of a reasoned decision." Plaintiff does not, however, challenge the trial court's conclusion that "[d]efendant is a fit and proper person to exercise secondary care and custody of the minor child, by way of visitation." Nor does plaintiff dispute the existence of evidence to support the trial court's finding that:

> 43. Both parties are excellent parents and both have provided exceptional care for the minor child. Both parties have strong support systems from family and friends. Both parties [have] adequate housing arrangements. Both parties are very connected to the minor child.

The trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child

and both of his parents. As discussed above, to achieve this goal the trial court was necessarily required to deviate from the most commonly employed custody schedules. Plaintiff's appellate arguments fail to acknowledge the value in the child's relationship with defendant. Thus, plaintiff describes the visitation schedule as "removing [the child] from his home and friends" during every period of visitation with defendant, without considering that the child could benefit from having a home and friends with both plaintiff and defendant. We conclude that, rather than being arbitrary, the visitation schedule was an appropriate response to the parties' unusual living situation.

Plaintiff also speculates that in the future the visitation schedule may prove incompatible with extracurricular activities in which child might participate. For example, plaintiff contends that if the child were to play football or soccer in high school, the visitation schedule would interfere with summer tryouts and practice. Given that the child is not yet three years old, we decline to speculate on his possible activities or schedule in high school. Moreover:

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a "substantial change of circumstances affecting the welfare of the child" warrants a change in custody.

Shipman v. Shipman, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (quoting *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899). See also N.C. Gen. Stat. § 50-13.7(a) ("an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."). If the child's future high school activities render a change of visitation advisable, plaintiff may seek a modification of the visitation schedule at that time.

Plaintiff also argues that testimony from her expert witness would have supported a different schedule. It is, however, the "duty of the trial judge 'to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' 'It is not the function of this Court to reweigh the evidence on appeal.' " *Sauls v. Sauls*, __ N.C. App. __, __, 763 S.E.2d 328, 330 (2014) (quoting *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted), and *Garrett v. Burris*, __ N.C. App. __ , __ , 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013)).

We hold that the trial court did not err in its permanent child custody order and that its order should be

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, PLAINTIFF
v.
STATE OF NORTH CAROLINA AND THE METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA14-1255

Filed 6 October 2015

1. Cities and Towns—public water system—challenge to legislation—standing

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the City had standing to challenge the constitutionality of the legislation. The Court of Appeals rejected the State's argument to the contrary because the City had not accepted any benefit from the legislation.

2. Cities and Towns—public water system—challenge to legislation—local act

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation was a local act related to health, sanitation, or non-navigable streams in violation of Article II, Sections 24(1)(a) and (e) of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue.

3. Cities and Towns—public water system—challenge to legislation—law of the land

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated the law of the land clause in

Article I, Section 19 of the state constitution. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue.

4. Cities and Towns—public water system—challenge to legislation—condemnation

Where the General Assembly enacted legislation requiring the City of Asheville to cede ownership and control of its public water system to another political subdivision, the trial court erred by concluding that the legislation violated Article I, Sections 19 and 35 of the state constitution, as an invalid exercise of power to take or condemn property. The Court of Appeals directed the trial court on remand to enter summary judgment in favor of the State on this issue.

Appeal by Defendants from "Memorandum of Decision and Order Re: Summary Judgment" entered 9 June 2014 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 June 2015.

Parker, Poe, Adams & Bernstein LLP, by Daniel G. Clodfelter, City Attorney for the City of Asheville, by Robin T. Currin and Robert W. Oast, Jr., Long, Parker, Warren, Anderson & Payne, P.A., by Robert B. Long, Jr., and Moore & Van Allen PLLC, by T. Randolph Perkins, for the Plaintiff-Appellee.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General I. Faison Hicks, for the Defendant-Appellant.

Cauley Pridgen, P.A., by James P. Cauley, III, and Gabriel Du Sablon, for Amicus Curiae, the City of Wilson.

Kimberly S. Hibbard and Gregory F. Schwitzgebel, III, for Amicus Curiae, the North Carolina League of Municipalities.

DILLON, Judge.

The City of Asheville ("Asheville") commenced this action against the State of North Carolina, challenging the constitutionality of certain legislation enacted by our General Assembly in 2013. A provision in this legislation requires Asheville to cede ownership and control of its public water system to another political subdivision. The trial court entered an

order enjoining this involuntary transfer, concluding that the legislation violated the North Carolina Constitution.

We affirm the trial court's conclusion that Asheville has standing to challenge the authority of the General Assembly in this matter. We reverse the court's conclusions regarding the legislation's constitutionality and its injunction and remand the matter for further proceedings consistent with this opinion.

I. Background

The General Assembly has empowered municipalities to own and operate public water systems and public sewer systems and to serve customers both inside and outside of their corporate limits. N.C. Gen. Stat. § 160A-312.

Asheville is a municipality which owns and operates a public water system (the "Asheville Water System"). Asheville, however, does not operate a public sewer system. Rather, the public sewer system is owned and operated by a metropolitan sewerage district (an "MSD").[1] Like a municipality, an MSD is a type of political subdivision authorized by the General Assembly. N.C. Gen. Stat. § 162-64, *et seq*.

The relationship between Asheville and its water customers living outside of its corporate limits has historically been quite litigious, with many disputes resolved through legislation from our General Assembly. *See Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958); *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

In 2013, our General Assembly enacted legislation (the "Water/Sewer Act") which withdraws from Asheville the authority to own and operate the Asheville Water System and transfers the System to the Buncombe County MSD as follows:

The Water/Sewer Act creates a new type of political subdivision known as a *metropolitan water and sewerage district* (an "MWSD"), empowered to run both a public water system and a public sewer system within a defined jurisdiction. An MWSD may be formed either *voluntarily or by operation of law*. An MWSD is formed voluntarily when two or more political subdivisions (*e.g.*, cities and MSD's) consent to

1. This MSD, known as the Metropolitan Sewerage District of Buncombe County, is the nominal defendant in this action.

form an MWSD to consolidate the governance of the public water and sewer systems in their region. N.C. Gen. Stat. § 162A-85.2.

A provision in the Water/Sewer Act (the "Transfer Provision") – the provision which is at the heart of this litigation – allows for the formation of an MWSD by operation of law. This provision states that the public *water* system belonging to a municipality or other political subdivision which meets certain criteria and which happens to operate in the same county that an MSD operates a public *sewer* system *must be transferred* to that MSD, upon which the MSD converts to an MWSD. *See* 2013 N.C. Sess. Laws 50, §§ 1(a)-(f), as amended by 2013 N.C. Sess. Laws 388, § 4.

Though the Transfer Provision does not *expressly* reference Asheville by name, the *only* public water system which currently meets all of the Transfer Provision's criteria for a forced transfer to an MSD is the Asheville Water System.

Asheville commenced this action, challenging the legality of the Transfer Provision on several grounds. The State moved to dismiss, contending that Asheville lacked standing to challenge the General Assembly's authority to enact the legislation. Also, both parties filed cross motions for summary judgment.

Following a hearing, the trial court entered an order recognizing Asheville's standing. The trial court enjoined the application of the Transfer Provision, concluding that it violated our state constitution on *three* grounds.

The State timely appealed.

II. Standard of Review

As this case involves the interpretation of a state statute and our state Constitution, our review is *de novo*. *See In re Vogler*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012).

III. Asheville's Standing

[1] The trial court concluded that Asheville has standing to challenge the authority of the General Assembly to enact the Transfer Provision. We agree.

Our Supreme Court has expressly held that "municipalities [have] standing to test the constitutionality of acts of the General Assembly." *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 790, 488 S.E.2d 144, 146 (1997) (citing *City of New Bern v. New Bern-Craven County Bd.*

of Educ., 328 N.C. 557, 402 S.E.2d 623 (1991) and *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987)).

In challenging Asheville's standing, the State cites *In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974), in which our Supreme Court held that a certain county lacked standing to challenge the constitutionality of a provision contained in a particular statute. However, the Court explained in *Town of Spruce Pine*, *supra*, that its holding in *Martin* was *not* that political subdivisions lack the authority to challenge the constitutionality of a statute *generally*, but rather that a political subdivision which *accepts the benefits* of part of a statute lacks standing to challenge another part of that same statute. *Town of Spruce Pine*, 346 N.C. at 790, 488 S.E.2d at 146 (distinguishing *Martin*). Here, Asheville has standing because it has not accepted any benefit from the 2013 Water/Sewer Act.

IV. Constitutionality of the Water/Sewer Act

The trial court held that the Transfer Provision was invalid under our North Carolina Constitution based on three separate grounds:

(1) the Transfer Provision is a "local law" relating to "health," "sanitation" and "non-navigable streams," in violation of *Article II*, *Section 24*;

(2) the Transfer Provision violates Asheville's rights under the "law of the land" clause found in *Article I*, *Section 19*; and

(3) the Transfer Provision constitutes an unlawful taking of Asheville's property without just compensation in violation of *Article I*, *Sections 19* and *35*.

We disagree and hold that the Transfer Provision does not violate these constitutional provisions.[2]

2. The trial court refused to rule on a fourth basis in support of the injunction, namely, that the Transfer Provision unlawfully impairs Asheville's contractual obligations with its bondholders who provided financing for its public water system, in violation of *Article I*, *Section 10* of the United States Constitution; *Article I*, *Section 19* of the North Carolina Constitution; and N.C. Gen. Stat. § 159-93. However, Asheville has not presented any argument regarding this fourth ground as "an alternative basis in law for supporting the [injunction]," N.C. R. App. P. 10(c), and, therefore, it is not preserved.

A. The General Assembly has plenary power regarding the political subdivisions in our State, except as restricted by the state and federal constitutions.

The plenary police power of the State is "vested in and derived from the people," *N.C. Const. Article I, § 2*; and "an act of the people *through their representatives in the legislature* is valid unless prohibited by [the State] Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (emphasis added). *See also Hart v. State*, ___ N.C. ___, ___, 774 S.E.2d 281, 287 (2015) (stating that the North Carolina Constitution "is not a grant of power, but [rather] *a limit* on the otherwise plenary police power of the State"); *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975) (stating that "[a]n act of our General Assembly is legal when [the North Carolina] Constitution contains no prohibition against it").

The General Assembly's power includes the authority to organize and regulate the powers of our State's municipalities and other political subdivisions. *See N.C. Const. art. VII, §1* (recognizing that the General Assembly has the power to regulate our towns and cities "except as [] prohibited by [our state] Constitution"). Our Supreme Court has repeatedly recognized this power. For example, in two cases in which Asheville was a party, the Court stated that the powers of a municipality "may be changed, modified, diminished, or enlarged [by the General Assembly, only] subject to the constitutional limitations," *Candler v. City of Asheville*, 247 N.C. 398, 407, 101 S.E.2d 470, 477 (1958), and that the authority accorded a municipality "may be withdrawn entirely at the will or pleasure of the [General Assembly]," *Rhodes v. Asheville*, 230 N.C. 134, 140, 52 S.E.2d 371, 376 (1949). *See also In re Ordinance*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978) ("Municipalities have no inherent powers; they have only such powers as are delegated to them by [our General Assembly]"); *Highlands v. Hickory*, 202 N.C. 167, 168, 162 S.E. 471, 471 (1932) ("[Municipalities] . . . are the creatures of the legislative will, and are subject to its control").

Here, the General Assembly has sought to exercise its power over political subdivisions by enacting the Transfer Provision, which (1) creates a new political subdivision in Buncombe County (an MWSD), (2) withdraws from Asheville authority to own and operate a public water system, and (3) transfers Asheville's water system to the MWSD, all without Asheville's consent and without compensation to Asheville.

Early last century, our Supreme Court recognized our General Assembly's power to withdraw from the City of Charlotte its authority

to operate its public water system and to transfer this system to a new political subdivision:

> It is clear that the Legislature may, in aid of municipal government or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards and confer upon them such powers and duties as in its judgment may seem best. . . . The Legislature has frequently exercised the power conferred by the Constitution by establishing boards of health in towns and cities, school boards and such others as may be deemed wise as additional government agencies. *We do not understand that this power is questioned, or that the title to the [public water system] purchased by [Charlotte] did not pass to and vest in the board of water commissioners established by the act [of the Legislature].*

Brockenbrough v. Board of Water Comm'rs., 134 N.C. 1, 17, 46 S.E. 28, 33 (1903). The Court recognized that the waterworks of a municipality are, in fact, "held in trust for the use of the city." *Id.* at 23, 46 S.E. at 35. Additionally:

> There is no prohibition . . . against the creation by the Legislature of every conceivable description of corporate authority and to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for example, there is nothing in the Constitution of this State to prevent the Legislature from placing the police department of [a municipality] or its fire department or its waterworks under the control of an authority which may be constituted for such purpose.

Brockenbrough, 134 N.C. at 18, 46 S.E. at 33. The Court noted that even the city of Charlotte, the plaintiff in *Brockenbrough*, "conced[ed] the power of the Legislature to establish [a separate] board of water commissioners and to transfer to the said board the [waterworks] property of the city." *Id.* at 18, 46 S.E. at 33.

Accordingly, *unless prohibited by some provision in the state or federal constitutions*, our General Assembly has the power to create a new political subdivision, to withdraw from Asheville authority to own and operate a public water system, and to transfer Asheville's water system to the new political subdivision.

B. The three constitutional restrictions on the General Assembly's power cited by the trial court do not apply to the enactment of the Transfer Provision.

Asheville argues that the trial court correctly concluded that the Transfer Provision violates our state constitution. In our *de novo* review of the trial court's conclusions, we are guided by the following:

Our courts have the power to declare an act of the General Assembly unconstitutional. *See Hart*, ___ N.C. at ___, 774 S.E.2d at 284; *Bayard v. Singleton*, 1 N.C. 5 (1787).

We must not declare legislation to be unconstitutional unless "the violation is *plain and clear*," *Hart*, ___ N.C. at ___, 774 S.E.2d at 284 (emphasis added). We are to "indulge every presumption in favor of [an act's] constitutionality" and that "all reasonable doubt will be resolved in favor of its validity." *Painter*, 288 N.C. at 177, 217 S.E. at 658.

We are not to be concerned with the "wisdom and expediency" of the legislation, but whether the General Assembly has the "power" to enact it. *In re Denial*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). As our Court has recognized in an opinion authored by Judge (now Chief Justice) Mark Martin, "courts have no authority to inquire into the *motives* of the [General Assembly] in the incorporation of [a] political subdivision[.]" *Bethania Town v. City of Winston-Salem*, 126 N.C. App. 783, 786, 486 S.E.2d 729, 732 (1997) (emphasis added).

And, finally, the burden in this case rests with Asheville to show beyond a reasonable doubt that the Transfer Provision violates some constitutional provision.

We now address the three constitutional grounds relied upon by the trial court in striking down the Transfer Provision.

1. Article II, Section 24 – Prohibition against certain types of local laws.

[2] Asheville argues, and the trial court concluded, that the Transfer Provision violates *Article II, Section 24(1)(a)* and *(e)* of our state constitution, which prevents the General Assembly from enacting certain types of local laws. We disagree.

Taking effect in 1917, *Article II, Section 24* restricts the otherwise plenary power of our General Assembly to enact so-called "local" laws, by declaring void any "local" law concerning any of 14 "prohibited subjects"

enumerated in that provision. *N.C. Const. art. II, § 24(1)(a)-(n)*. Therefore, a law violates this constitutional provision *only* if it is deemed "local" *and* if it falls within the ambit of one of the 14 "prohibited subjects."

In the present case, the trial court held that the Transfer Provision is a local law and that it falls within the ambit of two "prohibited subjects": Laws "relating to health [or] sanitation" and laws "relating to non-navigable streams[.]" *N.C. Const. art. II, § 24(1)(a), (e)*.

Our Supreme Court has stated that a law is either "general" or "local," but there is "no exact rule or formula" which can be universally applied to make the distinction. *Williams v. Blue Cross*, 357 N.C. 170, 183, 581 S.E.2d 415, 425 (2003). However, in the present case, we need not reach whether the Transfer Provision constitutes a "local law." Rather, we hold that it is not *plain and clear* and *beyond reasonable doubt* that the Transfer Provision falls within the ambit of either prohibited subject identified by the trial court.

Seven years ago, our Court grappled with this issue in a case involving these same parties and a constitutional challenge of three statutes regulating the Asheville Water System. *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

In the 2008 case, Asheville argued that every law which concerns a water or sewer system "*necessarily* relate[s] to health and sanitation" within the ambit of *Article II, Section 24(1)(a)*. *City of Asheville*, 192 N.C. App. at 32, 665 S.E.2d at 126. Writing for this Court, our former Chief Judge John Martin rejected Asheville's argument, holding that "the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution." *Id.* at 37, 665 S.E.2d at 129.

Rather, we concluded that our Supreme Court precedent instructs that a local law is not deemed to be one "relating to health [or] sanitation" unless (1) the law plainly "state[s] that *its purpose is to regulate* [this prohibited subject]," or (2) the reviewing court is able to determine "that the purpose of the act is to regulate [this prohibited subject after] careful perusal of the entire act". *Id.* at 33, 665 S.E.2d at 126 (quoting *Reed v. Howerton*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924)). We noted that the best indications of the General Assembly's purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *City of Asheville*, 192 N.C. App. at 37, 665 S.E.2d at 129 (*quoting State ex rel. Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980)).

Following *Reed* and our 2008 case, we first look to see if the Water/Sewer Act expressly states that its purpose is to regulate health or sanitation, and conclude that it does not. Rather, the Act's *stated* purpose is to address concerns regarding the quality of the service provided to the customers of public water and sewer systems:

> Whereas, regional water and sewer systems provide reliable, cost-effective, *high-quality* water and sewer *services* to a wide range of residential and institutional customers; and
>
> Whereas, in an effort to ensure that the citizens and businesses of North Carolina are provided with the *highest quality services*, the State recognizes the value of regional solutions for public water and sewer for large public systems; Now, therefore,
>
> The General Assembly of North Carolina enacts . . . .

2013 N.C. Sess. Laws 50 (emphasis added).

We next peruse the entire Water/Sewer Act to determine whether it is plain and clear that the Act's purpose is to regulate health or sanitation. We find that there are no provisions in the Act which "contemplate[] . . . prioritizing the [Asheville Water System's] health or sanitary condition[.]" *See City of Asheville*, 192 N.C. App. at 36-37, 665 S.E.2d at 128. In fact, a provision in the Act allows for the "denial or discontinuance of [water and sewer] service" by an MWSD based on a customer's non-payment, *see* N.C. Gen. Stat. § 162A-85.13(c), which, as in the 2008 case, belies Asheville's argument that the purpose of the Act relates to health and sanitation. *See City of Asheville*, 192 N.C. App. at 35, 665 S.E.2d at 127. Rather, the provisions in the Water/Sewer Act appear to prioritize concerns regarding the governance over water and sewer systems and the quality of the services rendered. *See* N.C. Gen. Stat. § 162A-85.1, *et seq.*

Following this same analysis, we hold that the Water/Sewer Act does not fall within the ambit of the phrase "relating to non-navigable streams." The mere implication in legislation of a public water system which happens to derive water from a non-navigable stream "does not necessitate a conclusion that [the legislation] relates to [non-navigable streams] in violation of the Constitution." *City of Asheville*, 192 N.C. App. at 37, 665 S.E.2d at 129. There is nothing in the Water/Sewer Act which suggests that its purpose is to address some concern regarding a non-navigable stream.

Asheville cites five cases from our Supreme Court to argue that the Transfer Provision is a law "relating to health [or] sanitation," which we now address:

The most compelling of these case is *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928). *Drysdale* appears to stand for the proposition that an act which establishes a sanitary district (to provide public water/sewer service) is a local law *and* relates to health and sanitation. However, on closer look, the *Drysdale* Court only bases its ruling on the fact that the act is a local law – the Court never makes any determination regarding which of the 14 "prohibited subjects" was implicated by the act; and, therefore we assume that this issue was not put before the Court.

We read *Drysdale* in conjunction with *Reed*, *supra*. Like *Drysdale*, *Reed* is a 1920's case in which our Supreme Court addresses the constitutionality of a statute creating sanitary districts. *Reed*, 188 N.C. at 42, 123 S.E. at 479-80. However, unlike *Drysdale*, the Court in *Reed* held that the act in question, which (ironically) created sewer districts in Buncombe County, was constitutional. *Id.* at 45, 123 S.E. at 481-82. Specifically, the Court addressed the issue of whether the act was one "relating to health [or] sanitation," holding that *it was not*, because the language in the act did not suggest this to be the act's purpose, but rather the act merely sought to create political subdivisions through which sanitary sewer service could be provided. *Id.* at 44, 123 S.E. at 481. The Court then addressed *separately* the issue of whether the act was local, though curiously holding that the act was not local because it applied to the entire county. *Id*. at 45, 123 S.E. at 481-82.

In any event, both cases provide insight on the issue as to whether a law is "local" or "general," and, admittedly, the Court's conclusion in *Drysdale* on this issue is more consistent with recent holdings from that Court, while the conclusion on the issue reached in *Reed* – that a law is "general" if it applies throughout one entire county – appears to be somewhat of an outlier. However, *Reed* is more instructive than *Drysdale* in determining whether an act "relat[es] to health [or] sanitation." *Id.* at 44, 123 S.E. at 481. The Court in *Reed* takes this issue head-on, while in *Drysdale* the Court never addresses the issue. Accordingly, as our Court did in 2008, we follow *Reed* on the issue as to whether a law relates to health or sanitation.

The other cases cited by Asheville do not mandate that we reach a contrary result in the present case. Three of these cases are distinguishable because they deal with legislation that empowers a political

subdivision with authority *to enforce health regulations* in a county. *See City of New Bern v. Bd. of Educ.*, 338 N.C. 430, 437-38, 450 S.E.2d 735, 739-40 (1994) (authorizing Craven County to perform building inspections); *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951) (creating a city-county board of health in Forsyth County); *Sams v. Bd. of County Comm'rs*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940) (creating a county board of health in Madison County). In the present case, however, the Transfer Provision does not empower anyone to enforce health regulations, nor does it impose any health regulations on the Asheville Water System. Rather, similar to the act at issue in *Reed*, it merely creates the political subdivision through which public water and sewer systems may be provided in Buncombe County. *Reed*, 188 N.C. at 44, 123 S.E. at 481.

The fifth case cited by Asheville, *Lamb v. Bd. of Educ.*, is also not controlling. 235 N.C. 377, 70 S.E.2d 201 (1952). In *Lamb*, our Supreme Court declared unconstitutional an act which imposed a duty on the Randolph County Board of Education to provide "a sewerage system and an adequate water supply" for its schools. *Id.* at 379, 70 S.E.2d at 203. The Court held that this legislation *did* relate to health and sanitation because it was clear that "its sole purpose" was to make sure that school children in Randolph County had access to "healthful conditions" while at school. *Id.* The Water/Sewer Act, however, does not require any political subdivision to continue operating a water or sewer system.

2. Article I, Section 19 – "Law of the Land" Clause/Equal Protection

[3] Asheville argues, and the trial court concluded, that the Transfer Provision violated the "law of the land" clause contained in *Article I, Section 19* because there is no "rational basis" in treating Asheville differently from other municipalities operating public water systems and because there is no "rational basis" in transferring Asheville's water system to another political subdivision. We disagree.

The trial court cites *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), as authority for its holding. In *Asbury*, our Supreme Court stated that our General Assembly "is under the same constitutional restraints that are placed upon it in respect of private corporations" when exercising power regarding a municipality's exercise of a proprietary function. *Id.* at 253, 78 S.E. at 149. However, we do not read *Asbury* as restricting the General Assembly's authority to *withdraw* authority from a political subdivision to engage in a proprietary function, a power recognized in *Article VII, Section 1* and in a number of other Supreme Court decisions. Rather, *Asbury* addresses the limitations to the General Assembly's

power to *manage* certain aspects of a municipality's water system, standing for the propositions that (1) the General Assembly has the authority *to empower* a municipality to operate a public water system (or other proprietary endeavor); (2) the General Assembly, however, cannot *compel* a municipality to operate a water system (or other proprietary endeavor); and (3) where a municipality which has been empowered *and* has decided to operate a public water system, the General Assembly may regulate but cannot otherwise "control the exercise of [] discretion by the municipality" in operating the system. *Id.* at 255, 78 S.E. at 150.

Our holding here is not at odds with *Asbury*. The Transfer Provision does not *compel* Asheville to operate a water system nor does it seek to interfere with Asheville's *discretion* in running a water system. Rather, the General Assembly is exercising its power to *withdraw* from Asheville its authority to own and operate a public water system. *See Candler*, 247 N.C. at 407, 101 S.E.2d at 477 (recognizing the General Assembly's power to "diminish" the powers of a municipality).

Asheville contends, and the trial court agreed, that the General Assembly had no "rational" basis for *singling out* Asheville in the Transfer Provision. Assuming that the Transfer Provision has this effect, we believe that the fact that the General Assembly irrationally singles out one municipality in legislation merely means that the legislation is a "local" law; it does not render the legislation unconstitutional, *per se*. *See City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 435-36, 450 S.E.2d 735, 738-39 (holding that a law is local if there is no "rational basis reasonably related to the objective of the legislation" for singling out the class to whom the law applies); *McIntyre v. Clarkson*, 254 N.C. 510, 519, 119 S.E.2d 888, 894 (1961) (establishing the "reasonable classification" method to determine whether a law is general or local). As previously noted, the General Assembly can enact a local law concerning municipalities so long as the law does not fall within one of the 14 prohibited subjects enumerated in *Article II*, *Section 24* of our state constitution. *See City of Asheville*, 192 N.C. App. at 32, 665 S.E.2d at 126 (sustaining statutes regulating the Asheville Water System though concluding that the singling out of Asheville was not based on any rational basis).

We are persuaded by decisions from the United States Supreme Court holding that municipalities do not have Fourteenth Amendment rights concerning acts of the legislature, *Ysursa v. Pocatello Educ. Assoc.*, 555 U.S. 353, 363 (2009) (holding that unlike a private corporation, a municipality "has no privileges or immunities under the federal

constitution which it may invoke in opposition to the will of its creator [the legislature]"), a rule which applies even when legislation affects a municipality's exercise of a proprietary function, such as operating a water system. *See Trenton v. New Jersey*, 262 U.S. 182, 190-91, 67 L. Ed. 937, 942 (1923) (holding that the distinction between a municipality acting "as an agent for the State for governmental purposes and as an organization to care for the local needs in a private or proprietary capacity . . . furnishes no ground to invoke [the Fourteenth Amendment of the United States]"); *see also Williams v. Baltimore*, 289 U.S. 36, 40, 77 L. Ed. 1015, 1020-21 (1933); *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (1979) (citing additional United States Supreme Court authority).

Finally, the trial court concludes that the Transfer Provision violates the "law of the land" clause because there is no rational basis between the purpose of the Act (to ensure that citizens and businesses are provided with the highest quality of services) and requiring the involuntary transfer of the Asheville Water System to an MWSD. The trial court lists reasons why it believes that the Transfer Provision will not accomplish a legitimate purpose. However, the State suggests a number of rational bases for the Transfer Provision. For instance, the Transfer Provision was included to provide better governance of the Asheville Water System, a system which has had a contentious history with customers residing outside Asheville's city limits: The Transfer Provision allows the Asheville Water System to be governed by a political subdivision whose representatives are selected from all areas served by the System, as opposed to being governed by Asheville's city council, which is chosen only by those living within Asheville's city limits. It is not our role to second-guess "the wisdom [or] expediency" of the Transfer Provision, as long as there is some rational basis in that provision to accomplish some valid public purpose. *See In re Denial*, 307 N.C at 57, 296 S.E.2d at 284.

Accordingly, we reverse the conclusion of the trial court that the Transfer Provision violates the "law of the land" clause in our state constitution.

3. Article I, Sections 19 and 35 – Taking of Asheville's Property

[4] Asheville argues, and the trial court held, that the Transfer Provision exceeded the State's authority to take property, or, in the alternative, to take property without paying just compensation in violation of *Article I*, *Sections 19* and *35* of our state constitution. We disagree.

Article I, *Section 19* of our state constitution states that no person shall be "deprived of . . . property, but by the law of the land," and *Article I*,

Section 35 states that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

The trial court concluded that the Transfer Provision violates the above cited sections in two respects: First, the Transfer Provision was "not a valid exercise of the sovereign power of the [General Assembly] to take or condemn property for a public use" because the transfer of Asheville's water system to the MSD would not result in any "change in the existing uses or purposes currently served by the [system]"; and *second*, even if the General Assembly had the power to "condemn" Asheville's water system, it deprived Asheville of its constitutional right to receive "just compensation."

On the first issue, we note that our Supreme Court has recognized the authority of our General Assembly to divest a city of its authority to operate a public water system and transfer the authority and assets thereof to a different political subdivision. *See Brockenbrough*, 134 N.C. at 19, 46 S.E. at 33 (recognizing that the waterworks of a municipality are, in fact, held "in trust for the use of the city").

Our United States Supreme Court has held that there is no constitutional prohibition against a State withdrawing from a municipality the authority to own and operate a public water system and transferring the municipality's system to another political subdivision "without compensation" to the municipality or "without the consent" of the municipality's citizens:

> The diversion of waters from the sources of supply for the use of the inhabitants of the State is a proper and legitimate function of the State. This function . . . may be performed directly [by the State]; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the State. . . .
>
> . . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies. . . . All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

Trenton v. New Jersey, 262 U.S. at 186, 67 L. Ed. at 940. *See also Hunter v. Pittsburgh*, 207 U.S. 161, 178-79, 52 L. Ed. 151, 159-60 (1907). The *Trenton* Court specifically addressed that its holding applied even to

State action concerning a municipality acting in a proprietary capacity. *Trenton*, 262 U.S. at 191, 67 L.E. at 943.

Our holding today is consistent with holdings from around the United States. As the treatise *McQuillan on Municipal Corporations* recognizes, "it is generally held that transferring property and authority by act of the legislature from [a city] to another where the property is still devoted to its original purpose, does not invade the vested rights of the city." *McQuillan*, sec. 4.133, Vol. 2. Indeed, the Minnesota Supreme Court has stated:

> "[a]s to property held in a proprietary or private capacity, in trust for the benefit of township inhabitants for certain designated purposes, the legislature may provide for the transfer thereof from the officers of such municipality to different trustees, with or without consent of the municipality and without compensation to it.

Bridgie v. Koochiching, 35 N.W.2d 537, 540 (1948). Likewise, the Pennsylvania Supreme Court has stated:

> The Commonwealth has absolute control over such agencies and may add to or subtract from the duties to be performed by them, or may abolish them and take property with which the duties were performed without compensating the agency thereof.

Chester County v. Commonwealth, 17 A.2d 212, 216 (1941). *See also Orleans Parish v. New Orleans*, 56 So.2d 280, 284; *Hickey v. Burke*, 69 N.E.2d 33 (1946) (Ohio court recognizing power to "relieve [a] municipality of [certain] duties and withdraw the power. If property has been acquired, it may shift the title and control to other agencies[.] . . . without compensation").

None of the cases cited by Asheville in its argument address the situation where the General Assembly acts to take the property of a municipality used to carry on a proprietary function and transfers it to another political subdivision to carry out the same function. For instance, *State Hwy. Comm'n v. Greensboro Bd. of Educ.*, 265 N.C. 35, 143 S.E.2d 87 (1965) and *Bd. of Transp. v. Charlotte Park & Rec. Comm'n*, 38 N.C. App. 708, 248 S.E.2d 909 (1978) merely stand for the proposition that where one governmental agency charged with building roads condemns the property of another agency who owns property for purposes unrelated to building roads, the condemning agency must pay just compensation.

Accordingly, we hold that the Transfer Provision does not constitute an unlawful taking without just compensation.

V. Conclusion

In conclusion:

We affirm the portion of the trial court's order denying the State's motion to dismiss, rejecting the State's argument that Asheville lacked standing or capacity to challenge the validity of the Transfer Provision.

We reverse the trial court's grant of summary judgment for Asheville on its first claim for relief, which declared that the Transfer Provision constitutes a local act relating to health, sanitation or non-navigable streams in violation of *Article II*, *Sections 24(1)(a)* and *(e)* of our state constitution. Specifically, we hold that, assuming it is a local act, it does not "relate to" health, sanitation, or non-navigable streams within the meaning of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its second claim for relief, which declared that the Transfer Provision violates the "law of the land" clause in *Article I*, *Section 19* of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its third claim for relief, which declared that the Transfer Provision violates *Article I*, *Sections 19* and *35* of our state constitution, as an invalid exercise of power to take or condemn property. We also reverse the trial court's grant of summary judgment on Asheville's sixth claim for relief, which, in the alternative to the injunction, awarded Asheville money damages for the taking of the Asheville Water System. We also reverse the trial court's denial of the State's motion for summary judgment on these claims, and direct the court on remand to enter summary judgment in favor of the State on these claims.

We reverse the trial court's order enjoining the enforcement of the Transfer Provision.

We do not reach any conclusion regarding Asheville's fourth and fifth claims for relief, in which Asheville contends that the enforcement of the Transfer Provision would impermissibly impair obligations of contract

in violation of our state and federal constitutions and in violation of N.C. Gen. Stat. § 159-93. The trial court made no rulings on these claims, and Asheville did not take advantage of Rule 10(c) of our Rules of Appellate Procedure, which allows an appellee to propose issues which form "an alternate basis in law for supporting the order[.]" Therefore, any argument by Asheville based on these claims for relief are waived.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

EMPLOYMENT STAFFING GROUP, INC., PLAINTIFF
v.
MONICA LITTLE A/K/A MONICA PHILLIPS THOMAS, DEFENDANT

No. COA15-171

Filed 6 October 2015

1. Contracts—non-compete covenant—parol evidence—contract silent on essential term

The Court of Appeals affirmed the trial court's preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. A payment of $100 to defendant in exchange for her signing the covenant not to compete rendered the covenant binding and enforceable. The parol evidence rule did not prohibit the trial court from considering parol evidence of the $100 consideration where the contract was silent as to this essential term.

2. Employer and Employee—non-compete covenant—$100 consideration—pressure to sign

The Court of Appeals affirmed the trial court's preliminary injunction order prohibiting defendant, a former employee of plaintiff, from engaging in certain competition with plaintiff. The court rejected defendant's argument that a $100 payment by plaintiff was insufficient consideration to support the covenant not to compete. Even though defendant may have felt pressure to sign the agreement in order to continue her employment, the court has enforced non-compete agreements in similar circumstances in absence of fraud.

Appeal by Defendant from order entered 22 December 2014 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 26 August 2015.

Harris & Hilton, P.A., by Nelson G. Harris, for Defendant-Appellant.

McGuireWoods LLP, by Jason D. Evans and Andrew D. Atkins, for Plaintiff-Appellee.

INMAN, Judge.

Monica Little ("Defendant") appeals the trial court's order granting Employment Staffing Group's ("Plaintiff's") motion for a preliminary injunction, contending that the consideration given for the covenant not to compete within the parties' employment agreement was illusory and inadequate. After careful review, we hold that a monetary payment to Defendant in exchange for her signing the Employment Agreement rendered the covenant binding and enforceable, and therefore affirm the decision below. In the context of a non-compete covenant, the parol evidence rule does not prohibit the trial court from considering parol evidence of consideration when the written contract is silent as to this necessary and essential term.

Factual and Procedural Background

On 13 June 2014, Defendant, who had been working for Plaintiff since September 2001, signed an Employment Agreement containing a covenant titled "Limitation on Competition" (the "non-compete covenant"). The non-compete covenant prohibited Defendant from performing for any competing business within a 50-mile radius of Plaintiff's base locations for a period of one year following Defendant's termination any "Protected Duties," defined as those duties Defendant performed for Plaintiff in the two years before her termination. The non-compete covenant also contained a "Limitation on Solicitation" provision, which prohibited Defendant from soliciting Plaintiff's customers for a period of two years following her termination.[1] Although the non-compete

1. The Employment Agreement also contained a provision prohibiting Defendant from disclosing confidential information and trade secrets, and the trial court's order granting Plaintiff's preliminary injunction enforced this provision in addition to the non-compete covenant. However, Defendant's argument on appeal focuses solely on the non-compete covenant and whether it was supported by valuable consideration, a separate analysis from that involved in determining the likelihood of success on a misappropriation of trade secrets claim. *Compare Barr-Mullin, Inc. v. Browning*, 108 N.C. App. 590, 596, 424 S.E.2d 226, 230 (1993) (analyzing the plaintiff's likelihood of success on its

covenant does not contain any discussion of consideration, it is undisputed that Plaintiff's human resources director told Defendant that she would be paid $100 for executing the Employment Agreement and that, on 17 June 2014, $100 was directly deposited by Plaintiff into Defendant's bank account.

On 17 November 2014, Plaintiff filed suit against Defendant, claiming breach of the Employment Agreement, conversion, tortious interference with contractual relations, misappropriation of trade secrets, and unfair and deceptive trade practices. The complaint sought compensatory, punitive, and treble damages as well as injunctive relief. On 25 November 2014, Plaintiff moved for a preliminary injunction. According to the allegations in Plaintiff's Motion for a Preliminary Injunction, Defendant had left Plaintiff's employ and shortly thereafter begun soliciting Plaintiff's customers to her new employer, Atlantic Staffing Consultants. Plaintiff's Motion came on for hearing on 5 December 2014.[2] After hearing arguments, Judge Bridges concluded that "there is a reasonable likelihood that [Plaintiff] will prevail on its claims" and entered an order prohibiting Defendant from:

> 2. Soliciting or having any further business contact, directly or indirectly, with Ultra-Mek, Inc., any other ESG customer, and any employees of any such company. . . .

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misappropriation of trade secrets by determining whether the plaintiff established a *prima facie* case of misappropriation by showing that: "(1) [the] defendant knows or should have known of the trade secret; and (2) [the] defendant has had a specific opportunity to acquire the trade secret"), *and VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510-11, 606 S.E.2d 359, 364 (2004) (clarifying that "[t]o plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur") (internal citation omitted), *with Horner Int'l Co. v. McKoy*, __ N.C. App. __, __, 754 S.E.2d 852, 856-58 (2014) (analyzing the likelihood of the plaintiff's success on his breach of a non-compete agreement by determining the validity of the non-compete agreement). Defendant's failure to advance any argument challenging the trade secret and confidential information provision of the injunctive order constitutes waiver of the issue on appeal. *See Hammond v. Saini*, __ N.C. App. __, __, 748 S.E.2d 585, 592 n.5 (2013).

2. In its injunction order, the trial court noted that previously, on 26 November 2014, it had entered an injunction prohibiting Defendant from soliciting Plaintiff's customers and competing with Plaintiff. However, despite receiving notice of the preliminary injunction hearing, Defendant had failed to appear. Based on his "concern about entering a preliminary injunction that would operate during the pendency of this matter without providing [Defendant] with an opportunity to request an additional hearing[,]" Judge Bridges allowed Defendant to request that the November injunction be dissolved for good cause, which she did, and treated the 5 December 2014 hearing on Defendant's Motion for Relief as a hearing on Plaintiff's Motion for a Preliminary Injunction, giving Defendant the opportunity to argue that Plaintiff was not likely to succeed on its asserted claims.

> 3. Competing or attempting to compete with ESG in the staffing service industry on her own behalf or on behalf of any other employment staffing firm, directly or indirectly, by performing any duties that she performed within the 730 days immediately preceding her termination from ESG on July 21, 2014. . . .

Defendant timely appeals.

Appealability

"A preliminary injunction is interlocutory in nature, which means that an order issuing a preliminary injunction cannot be appealed prior to [a] final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment." *Copypro, Inc. v. Musgrove*, __ N.C. App. __, __, 754 S.E.2d 188, 191 (2014) (internal quotation marks omitted). However, as our Supreme Court has noted:

> where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, because this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983); *see also Horner Int'l Co. v. McKoy*, __ N.C. App. __, __, 754 S.E.2d 852, 855 (2014). Because this case presents a time-sensitive issue as to both Plaintiff's and Defendant's rights under the Employment Agreement and has a substantial effect on their livelihoods, we address the merits of Defendant's appeal.

Standard of Review

> The standard of review from a preliminary injunction is essentially *de novo*. Thus, on appeal from an order of a superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. Nevertheless, a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous.

Horner Int'l Co., __ N.C. App. at __, 754 S.E.2d at 855 (internal citations and quotation marks omitted).

> As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P., 308 N.C. at 401, 302 S.E.2d at 759-60 (internal citation omitted).

Analysis

Defendant contends that Plaintiff is not likely to succeed on the merits because the non-compete covenant was unenforceable due to lack of consideration. Specifically, Defendant alleges that the $100 Plaintiff paid her was illusory because it was not mentioned in the non-compete covenant or anywhere else in the Employment Agreement. Furthermore, Defendant, distinguishing *Hejl v. Hood*, *Hargett & Associates*, *Inc.*, 196 N.C. App. 299, 303-305, 674 S.E.2d 425, 428-29 (2009), where this Court found $500 to constitute adequate consideration, argues that the parties in the present case did not contract "at arms length [sic]" because Defendant was already an employee at the time she signed the Employment Agreement and entering into the Employment Agreement "was a condition to continued employment."

A covenant not to compete is valid if the covenant is: "(1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy." *Hejl*, 196 N.C. App. at 303-04, 674 S.E.2d at 428 (internal quotation marks omitted). "[I]f an employment relationship already exists without a covenant not to compete, any such future covenant must be based upon new consideration." *Milner Airco*, *Inc. v. Morris*, 111 N.C. App. 866, 869, 433 S.E.2d 811, 813 (1993).

I. Illusory Consideration

The Employment Agreement specified in writing all essential terms of the non-compete covenant except consideration. However, contemporaneous with the execution of the written contract, the parties entered into a separate oral agreement as to the amount of consideration

Plaintiff would pay Defendant for signing the non-compete agreement. Defendant relies on the Employment Agreement's merger clause that "[t]his [Employment] [A]greement embodies the entire agreement of the parties relating to the subject matter in this Agreement" to support her claim that the trial court is prohibited from considering any separate oral agreement as to consideration to determine whether the non-compete agreement is enforceable. Thus, the issue is whether the trial court could consider evidence of the parties' outside negotiations as to consideration even though the Employment Agreement contained a merger clause.

As our Court has noted, "merger clauses were designed to effectuate the policies of the Parol Evidence Rule; i.e., barring the admission of prior and contemporaneous negotiations on terms inconsistent with the terms of the writing. North Carolina recognizes the validity of merger clauses and has consistently upheld them." *Zinn v. Walker*, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987). The parol evidence of the consideration in the present case is not inconsistent with the terms of the Employment Agreement, but it is needed to establish a necessary element for a valid covenant not to compete. In other words, the evidence is necessary to show the existence of a complete contract. "The parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 436, 617 S.E.2d 664, 670 (2005) (internal quotation marks omitted). As our Supreme Court has clarified,

> [t]his rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. *The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol.*

Craig v. Kessing, 297 N.C. 32, 35, 253 S.E.2d 264, 265-66 (1979) (emphasis added).[3] In *Craig*, the contract at issue had to also be in writing, *see* N.C. Gen. Stat. § 22-2, similar to the written requirement for non-compete agreements.

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3. We note that our Supreme Court's decision appears to conflict with this Court's decision in *R.B. Cronland Bldg. Supplies, Inc. v. Sneed*, 162 N.C. App. 142, 146, 589 S.E.2d 891, 893 (2004). In *R.B. Cronland*, this Court concluded that the parol evidence rule prohibits the consideration of evidence "to supply a missing component of a contract." *Id.* There,

This Court has previously addressed limitations of the parol evidence rule in the employment contract context. *In Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984), the parties had an employment contract which was partly written and partly parol. They stipulated and admitted that there were significant and essential terms of the employment agreement that they had agreed upon but were not included in the written contract—specifically, a definite term for the duration of employment. *Id.* This Court noted that "[t]he parol evidence rule presumes finality with respect only to the written terms in the agreement. Other significant and essential terms, the presence of which was stipulated by the parties, can be established by using parol evidence without violating the rule." *Id.* Accordingly, the Court held that "the term of employment was properly established with parol evidence." *Id.*

Similarly, in *Beal v. K. H. Stephenson Supply Co., Inc.*, 36 N.C. App. 505, 509, 244 S.E.2d 463, 466 (1978), the parties had an employment contract where "the only element of an enforceable employment contract which [was] definite on the face of the paperwriting [was] the amount of compensation to be paid." Since the parties agreed that there were other terms that were not included in the written contract, including the employer's name and the employment duration, parol evidence establishing these missing terms was properly admitted. *Id.*

Here, since the Employment Agreement is *silent* as to consideration, an element necessary to form a binding non-compete agreement is absent—but that element is not precluded by any provision in the written agreement. Furthermore, both parties admitted that Plaintiff offered Defendant $100 to sign the non-compete covenant, and it is undisputed that Plaintiff actually paid Defendant $100. Consequently, as in *Hall* and *Beal*, the written non-compete covenant is not fully integrated, and the merger clause and parol evidence rule do not prohibit the trial court from considering the evidence showing the missing essential term of consideration—that Plaintiff paid Defendant $100 for signing the Employment Agreement. This Court has reached a similar conclusion in a case in which there was no signature on the signature line of the written non-compete agreement. *See New Hanover Rent-A-Car, Inc.*

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at issue was a guaranty contract that failed to identify a debtor and did not include a signature of a debtor. *Id.* This Court held that parol evidence of these missing elements was not admissible. *Id.* However, where there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion. *See Crawford v. Commercial Union Midwest Ins. Co.*, 147 N.C. App. 455, 459, n.5, 556 S.E.2d 30, 33 (2001). Thus, we are not bound by *R.B. Cronland* but, instead, must follow the rule enunciated in *Craig*.

v. Martinez, 136 N.C. App. 642, 646-47, 525 S.E.2d 487, 490-91 (2000) (considering parol evidence to determine whether an employee had signed a non-compete agreement and assented to its terms). In this case, we hold that Defendant's argument that the consideration was illusory because it was not provided for in the Employment Agreement is without merit.

II. Inadequate Consideration

Next, Defendant argues that the non-compete covenant was not supported by adequate consideration. This argument is refuted by well-established case law.

Defendant, citing *Hejl*, 196 N.C. at 304-305, 674 S.E.2d at 429, concedes that "[o]ur Courts have generally not evaluated the adequacy of the consideration for a non-competition agreement entered into after the employment relationship already exists, considering the parties to be the judges of the adequacy of the consideration." However, Defendant contends that because the parties in the instant case did not contract "at arms length [sic]," this Court is authorized to "judge the adequacy of the consideration." Defendant alleges that "arms length [sic]" transactions do not involve "pressure and duress." While it may be true that Defendant felt pressure to sign the non-compete covenant in order to continue her employment, this Court has enforced non-compete agreements under similar circumstances in the absence of fraud. *See generally Hejl*, 196 N.C. App. at 305, 674 S.E.2d at 429 (noting that "the parties dealt at arms length [sic]" even though the plaintiff worked for the defendant at the time he signed the non-compete agreement). Accordingly, we hold that Defendant's argument that this Court may invalidate the non-compete covenant based on the inadequacy of the $100 consideration is without merit.

Conclusion

For the reasons stated above and based on our review of the record and the applicable law, we affirm the preliminary injunction order.

AFFIRMED.

Judges CALABRIA and STROUD concur.

FOX v. JOHNSON

[243 N.C. App. 274 (2015)]

WILLIAM THOMAS FOX AND SCOTT EVERETT SANDERS, PLAINTIFFS
v.
MITCHELL JOHNSON, TIMOTHY R. BELLAMY, GARY W. HASTINGS, AND MARTHA T. KELLY, IN THEIR INDIVIDUAL CAPACITIES, DEFENDANTS

No. COA15-206

Filed 6 October 2015

1. Appeal and Error—appealability—denial of judgment on the pleading

Defendants' interlocutory appeal was properly before the Court of Appeals where the denial of their motion for judgment on the pleadings affected a substantial right. Defendants made a colorable assertion that the claim was barred by collateral estoppel.

2. Judges—one not overruling anther—Rule 12(c) and Rule 12(b)(6) motions

A Rule 12(c) order was not an improper "overruling" by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order where different materials and questions were considered.

3. Collateral Estoppel and Res Judicata—federal and state rule 12(b)(6)

The trial court erred by denying defendants' motion for judgment on the pleadings as to plaintiffs' malicious prosecution claims based on collateral estoppel where plaintiffs' Rule 12(b)(6) motion had been granted in federal court. The standard under Federal Rule 12(b)(6) is a different, *higher* pleading standard than mandated under the North Carolina General Statutes.

Appeal by Defendants from order entered 25 September 2014 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 26 August 2015.

Morrow Porter Vermitsky Fowler and Taylor PLLC, by John C. Vermitsky, for Plaintiffs.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson, Stuart H. Russell, and Lorin J. Lapidus, for Defendants.

STEPHENS, Judge.

In this appeal, we consider whether Plaintiffs' malicious prosecution claims under North Carolina law brought in Guilford County Superior Court are barred by the doctrine of collateral estoppel as a result of the dismissal under Federal Rule of Civil Procedure 12(b)(6) of certain federal law claims brought in Plaintiffs' earlier federal lawsuit against Defendants. Because we conclude that dismissal of federal claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same issues under state law in our State's courts, we affirm the trial court's order denying Defendants' motion to dismiss on the basis of collateral estoppel.

Factual and Procedural Background

This appeal arises from claims and counterclaims of racial discrimination, misconduct, and conspiracies by various factions in the Greensboro Police Department ("GPD") and the government of the City of Greensboro ("the City"). In simplified form, some African American GPD officers alleged that a secret unit of Caucasian GPD officers was targeting them for improper investigations based on their race, while some of the accused Caucasian officers denied those allegations and instead asserted that *they* were the victims of racially motivated false claims and criminal charges.

In June 2005, GPD Officer James Hinson and other African American GPD officers accused then-GPD Chief David Wray of using certain Caucasian officers of the Special Investigation Section ("SIS"), a subdivision of the GPD, to surveil and target African American GPD officers. Officially, the SIS was tasked with duties such as protecting celebrities who visited Greensboro, investigating allegations of criminal activities by GPD officers, and handling other sensitive police matters.[1]

Hinson alleged that one tool the SIS used in its supposed racial misconduct against African American GPD officers was a binder containing photographs of African American GPD officers known as the "black book." The SIS did in fact have a black binder which contained photo arrays of African American GPD officers, but SIS officers asserted that the photos were only those officers who had been on duty at the time of an alleged sexual assault by a uniformed African American GPD officer and that the binder was shown only to the victim of the alleged sexual assault as part of an SIS investigation into the matter.

1. Prior to June 2005, Hinson himself had been investigated by the SIS for alleged police misconduct.

After learning of Hinson's claims, Defendant Mitchell Johnson, who was employed by the City first as Assistant City Manager and later as City Manager, and who also served on the City Council, met with attorneys representing some of the African American GPD officers who made the allegations against the SIS. After that meeting, Johnson instructed the City Attorney's Office to initiate an investigation of Plaintiffs William Thomas Fox and Scott Everett Sanders, two Caucasian GPD officers alleged to have been part of the SIS group racially targeting African American officers. Johnson and the City Council also contracted with Risk Management Associates, Inc., ("RMA") to conduct a private investigation of Plaintiffs and the SIS to supplement the official City investigation. Plaintiffs contend that the investigations were initiated by Johnson as part of a plan to pressure Wray into resigning as well as to tarnish Plaintiffs' own reputations and ultimately remove them from their positions with the SIS.

In the midst of the official and private investigations, on 9 January 2006, Wray resigned as GPD Chief, and Defendant Timothy R. Bellamy was appointed as acting Chief and then Chief of the GPD. A few days later, the Federal Bureau of Investigation ("FBI") began its own investigation into the actions of Wray and Plaintiffs. After learning that the FBI investigation revealed no evidence of civil rights violations by Wray, Fox, or Sanders, Bellamy directed Johnson to request an investigation by the State Bureau of Investigation ("SBI"). In the course of its investigation, the SBI interviewed numerous GPD officers, including defendants Gary R. Hastings and Martha T. Kelly. Plaintiffs contend that Bellamy and Johnson sought the SBI investigation despite knowing that the allegations of wrongdoing by Fox and Sanders were false. Plaintiffs further assert that Hastings and Kelly gave false information to the SBI and destroyed and/or refused to turn over to the SBI evidence and information that was favorable to Fox and Sanders. The SBI investigation concluded in the fall of 2007, and resulted in the indictment of Fox on one count each of felonious obstruction of justice and felonious conspiracy, while Sanders was indicted on one count of accessing a government computer without authorization, two counts of felonious obstruction of justice, and one count of felonious conspiracy.

Following a trial in February 2009, a jury found Sanders not guilty of improperly accessing a government computer. As a result of a post-trial *Brady*[2] motion by Sanders, previously undisclosed statements came to

2. A criminal defendant is entitled to production of all government evidence favorable to him. *See Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

light, leading to the dismissal of all the remaining charges against both Plaintiffs. Plaintiffs contend those exculpatory statements had been intentionally and maliciously suppressed by Hastings and Kelly, among others, as part of a conspiracy against Plaintiffs.

Plaintiffs filed a complaint on 23 March 2010 against Johnson, Bellamy, Hastings, and Kelly, as well as the City, RMA, and GPD officers John Slone and Ernest Cuthbertson (collectively, "the federal defendants") in the United States District Court for the Middle District of North Carolina. *See Fox v. City of Greensboro*, 807 F. Supp. 2d 476 (2011). In their complaint, Plaintiffs alleged claims for

> violation of 42 U.S.C. § 1981 by the City and Johnson (Counts Two & Three); violation of the Fourth Amendment by the City, Johnson, Bellamy, Hastings, and Kelly (Counts Four & Five); and violation of 42 U.S.C. § 1985 by Johnson, Bellamy, Hastings, Kelly, Slone, Cuthbertson, and RMA (Counts Six & Seven). Plaintiffs also allege[d] a variety of state-law claims against various combinations of Defendants: declaratory judgment regarding indemnification of litigation expenses (Count One); malicious prosecution (Counts Eight and Nine); abuse of process (Counts Ten and Eleven); negligence (Count Twelve); defamation (Count Thirteen); civil conspiracy (Counts Fourteen and Fifteen); and punitive damages (Count Sixteen).

Id. at 483-84. After the federal defendants moved to dismiss, Plaintiffs sought and were granted leave by the federal court to amend their complaint to "clarify and amplify the factual basis for their allegations." *Id.* at 501. Plaintiffs filed their amended complaint on 1 April 2011. The federal defendants then moved to dismiss the amended complaint, including, *inter alia*, Plaintiffs' claims "that the City, Johnson, Bellamy, Hastings, and Kelly took certain actions . . . that led to 'unfounded' criminal charges against Plaintiffs (which ultimately terminated in their favor) and the arrest and detention of Plaintiffs in violation of their Fourth Amendment right to be free from unreasonable searches and seizures." *Id.* at 491. Specifically as to those Fourth Amendment claims, "Defendants argue[d] that Plaintiffs' vague allegations d[id] not sufficiently indicate that each Defendant performed actions proximately causing Plaintiffs' indictment and arrest." *Id.*

The federal court dismissed with prejudice all of Plaintiffs' federal law claims, including the Fourth Amendment claims. *Id.* at 501. In addition, noting that, "[u]nder 28 U.S.C. § 1367(c), a federal district court

may decline to exercise supplemental jurisdiction over such state-law claims if the district court has dismissed all claims over which it has original jurisdiction[,]" the federal court "decline[d] to exercise supplemental jurisdiction over [Plaintiffs'] state-law claims[,]" which it dismissed without prejudice. *Id.* at 500 (citation and internal quotation marks omitted).

On 23 January 2012, Plaintiffs filed a complaint ("the state complaint") in Forsyth County Superior Court[3] against all of the federal defendants except RMA, and added Defendant Norman O. Rankin, another GPD officer (collectively, "the state defendants"). The state complaint alleged the following claims: malicious prosecution, abuse of process, civil conspiracy, and punitive damages against Johnson, Bellamy, and Hastings; malicious prosecution and abuse of process against Kelly; civil conspiracy and punitive damages against Cuthbertson, Slone, and Rankin; and declaratory judgment, malicious prosecution, abuse of process, and punitive damages against the City. Johnson, Bellamy, Hastings, and Kelly ("Defendants") were sued in both their official and individual capacities, while Cuthbertson, Slone, and Rankin were sued only in their individual capacities.

On 24 February 2012, the individual state defendants moved to dismiss all claims against them "because [the complaint] fails to sufficiently plead a conspiracy, abuse of process, and other matters." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). The City also moved to dismiss. At the motion hearing, the state defendants argued that Plaintiffs' claims were barred by, *inter alia*, the statute of limitations, the intracorporate conspiracy doctrine, collateral estoppel, and the failure to plead sufficient facts. On 11 July 2012, the trial court granted the motion to dismiss as to the City and dismissed all claims against it with prejudice, a ruling that also effectively eliminated Plaintiffs' claims against the individual state defendants in their official capacities. *See Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. Thus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant.") (citations and internal quotation marks omitted). On 14 August 2012, the trial court entered an order dismissing Plaintiffs' civil conspiracy and abuse of process claims against the remaining state defendants in

3. By consent order entered 12 March 2012, the action was transferred from Forsyth County to Guilford County.

their individual capacities, but "otherwise denied" the motions to dismiss, leaving intact Plaintiffs' malicious prosecution claims against Defendants in their individual capacities.

Defendants appealed from the trial court's 14 August 2012 order, contending that the trial court erred by failing to dismiss Plaintiffs' malicious prosecution claims pursuant to Rule 12(b)(6). Plaintiffs cross-appealed from the trial court's dismissal of their civil conspiracy and abuse of process claims. In an unpublished opinion entered 17 December 2013, this Court dismissed the appeal and cross-appeal as interlocutory. *Fox v. City of Greensboro*, 752 S.E.2d 256 (2013), *available at* 2013 N.C. App. LEXIS 1321, *disc. review denied*, 367 N.C. 494, 757 S.E.2d 919 (2014). In its opinion, this Court noted that

> collateral estoppel is an affirmative defense that must be pled. However, our Supreme Court has held that the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. Thus, collateral estoppel is properly before the trial court if that defense is specifically argued in a motion to dismiss made before a defendant has answered the plaintiff's complaint. . . .
>
> Where an affirmative defense is raised for the first time in a motion to dismiss under Rule 12(b)(6), the motion must ordinarily refer expressly to the affirmative defense relied upon. However, where the non-movant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense, the failure of the motion to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an insurmountable bar to recovery.

Id. at *6-7 (citations, internal quotation marks, and brackets omitted). This Court then held that Defendants

> did not make any colorable claim of collateral estoppel in their motion to dismiss. In fact, Defendants' motion is devoid of any mention of collateral estoppel. There is

> no pleading in the record asserting collateral estoppel. Further, Defendants' motion does not reference the prior order of the District Court for the Middle District of North Carolina upon which they base their argument for collateral estoppel. Finally, . . . the complaint in the present case makes no mention of the federal court judgment.
>
> It is true that Defendants argued collateral estoppel at the hearing on their motion to dismiss, and that Plaintiffs, without objection, argued against collateral estoppel at that hearing. It also appears that Defendants submitted a brief in support of their motion to dismiss in which they argued collateral estoppel. However, that brief does not appear in the record. Assuming, *arguendo*, the collateral estoppel argument was properly before the trial court, we do not see how the trial court could have granted Defendants' motion to dismiss based upon that argument.

Id. at *8-11 (citations and internal quotation marks omitted).

Following dismissal of the prior appeal, Defendants filed a timely answer to Plaintiffs' complaint on 14 November 2013, specifically pleading the factual basis for their collateral estoppel defense and attaching and incorporating by reference the relevant federal complaint and order upon which that defense is based. On 5 August 2014, Defendants moved for judgment on the pleadings pursuant to Rule 12(c) of our North Carolina Rules of Civil Procedure:

> In support of this motion, [D]efendants contend that [P]laintiffs' remaining claim for malicious prosecution is barred by the doctrine of collateral estoppel given the final judgment in the prior case *Fox v. City of Greensboro*, 807 F. Supp. 2d 476 (M.D.N.C. 2011) (See Answer, First Defense.) Specifically, the federal court previously dismissed *with prejudice*, *inter alia*, [P]laintiffs' claim for malicious prosecution rooted in the Fourth Amendment to the Federal Constitution because the alleged misconduct of [D]efendants did not proximately cause them harm. This federal order and judgment therefore bar[s] [P]laintiffs' remaining malicious prosecution claims against [D]efendants because the causation element essential to that state law claim was previously decided against [P]laintiffs by virtue of the federal court's order.

Following a hearing on 4 September 2014, the trial court denied Defendants' motion specifically as to the issue of collateral estoppel by order entered 25 September 2014. From that order, Defendants appeal.

Grounds for Appellate Review

[1] As Defendants note, this appeal is interlocutory.

> Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy. As a general rule, interlocutory orders are not immediately appealable. However, immediate appeal of interlocutory orders and judgments is available . . . when the interlocutory order affects a substantial right under [N.C. Gen. Stat.] §§ 1-277(a) and 7A-27(d)(1).
>
> . . . . [The] denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel. . . . Under the collateral estoppel doctrine, parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. The doctrine is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment.

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citations and internal quotation marks omitted). As noted *supra*, following dismissal of their previous appeal, Defendants filed an answer in which they specifically asserted collateral estoppel as a defense to Plaintiffs' malicious prosecution claims and moved for judgment on the pleadings based upon their collateral estoppel defense. Defendants having made "a colorable assertion that the claim is barred under the doctrine of collateral estoppel[,]" the denial of their motion for judgment on the pleadings affects a substantial right. *See id.* Accordingly, Defendants' interlocutory appeal is properly before this Court.

Discussion

Defendants argue that the trial court erred in denying their motion for judgment on the pleadings as to Plaintiffs' malicious prosecution claims based on the doctrine of collateral estoppel. We disagree.

I. Relation of the trial court's Rule 12(c) and 12(b)(6) orders

[2] As a preliminary matter, we consider Defendants' assertion that the trial court's August 2012 order denying their Rule 12(b)(6) motion did not bar the trial court from adjudicating Defendants' motion for judgment on the pleadings pursuant to Rule 12(c). It is well established that, ordinarily, "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). The only exception occurs when three conditions are met: (1) the subsequent order "was rendered at a different stage of the proceeding, [(2)] the materials considered by [the second judge] were not the same, and [(3)] the [first] motion . . . did not present the same question as that raised by the later motion . . . ." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (citation omitted). Defendants argue that all three of the *Smithwick* conditions are satisfied here.

First, Defendants point out that a motion pursuant to Rule 12(c) may be made only after the pleadings are closed, while a Rule 12(b)(6) motion must be made before the pleadings are closed. *See* N.C. Gen. Stat. § 1A-1, Rule 12; *see also Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988) (noting that "[t]he principal difference between the two motions is that a motion under Rule 12(c) . . . is properly made after the pleadings are closed while a motion under Rule 12(b)(6) must be made prior to or contemporaneously with the filing of the responsive pleading"). Plaintiffs counter that, because "[b]oth a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief[,]" *id.* (citations omitted), there is no "functional" difference between the stage of the proceedings when each motion is decided. We must reject Plaintiffs' contention:

> As we have recognized, a complaint is subject to dismissal under Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim. On the other hand, a motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Neither

> rule employs the same standard. It is plainly evident under our Rules of Civil Procedure that because a plaintiff has survived a 12(b)(6) motion, and thus has alleged a claim for which relief may be granted, his survival in the action is not the equivalent of the court determining that conflicting issues of fact exist and no party is entitled to judgment as a matter of law under Rule 12(c).

Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 201-02, 528 S.E.2d 372, 378 (2000) (citations and internal quotation marks omitted).

Regarding the second and third *Smithwick* conditions, this Court's opinion dismissing Defendants' previous appeal shows that different materials and questions were considered by the trial court in ruling on the respective Rule 12(b)(6) and Rule 12(c) motions. In ruling on Defendants' Rule 12(b)(6) motion, the trial court considered only Plaintiffs' complaint and the arguments of the parties, while the later Rule 12(c) ruling was based upon the trial court's consideration of additional materials: Defendants' answer, the federal complaint, and the federal court's decision. Further, as we observed *supra*, this Court dismissed Defendants' interlocutory appeal precisely because it was not persuaded by Defendants' argument that the trial court's denial of their Rule 12(b)(6) motion "necessarily rejected their argument that Plaintiffs' malicious prosecution claims were barred by collateral estoppel." *Fox*, 2013 N.C. App. LEXIS 1321 *4. In contrast, the trial court's Rule 12(c) order explicitly ruled on Defendants' collateral estoppel argument. In sum, the Rule 12(c) order appealed from here is not an improper "overruling" by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order.

II. Standard of review

[3] "A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted).

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except

> conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). We review *de novo* a trial court's ruling on a motion to dismiss under Rule 12(c). *Id.* Further, for a Rule 12(c) motion based upon an assertion of collateral estoppel:

> In determining what issues were actually litigated or determined by the earlier judgment, the court in the second proceeding is free to go beyond the judgment roll, and may examine the pleadings and the evidence if any in the prior action. . . . The burden is on the party asserting issue preclusion to show with clarity and certainty what was determined by the prior judgment.

Burgess v. First Union Nat'l Bank of N.C., 150 N.C. App. 67, 75, 563 S.E.2d 14, 20 (2002) (citation, internal quotation marks, brackets, and emphasis omitted).

III. The trial court's rejection of Defendants' collateral estoppel defense

Defendants' collateral estoppel defense is based on their contention that, in its 2011 opinion dismissing, *inter alia*, Plaintiffs' Fourth Amendment claims for failure to state a claim under Federal Rule 12(b)(6), the federal court ruled against Plaintiffs on the same issue of proximate cause applicable to their state malicious prosecution allegations, thereby precluding re-litigation of those claims in Guilford County Superior Court. Although we agree that both Plaintiffs' federal Fourth Amendment claims and their state malicious prosecution claims include the same element of proximate cause,[4] after a careful analysis of the procedural posture of the federal case, we are not persuaded that the dismissal of the Fourth Amendment claims for failing to meet the federal "plausibility" pleading standard means "the federal court has already determined that [P]laintiffs cannot establish the same requisite causation element essential to their [state malicious prosecution] claim[s]."

"Under the doctrine of collateral estoppel, *when an issue has been fully litigated and decided*, it cannot be contested again between the same parties, even if the first adjudication is conducted in federal court

4. "It is well settled that a plaintiff asserting a constitutional tort under § 1983 must, like any tort plaintiff, satisfy the element of proximate causation." *Fox*, 807 F. Supp. 2d at 492 (citation, internal quotation marks, brackets, and ellipsis omitted).

and the second in state court." *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 52, 542 S.E.2d 227, 231 (citation omitted; emphasis added), *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). In addition, "parties are precluded from retrying *fully litigated issues* that were decided in any prior determination, even where the claims asserted are not the same." *Id.* at 51, 542 S.E.2d at 231 (citation omitted). "The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in *a final judgment on the merits*; (2) *identical issues involved*; (3) *the issue was actually litigated in the prior suit* and necessary to the judgment; and (4) *the issue was actually determined*." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (citation and internal quotation marks omitted; emphasis added), *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). Thus, as an initial step, we must determine whether the federal court's dismissal of Plaintiffs' claims under Federal Rule 12(b)(6) was a final judgment on the merits that actually decided the issue of proximate cause.

It is well settled that "[a] dismissal under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." *Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2d 269, 274 (citations omitted), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992); *see also* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2013). However, the federal court did not dismiss Plaintiffs' federal claims under North Carolina Rule 12(b)(6), but rather dismissed them pursuant to Federal Rule 12(b)(6). *See Fox*, 807 F. Supp. 2d at 484. No North Carolina case law or statute that we have discovered directly addresses the question of whether a dismissal under Federal Rule 12(b)(6) operates as an adjudication on the merits so as to collaterally estop a plaintiff from re-litigating a claim or issue in our State's courts. Of course, if the evaluation of a claim in light of a motion to dismiss pursuant to Federal Rule 12(b)(6) were identical to the evaluation made in response to a motion under North Carolina Rule 12(b)(6), it would be clear that the federal court's dismissal had adjudicated and settled the same issue Plaintiffs raise in their state complaint. However, our review of the pertinent statutes and case law demonstrates that the standard under Federal Rule 12(b)(6), which the federal court here held Plaintiffs failed to meet, is a different, *higher* pleading standard than mandated under our own General Statutes. In other words, the fact that Plaintiffs' allegations of proximate cause in the federal complaint did not meet the pleading standard under Federal Rule 12(b)(6) does not *necessarily* mean that their allegations of proximate cause would have resulted in dismissal pursuant to North Carolina Rule 12(b)(6).

As the federal court noted in its order, "[t]he purpose of a motion under Federal Rule of Civil Procedure 12(b)(6) is to test[] the sufficiency of a complaint and *not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses*." *Id.* (citation and internal quotation marks omitted; emphasis added). In so doing, the federal court explicitly applied the so-called "plausibility" pleading standard as enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*:

> Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Although the complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), *abrogated on other grounds by Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929), a plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," *id.* [Federal] Rule 12(b)(6) protects against meritless litigation by requiring sufficient factual allegations "to raise a right to relief above the speculative level" so as to "nudge[] the[] claims across the line from conceivable to plausible." *Id.* at 555, 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-51, 173 L. Ed. 2d 868 (2009).

Id. at 484. As a prior panel of this Court has previously held, the higher federal plausibility pleading standard differs from our State's notice pleading standard:

> Plaintiff argues that this [C]ourt should apply the plausibility standard as set forth in *Bell Atlantic Corp. v. Twombly* . . . . Plaintiff has also correctly noted that to date, North Carolina has not adopted the plausibility standard set forth in *Bell Atlantic* for 12(b)(6) Motions to Dismiss. This Court does not have the authority to adopt a new standard of review for motions to dismiss. Instead, we use the following standard, which is the correct standard of review as used by the North Carolina appellate courts:
>
> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of

> review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Holleman v. Aiken, 193 N.C. App. 484, 490-91, 668 S.E.2d 579, 584-85 (2008) (citations, internal quotation marks, and brackets omitted).

Given the difference between the federal and State pleading standards, we must conclude that a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same or related claims under State law in our State's courts. *See Hoots*, 106 N.C. App. at 404, 417 S.E.2d at 274. In other words, a determination that Plaintiffs' allegations regarding proximate cause in their Fourth Amendment claims did not pass the federal plausibility test does not *automatically* mean they fail to meet the notice pleading requirements of our State. We acknowledge that the federal court's well-reasoned and highly detailed opinion amply demonstrates that the allegations in Plaintiffs' federal complaint regarding proximate cause between Defendants' alleged acts and Plaintiffs' criminal prosecutions were, "to put it charitably, sparse at best." *Fox*, 807 F. Supp. 2d at 495. However, the "issue actually litigated in the prior suit . . . and . . . actually determined" by the federal court, *see Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61 (citation and internal quotation marks omitted), was whether Plaintiffs' pleadings met the plausibility standard applicable to motions to dismiss pursuant to Federal Rule 12(b)(6). The federal court's opinion simply did not consider or address the issue of whether Plaintiffs' pleadings sufficiently stated a claim to survive a motion to dismiss pursuant to the notice pleading requirements of North Carolina Rule 12(b)(6). Accordingly, the trial court properly denied Defendants' motion to dismiss pursuant to Rule 12(c) based upon their assertion of collateral estoppel.

We emphasize that our holding here is specific and limited to the sole issue raised by Defendants in *this* appeal: whether Plaintiffs are collaterally estopped from litigating their state malicious prosecution claims in North Carolina courts because the federal court dismissed their federal "malicious prosecution" claims for failing to meet the plausibility standard applicable to motions to dismiss pursuant to Federal Rule 12(b)(6). We express no opinion about whether Plaintiffs' malicious prosecution

claims were sufficiently pled under North Carolina Rule 12(b)(6). As noted by this Court in Defendants' previous appeal, that interlocutory issue is not before us at this point. *See, e.g.*, *Turner*, 363 N.C. at 558, 681 S.E.2d at 773.

In sum, Plaintiffs are not collaterally estopped from bringing their malicious prosecution claims under state law. Accordingly, the trial court did not err in denying Defendants' motion to dismiss on that basis, and its order is

AFFIRMED.

Judges McCULLOUGH and ZACHARY concur.

STEVEN CRAIG HERNDON, PLAINTIFF
v.
ALISON KINGREY HERNDON, DEFENDANT

No. COA15-28

Filed 6 October 2015

Constitutional Law—Fifth Amendment—domestic violence protective order—civil case—voluntary testimony not an automatic waiver

A domestic violence prevention order was vacated and remanded where the trial court asked defense counsel whether defendant would be claiming her Fifth Amendment right to remain silent and then indicated that she was not going to "do" the Fifth Amendment. The trial court went on to substitute its own questions for cross-examination, with many of those questions going beyond the scope of direct examination. A witness does not automatically waive her Fifth Amendment rights by voluntarily testifying in a civil case. The trial court must evaluate whether a real danger of self-incrimination exists given the implications of the question and the setting in which it was asked.

Judge BRYANT dissents by separate opinion.

Appeal by defendant from order entered 10 September 2014 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 19 May 2015.

Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for plaintiff-appellee.

Tharrington Smith, LLP, by Jill Schnabel Jackson and Evan B. Horwitz, for defendant-appellant.

DIETZ, Judge.

This is an appeal from a domestic violence protective order entered against Alison Herndon upon motion of her husband Steven Herndon. Mr. Herndon alleged that his wife was putting sleep-inducing drugs in his food and then sneaking out at night to conduct an affair, often leaving their children home unsupervised.

When Ms. Herndon's counsel called her to testify at the hearing, the trial court stated, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" Ms. Herndon's counsel responded that she did not expect Ms. Herndon to invoke her Fifth Amendment right to remain silent. The trial court then stated, "I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment."

Ms. Herndon testified on direct examination without invoking her Fifth Amendment rights. The trial court then stated that there would not be any cross-examination. Instead, the trial court asked Ms. Herndon questions, many of which were beyond the scope of Ms. Herndon's direct examination. In response to those questions, Ms. Herndon stated variations of "I don't recall" or "I don't remember."

After ending the questioning, the trial court explained that it found Ms. Herndon's testimony "not credible that you don't remember." The court then entered a domestic violence protective order against Ms. Herndon.

We are constrained to reverse and remand this case. Under long-standing U.S. Supreme Court precedent, a witness does not automatically waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case. Instead, the trial court must listen to the witness's testimony and determine whether the questions for which the witness invokes the right to remain silent concern "matters raised by her own testimony on direct examination." *Brown v. United States*, 356 U.S. 148, 156 (1958). If so, then the witness has waived her Fifth Amendment rights as to those questions.

Here, the trial court's statement that "I'm not doing no Fifth Amendment" and that if Ms. Herndon attempted to invoke her Fifth Amendment rights "somebody might be going to jail" violated Ms. Herndon's Fifth Amendment rights. The threat to imprison Ms. Herndon if she invoked her right to remain silent may have forced Ms. Herndon to answer questions differently than she otherwise would have if she felt free to assert that constitutional right. Accordingly, we must vacate and remand this case for a new hearing that disregards Ms. Herndon's previous testimony, obtained in violation of her Fifth Amendment rights.

Finally, as explained below, our need to vacate and remand this case on Fifth Amendment grounds precludes us from reaching the remaining issues raised in this appeal under the doctrine of constitutional avoidance.

Facts and Procedural Background

On 21 May 2014, Plaintiff Steven Herndon filed a complaint and motion for a domestic violence protective order against his wife, Defendant Alison Herndon. In his complaint, Plaintiff claimed that Defendant caused or attempted to cause bodily injury to him and the parties' four minor children, and that Mr. Herndon lived in fear of imminent serious bodily injury. Specifically, Mr. Herndon alleged that Ms. Herndon had drugged his food and drink on at least three occasions, causing him to pass out and become ill. Mr. Herndon also alleged that, after rendering him incapacitated, his wife left the couple's four minor children in the home unsupervised while she visited her lover. Based on these allegations, the trial court entered an *ex parte* domestic violence protective order that same day and scheduled a full hearing.

On 10 September 2014, the trial court held a full hearing. Following Mr. Herndon's evidence, Ms. Herndon's counsel called her to the stand and the following exchange occurred:

> COUNSEL: Call Alison Herndon.
>
> THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?
>
> COUNSEL: No, she's not.
>
> THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.

After defense counsel's direct examination, the trial court denied Mr. Herndon's counsel the right to cross-examination, explaining that "I was going to let you all ask two questions, but we're about [out] of time for them now." The court then asked Ms. Herndon a series of questions, some of which concerned whether Ms. Herndon had admitted in text messages that she was drugging her husband. Ms. Herndon answered many of those questions with variations of "I don't recall" or "I don't remember."

After these questions concluded, the trial court announced its ruling. The court stated that it did not believe Ms. Herndon's testimony: "I find your limited testimony you did talk about to be not credible that you don't remember." The court then made a series of additional findings and conclusions and later entered a written domestic violence protective order. Ms. Herndon timely appealed.

Analysis

Among the many arguments presented in this appeal, Ms. Herndon contends that her Fifth Amendment rights were violated when the trial court stated "You're calling her. She ain't going to get up there and plead no Fifth Amendment" and that "I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment." We agree that these statements violated Ms. Herndon's Fifth Amendment rights and require us to vacate and remand this matter for a new hearing that disregards Ms. Herndon's previous testimony.

The Fifth Amendment protects an individual from being compelled to testify in a way that could incriminate her or subject her to fines, penalties, or forfeiture. *See State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 166 (1997). To determine whether the Fifth Amendment privilege applies, the trial court must evaluate whether, given the implications of the question and the setting in which it was asked, a real danger of self-incrimination by the witness exists. *Id.* at 637, 488 S.E.2d at 167. The court can reject a claim of Fifth Amendment privilege only if there is no possibility of such danger. *Id.* at 637, 488 S.E.2d at 167.

Importantly, the "privilege against self-incrimination is intended to be a shield and not a sword." *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000). As a result, although a witness does not "forego the right to invoke on cross-examination the privilege against self-incrimination" merely by choosing to testify willingly in a civil proceeding, that choice is a waiver of the right with regard to "matters raised by [the witness's] own testimony on direct examination."

Brown v. United States, 356 U.S. 148, 154-56 (1958). Indeed, it is hornbook law that "[a] party to or other witness in a civil proceeding does not waive his privilege merely by taking the stand." *Testifying in civil proceedings as waiver of privilege against self-incrimination*, 72 A.L.R.2d 830 (2014) (collecting cases). When a witness chooses to testify, "the privilege is not lost as to matters wholly unrelated to and not connected with the subject of the direct examination." *Id.*

In *Brown*, the Supreme Court held that the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness "said on the stand." *Id.* at 157. In other words, the determination that a witness may not invoke the Fifth Amendment cannot be made simply because the witness "physically took the stand." *Id.*

That is precisely what happened here. The trial court first sought to confirm with Ms. Herndon's counsel that, if Ms. Herndon testified, "[s]he ain't going to get up there and plead no Fifth Amendment." The court then threatened to imprison Ms. Herndon (or her counsel) if Ms. Herndon invoked her Fifth Amendment rights during her testimony: "I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment."

Under *Brown*, the trial court's statements violated Ms. Herndon's Fifth Amendment rights. Ms. Herndon was left with the choice of forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination. It was error for the trial court to place her in that impossible situation. Moreover, the error was prejudicial and "amounts to the denial of a substantial right." N.C. R. Civ. P. 61. Although Ms. Herndon's direct testimony did not address her alleged drugging of her husband, the trial court asked her about text messages that corroborated this allegation. Ms. Herndon responded to these questions with variations of "I don't recall" and "I don't remember." The trial court then relied on those answers to determine that Ms. Herndon's testimony was not credible. The trial court's threat to imprison Ms. Herndon if she invoked her Fifth Amendment rights may have forced Ms. Herndon to answer these questions differently than she otherwise would have if she felt free to assert that constitutional right.

The dissent asserts that Ms. Herndon waived her Fifth Amendment rights when her counsel indicated that Ms. Herndon did not plan to invoke those rights. But Ms. Herndon's counsel could not have anticipated that

the trial court, on its own initiative, would ask Ms. Herndon questions well beyond the scope of the direct testimony. Thus, counsel's statement that Ms. Herndon would not invoke her Fifth Amendment rights is more reasonably viewed as addressing the scope of her testimony on direct.[1] And, in any event, a trial court cannot demand that a witness waive her Fifth Amendment rights in order to testify in her own defense—particularly in a proceeding like this one, where Ms. Herndon's fundamental right to be with her children is at stake. *See Jenkins v. Wessel*, 780 So. 2d 1006, 1008 (Fla. Dist. Ct. App. 2001) (discussing the scope of Fifth Amendment waiver for testimony during a domestic violence protective order hearing).

The dissent also cites *McKillop v. Onslow County*, 139 N.C. App. 53, 63, 532 S.E.2d 594, 601 (2000), a case in which this Court found a complete waiver of a party's Fifth Amendment rights. But *McKillop* involved a plaintiff who *initiated* the legal proceedings by challenging the constitutionality of an ordinance regulating adult businesses. This Court held that "if a plaintiff seeks *affirmative relief* or a defendant pleads *an affirmative defense*[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Id.* (emphasis added). Here, by contrast, Ms. Herndon is defending an action brought against her, seeking a protective order that would prevent her from contacting her own children. As the Florida District Court of Appeal acknowledged in *Jenkins*, a defendant in this circumstance is entitled to invoke the Fifth Amendment in response to questions beyond the scope of her direct testimony. *See* 780 So. 2d at 1008.

Finally, the dissent notes that Ms. Herndon "presents no substantive authority in support of her argument." To be sure, there are few citations to legal authority in this section of Ms. Herndon's brief, but Ms. Herndon quoted the portion of the hearing transcript containing the trial court's challenged statements, asserted a violation of the Fifth Amendment, and cited both the Fifth Amendment to the U.S. Constitution and a U.S. Supreme Court case discussing the scope of Fifth Amendment rights. We believe that is sufficient to satisfy Rule 28(b)(6) of the Rules of Appellate Procedure. Indeed, Mr. Herndon had no difficulty understanding and responding to this argument; his Appellee Brief cites and discusses both *Brown* and *McKillop*.

1. Notably, in his Appellee Brief, Mr. Herndon does not contend that this statement constituted a waiver.

In sum, we hold that the trial court violated Ms. Herndon's Fifth Amendment rights. We therefore vacate and remand this case for a new hearing. At that hearing, the trial court should disregard Ms. Herndon's testimony from the previous hearing. If Ms. Herndon chooses to testify at the new hearing, the trial court should assess any invocation of the Fifth Amendment under the test established by the Supreme Court in *Brown*.[2]

This appeal also raises several other evidentiary issues, one of which involves an issue of first impression with a constitutional dimension concerning the right to privacy in the marital relationship. We cannot address those issues. As explained above, we must vacate and remand this case for a new hearing. At that hearing, the trial court may not rule the same way on these evidentiary issues, or the parties may choose to present different evidence and these issues might never arise. Thus, our discussion of those issues in this opinion would be nonbinding dicta, *see Trustees of Rowan Tech. College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985), or, worse yet, might be an impermissible advisory opinion, *Kirkman v. Wilson*, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991). Moreover, with respect to the issue concerning the right to privacy, addressing it would violate the long-standing principle that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). Accordingly, for the reasons discussed above, we vacate and remand this case based on the violation of Ms. Herndon's Fifth Amendment rights, and decline to reach the remaining issues raised on appeal.

Conclusion

For the reasons stated above, we vacate and remand the trial court's entry of the domestic violence protective order and remand this matter for further proceedings.

VACATED AND REMANDED.

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2. We note that Ms. Herndon's invocation of her Fifth Amendment rights in response to certain questions by the court, or counsel on cross-examination, will not impede the court's ability to find the truth in a civil hearing. "The finder of fact in a civil cause may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *McKillop*, 139 N.C. App. at 63-64, 532 S.E.2d at 601. Thus, if Ms. Herndon refuses to answer certain questions based on her Fifth Amendment rights, the trial court may draw an adverse inference supporting Mr. Herndon's request for the protective order.

Judge STEPHENS concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority reverses and remands on grounds that the trial court violated defendant's Fifth Amendment rights. However, under the circumstances present in this case, where defendant waived her Fifth Amendment privilege, then took the stand and testified in her own defense, the trial court's assertion that defendant would not be allowed to claim the privilege has no practical and certainly no prejudicial effect. Because there was no violation of defendant's Fifth Amendment rights, I respectfully dissent.

"No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This phrase, commonly known as the privilege against self-incrimination, is meant to assure individuals that they will not be compelled to give testimony which will tend to incriminate them or which will tend to subject them to fines, penalties, or forfeiture. *McKillop v. Onslow Cnty.*, 139 N.C. App. 53, 62–63, 532 S.E.2d 594, 600 (2000). "However, 'it is well established that the privilege protects against real dangers, *not remote and speculative possibilities*,' and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists." *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502 (1979) (emphasis added) (quoting *Zicarelli v. Investigation Comm'n*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972)).

At the outset, it should be noted that defendant has failed to argue any case law in support of her argument, citing only to *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964), for the proposition that the Fifth Amendment right against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment. As defendant presents no substantive authority in support of her argument, our Rules of Appellate Procedure normally require that defendant's argument be dismissed. *See* N.C. R. App. P. 28(b)(6) (2015) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). However, the majority chooses to address the Fifth Amendment issue as its sole reason for reversing the trial court; I therefore address the issue in dissent.

Here, a review of the record fails to demonstrate a violation of defendant's constitutional right against self-incrimination. The transcript of the hearing indicates that defendant and her paramour were both hostile witnesses. Defendant's paramour was called as a witness by plaintiff. On direct examation, defendant's paramour consistently refused to answer questions posed by plaintiff. Instead, he repeatedly asserted his Fifth Amendment right against compulsory self-incrimination in lieu of answering the questions posed.[1] With the exception of questions regarding communications between defendant and her paramour regarding defendant's children (which the court found did not expose defendant's paramour to criminal culpability), there is nothing in the record to indicate that the paramour was compelled to answer questions once he asserted his Fifth Amendment right.

> THE COURT: I understand why you are not answering the other questions and nobody is asking you to . . . .

In fact, following its order compelling testimony regarding communications about defendant's children, the trial court informed the witness that the scope of her order compelling his testimony was limited to the testimony about those communications.

After plaintiff rested his case, defendant put on her direct case. Defendant called a neighbor of plaintiff and defendant as a witness, whose testimony on direct and cross-examination was in response to many questions regarding plaintiff and defendant, their children, and many aspects of the parties' lives. Defense counsel then called defendant as a witness. As defendant was about to take the stand on her own behalf, the following occurred:

> THE COURT: Thank you. Come on down. Call your next witness.
>
> [Defense counsel]: Call Alison Herndon.
>
> THE COURT: All right. Before we do that, let me make a statement. *You're calling her. She ain't going to get up there and plead no Fifth Amendment?*
>
> *[Defense counsel]: No, she's not.*

1. According to the record, plaintiff attempted to depose defendant's paramour prior to trial, but defendant's paramour refused to testify under oath or remain for the deposition. Later, Judge David Q. LeBarre found defendant's paramour to be willfully not in compliance with a subpoena of the Durham County District Court.

> THE COURT: I want to make sure that wasn't going to happen because you -- somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.
>
> [Defense counsel]: No.
>
> THE COURT: Okay. Call your witness.
>
> [Defense counsel]: Alison Herndon.

(emphasis added). The majority holds that this statement by the trial court constituted a violation of defendant's constitutional right against self-incrimination, because "[this] threat to [defendant] . . . may have forced [her] to answer questions *differently* than she otherwise would have if she felt free to assert that constitutional right." (emphasis added). I strongly disagree with the majority's holding and its reasoning.

To the trial court's question, "You're calling her. She ain't going to get up there and plead no Fifth Amendment?" defendant's counsel responded, "No she's not." Defendant's counsel made no further response or objection to the trial court's statement. Defendant testified at length regarding matters before the court, and never asserted or attempted to assert a Fifth Amendment privilege, nor did defendant make a proffer that her testimony was in anyway compromised, that she felt threatened or forced to answer questions differently based on the trial court's comments. As such, the factual basis upon which the majority bases its opinion, is unsupported. There is nothing in the record or transcript to permit the majority's finding that defendant's Fifth Amendment right against self-incrimination was violated. In fact, counsel's response that defendant would not plead the Fifth, could, I submit, be considered a waiver of the privilege. Further, it is clear that defendant could have refused to testify upon hearing the trial court's additional statement that "somebody might be going to jail"; instead, defendant proceeded to testify.

> [W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. *Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a*

> *witness, not to testify at all.* He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.

Brown v. United States, 356 U.S. 148, 155–56, 2 L. Ed. 2d 589, 597 (1958) (emphasis added). While the majority cites *Brown* in support of its holding that a Fifth Amendment violation occurred, I do not read *Brown* as supporting the overly technical application made by the majority. The majority states that *Brown* holds "the decision whether to permit invocation of the Fifth Amendment in a civil proceeding is one that can be made only after the trial court considers what the witness 'said on the stand.' " And a "determination that a witness may not invoke the Fifth Amendment cannot be made simply because the witness 'physically took the stand.' " Viewing the facts as interpreted by the majority, even if the trial court's actions did not follow the procedure the majority seems to think is required before a ruling on privilege, I am unaware of any cases that would consider these facts to constitute a Fifth Amendment violation and support a reversal of this case.

I disagree with the majority's assertion that *Brown* is an indication of "long-standing U.S. Supreme Court precedent" that "a witness does not waive her Fifth Amendment rights by voluntarily taking the stand to testify in a civil case." *Brown* resulted from a civil contempt proceeding during which the defendant was held in contempt for failure to answer certain questions on cross-examination. The United States Supreme Court held that where the defendant took the stand voluntarily and testified on her own behalf, she could **not** invoke the privilege against self-incrimination as to relevant matters, and affirmed the lower court's contempt ruling. *See McKillop*, 139 N.C. App. at 64–65, 532 S.E.2d at 601 ("[U]nder [*Cantwell v. Cantwell*, 109 N.C. App. 395, 427 S.E.2d 129 (1993)], we hold that [the] plaintiff must choose between her right not to incriminate herself in a pending criminal trial and her claim that she cannot be held in civil contempt.").

In *McKillop*, this Court addressed *Brown* and discussed how, even when a party invokes the Fifth Amendment, the trial court has a duty to weigh the rights of the litigants and ensure that there is due process and a fair trial:

> While we recognize that the defendant in the present case had the right to invoke her privilege against self-incrimination, "the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege. . . ." *Brown v. United States*, 356 U.S. 148, 156, 2 L. Ed. 2d 589, 597, *reh'g denied*, 356 U.S. 948, 2 L. Ed. 2d 822 (1958) (a party witness in a criminal case cannot present testimony on direct examination and then invoke the privilege on cross-examination); *see also Pulawski v. Pulawski*, 463 A.2d 151, 157 (R.I. 1983) (as between private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial). The privilege against self-incrimination is intended to be a shield and not a sword. *Pulawski*, 463 A.2d at 157; *Christenson v. Christenson*, 162 N.W.2d 194, 200 (Minn. 1968). Therefore, "if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Christenson*, 162 N.W.2d at 200 (citation omitted).

[*Cantwell*, 109 N.C. App. at 397, 427 S.E.2d at 130–31]. Finding *Christenson* persuasive and instructive, this Court held "a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim." *Id.* at 398, 427 S.E.2d at 131.

Furthermore, it is well established that North Carolina law allows the trier of fact to infer guilt on a civil defendant who, having the opportunity to refute damaging evidence against her, chooses not to. The finder of fact in a civil cause may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable

> to him. *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657–58, 318 S.E.2d 244, 246 (1984).

McKillop, 139 N.C. App. at 63–64 , 532 S.E.2d at 600–01.

> [S]ince the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of the foregoing statutes, and therefore punishable [by contempt].

Galyon v. Stutts, 241 N.C. 120, 124, 84 S.E.2d 822, 825 (1954).

In the instant case, the trial court understood that the purpose of the DVPO hearing was to determine whether sufficient credible evidence existed to support plaintiff's claim that his wife was putting drugs in his food and sneaking out of the house to have an affair with her paramour. The trial court had already heard the paramour take the Fifth Amendment upon being asked a number of questions regarding his relationship with defendant and whether she had shared certain information with him regarding what she may have been doing to her husband. However, unlike Defendant, the paramour was compelled to testify. *See Brown*, 356 U.S. at 155, 2 L. Ed. 2d at 597 ("A witness who is compelled to testify . . . has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.")

And while defendant had the right to meet the evidence presented against her by plaintiff with evidence of her own, defendant was not compelled to testify on her own behalf. She did so voluntarily. Based on the initial question and response just prior to her testimony, defendant could be said to have waived the privilege. However, it was within the inherent power of the trial court to ascertain from defendant that she chose to testify voluntarily and waive her privilege against self-incrimination. Further, the trial court's statement was sufficient to put defendant on notice that if she intended to testify, the trial court expected defendant to answer questions truthfully. Notwithstanding the less than artful phraseology, it was ultimately up to the court to determine the scope of the privilege. *See id.* at 156, 2 L. Ed. 2d at 597 ("The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.").

Upon hearing the trial court's statement of warning, defendant could have refused to testify, she was not compelled to do so. Instead, she took the stand and testified. The court did not allow plaintiff to cross-examine defendant, but the trial court asked questions of her. Throughout, defendant made no objection to the trial court's admonition and never asserted the privilege against self-incrimination. Moreover, defendant does not claim and the record does not support that she incriminated herself, or that she testified differently because of the trial court's comments. There is no indication from these facts that defendant's Fifth Amendment rights were violated. Further, neither *Brown*, *McKillop*, nor any other case I have found would support a holding that defendant's Fifth Amendment right against self- incrimination was violated in t his case.

If allowed to stand, the majority opinion would grant a defendant the right to use a constitutional privilege, intended as a shield to protect a litigant, to be used as a sword to strike down the inherent authority of the court to oversee the proper conduct of trials. Accordingly, as I see no facts or law as espoused by the majority that amount to a violation of defendant's constitutional right against self-incrimination, I respectfully dissent.

IN THE MATTER OF E.L.E.

No. COA15-113

Filed 6 October 2015

1. Termination of Parental Rights—failure to pay for child's care—child not in foster home

The trial court erred by concluding that respondent's parental rights could be terminated for failing to pay a reasonable portion of the child's care under N.C.G.S. § 7B-1111(a)(3). This ground for termination applied only if petitioners' home qualified as a foster home, but it did not qualify because the child was not placed with petitioners by a child placing agency and because petitioners were related to the child by blood.

2. Termination of Parental Rights—no reasonable progress—conclusion not supported by findings

The trial court's findings of fact did not support its conclusion that respondent-mother had not made reasonable progress under the circumstances toward correcting the conditions that led to the removal of her child from her care, and the trial court erred by concluding that respondent's parental rights should be terminated.

3. Termination of Parental Rights—neglect—probability of repetition—findings inadequate

The trial court erred by concluding that grounds existed to terminated respondent-mother's parental rights based on neglect where it did not find that there was a probability of repetition of neglect. While there was arguably competent evidence in the record to support such a finding, the absence of the necessary finding required reversal.

Appeal by respondent-mother from order entered 6 November 2014 by Judge David Byrd in Ashe County District Court. Heard in the Court of Appeals 8 September 2015.

Randolph and Fischer, by J. Clark Fischer, for petitioner-appellee custodians.

Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.

No brief filed for guardian ad litem.

BRYANT, Judge.

Where the trial court failed to make necessary findings of fact to support its conclusions of law that grounds exist to terminate respondent's parental rights, we reverse.

In February 2010, shortly after Emma's[1] birth, the Ashe County Department of Social Services ("DSS") received a report of domestic violence and substance abuse in her home. DSS arranged for Emma to be placed with her maternal great aunt and uncle ("petitioners") though

1. A pseudonym has been used to protect the identity of the minor child pursuant to N.C. R. App. P. 3.1 (2013).

a kinship agreement. Respondent entered into an in-home services agreement with DSS, but on 3 August 2010 she was arrested for shoplifting, concealing goods, and possession of a controlled substance.

On 5 August 2010, DSS filed a petition alleging Emma was a neglected juvenile because she lived in an environment injurious to her welfare and did not receive proper care, supervision, or discipline. In the petition, DSS reiterated the domestic violence and substance abuse claims that were first reported in February 2010, and asserted that respondent had failed to move forward with the Family Service Case Plan she entered into in March of 2010. Additionally, DSS alleged that respondent had been arrested for shoplifting as she left a pediatrician's office after an appointment for Emma. DSS took nonsecure custody of Emma, but continued placement of her with petitioners.

After a hearing on 27 October 2010, the trial court entered an order adjudicating Emma to be a neglected juvenile. The court continued custody of Emma with DSS and sanctioned her placement with petitioners. The court directed respondent to comply with her plan of treatment and awarded her supervised visitation with Emma for at least two hours per week.

In an order from a review hearing held 23 February 2011, the trial court continued custody of Emma with DSS and continued to sanction placement with petitioners. However, the court found that respondent, while not perfect, "had done well in therapy and drug screen[s,]" and granted her two hours of weekly unsupervised visitation with Emma. The court conditioned respondent's unsupervised visitation upon her continued compliance with her case plan and the requirements of the Family Solutions House, where she was residing and receiving mental health and substance abuse treatment and therapy.

The trial court held a combined review and permanency planning on 27 April 2011. The court set the permanent plan for Emma as reunification with a parent, continued custody of Emma with DSS and placement with petitioners, and increased respondent's visitation to include one overnight visitation each week. The court stated that it was impressed that respondent had not missed any counseling sessions or classes since her entry into the Family Solutions House, but admonished her for committing "childish" violations of the house rules.

A second combined review and permanency planning hearing was held by the trial court on 30 September 2011. In its order from that hearing, the court found respondent mother was no longer living at the Family Solutions house because she was "kicked out" the previous June

for continued violations of the house rules. The court further found that respondent missed several drug tests in July and August 2011, had a recent conviction for driving while impaired, had a sporadic work history consisting of short-duration jobs, and had married in July 2011. Respondent's new husband was a recovering alcoholic and had entered into a Family Service Case Plan with DSS that required him to obtain substance abuse treatment. The court incorporated by reference GAL court summaries, particularly the portion of the GAL summary recording respondent's poor reunification efforts. The court found that although respondent had made some recent progress on her case plan, she had not shown consistent and lasting progress toward correcting the conditions that led to the removal of Emma from her care.

Based on respondent's lack of progress, the court concluded that reasonable efforts toward reunification were futile and relieved DSS of any further responsibility to work with respondent towards reunification. Nevertheless, the court found that respondent had a close bond with Emma and that it would not be in Emma's best interests to terminate respondent's parental rights. The court awarded full legal and physical custody of Emma to petitioners and established a visitation schedule for respondent. At the next review and permanency planning hearing, the trial court relieved Emma's guardian ad litem of further involvement in the juvenile case, continued legal and physical custody with petitioners, continued visitation with respondent, and converted the juvenile case to a Chapter 50 civil action by order entered 23 June 2012.

On 28 January 2013, petitioners filed a petition to terminate respondent's parental rights to Emma. Petitioners alleged grounds existed to terminate respondent's parental rights based on neglect, failure to make reasonable progress to correct the conditions that led to Emma's removal from her care and custody, failure to pay a reasonable portion of the cost of Emma's care, dependency, and abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)–(3), (6)–(7) (2013). Petitioners filed a motion to appoint a guardian ad litem ("GAL") for Emma, and by order entered 27 February 2013, the trial court reappointed the GAL who had previously represented Emma in the juvenile case. Petitioners also obtained civil court orders ceasing respondent's visitation with Emma.

After a three-day hearing, the trial court entered an order terminating respondent's parental rights on 6 November 2014. The trial court terminated respondent's parental rights on the grounds of neglect, failure to make reasonable progress to correct the conditions that led to Emma's removal from her care and custody, and failure to pay a reasonable portion of the cost of Emma's care. Respondent appeals.

On appeal, respondent-mother contends the trial court erred by failing to appoint an attorney advocate. Respondent further argues that the trial court erred in terminating her parental rights because the trial court's findings of fact and conclusions of law were inaccurate.

[1] We first address respondent's arguments that the trial court erred in concluding that grounds exist to terminate her parental rights. At the adjudication stage of a termination of parental rights proceeding, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005).

We review the trial court's adjudication to determine if its "findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). "Findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings." *In re L.H.*, 210 N.C. App. 355, 362, 708 S.E.2d 191, 196 (2011). Similarly, the trial court's findings of fact that are not challenged by the appellant are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). However, "[t]he trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

We first address the trial court's conclusion that grounds exist to terminate respondent's parental rights because she willfully failed to pay a reasonable portion of the cost of care for Emma. This conclusion is based on N.C. Gen. Stat. § 7B-1111(a)(3), which permits termination of parental rights where:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2013). Here, Emma was not placed in the custody of a county department of social services, a licensed

child-placing agency, a child-caring institution, and this ground may only apply if petitioners' home qualifies as a foster home. A foster home in North Carolina is defined as a:

> [P]rivate residence of one or more individuals who permanently reside as members of the household and who provide continuing full-time foster care for a child or children who are placed there by a child placing agency or who provide continuing full-time foster care for two or more children who are unrelated to the adult members of the household by blood, marriage, guardianship or adoption.

N.C. Gen. Stat. § 131D-10.2(8) (2013). Thus, there are two means by which petitioners' home may qualify as a foster home: (1) they are providing full-time foster care for a child placed there by a child placing agency; or (2) they are providing full-time foster care for two or more children who are unrelated to them. Petitioners meet neither of these criteria. Emma was not placed with petitioners by a child placing agency because petitioners are Emma's lawful custodians pursuant to a court order entered 23 June 2012. Petitioners are also Emma's maternal great aunt and uncle and thus related to her by blood. Accordingly, petitioners' home does not qualify as a foster home and the trial court erred in concluding that respondent's parental rights could be terminated for her failure to pay a reasonable portion of Emma's cost of care under N.C.G.S. § 7B-1111(a)(3).

[2] The trial court also concluded that grounds exist to terminate respondent's parental rights because she had "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances ha[d] been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2013).

To terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." *In re C.C.*, 173 N.C. App. 375, 618 S.E.2d 813, 819 (quoting N.C. Gen. Stat. § 7B-1109(e) (2003)). Consequently, the trial court must perform a two part analysis:

> The trial court must determine by clear, cogent and convincing evidence that [1] a child has been willfully left by the parent in . . . placement outside the home for over twelve months, and, [2] further, that as of the time of the

> hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re O.C., 171 N.C. App. 457, 464, 615 S.E.2d 391, 396 (2005).

Emma had been adjudicated neglected and removed from respondent's care and custody due to domestic violence and respondent's substance abuse. The trial court made no findings of fact regarding respondent's progress toward correcting her domestic violence issues, and the evidence presented at the hearing failed to suggest that respondent continued to be involved in any domestic violence. On the other hand, the court did find that respondent had "gone through various substance abuse treatment programs and ha[d] been 'clean' for approximately 18 months." The court commended respondent on her progress in addressing her substance abuse issues. Accordingly, we conclude that the trial court's findings of fact do not support its conclusion that respondent had not made reasonable progress under the circumstances toward correcting the conditions which led to Emma's removal from her care. We thus hold the trial court erred in concluding that respondent's parental rights could be terminated based on this ground.

[3] Lastly, the trial court concluded that grounds exist to terminate respondent's parental rights because she had neglected the juvenile. *Id.* § 7B-1111(a)(1) (2013). A neglected juvenile is defined as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). However, "[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citations

omitted). In such cases, a trial court may terminate parental rights based upon prior neglect of the juvenile if "the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

Here, the trial court did not find there was a probability of repetition of neglect if Emma were returned to respondent and, thus, the ground of neglect is unsupported by necessary findings of fact. *Shermer*, 156 N.C. App. at 287–88, 576 S.E.2d at 407–08. Arguably, competent evidence in the record exists to support such a finding, however, the absence of this necessary finding requires reversal. Moreover, we note that in this case there had been no showing that Emma could be returned to respondent, as she was in petitioners' custody pursuant to a civil custody order that, unlike custody granted in a juvenile order under Chapter 7B, could only be modified upon a showing that "(1) that there has been a substantial change in circumstances affecting the welfare of the child, and (2) a change in custody is in the best interest of the child." *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578–79 (2000) (internal citations omitted). Accordingly, we hold the trial court erred in concluding that respondent's parental rights could be terminated on the ground of neglect.

In conclusion, because the trial court erred in concluding that any ground existed to terminate respondent's parental rights, we must reverse its order. Because we are reversing the trial court's order on this basis, we need not address respondent's arguments regarding whether the court erred in failing to appoint an attorney to represent Emma at the termination hearing or in concluding that it would be in Emma's best interests to terminate respondent's parental rights.

REVERSED.

Judges McCULLOUGH and INMAN concur.

IN RE J.R.

[243 N.C. App. 309 (2015)]

IN THE MATTER OF J.R.

No. COA15-286

Filed 6 October 2015

Child Abuse, Dependency, and Neglect—neglect adjudication—not sufficiently supported by evidence

An adjudication that a juvenile was neglected was reversed where some of the trial court's findings were not supported by competent evidence from the adjudicatory hearing. The trial court's findings focused primarily on contact between the child and his father, who had pled guilty to indecent liberties with a sibling, but the evidence and the findings did not show that the father's single contact with the child harmed him or created a risk of harm. Moreover, there was no evidence that the mother's housing instability impeded her care of the child or exposed him to an injurious environment.

Appeal by respondent father from order entered 1 December 2014 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 8 September 2015.

Anthony H. Morris for petitioner-appellee Wake County Human Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for guardian ad litem.

Assistant Appellate Defender Joyce L. Terres for respondent-appellant father.

McCULLOUGH, Judge.

Respondent-father appeals from an order adjudicating his son "Jonah"[1] a neglected juvenile under N.C. Gen. Stat. § 7B-101(15) (2013). Because the evidence at the adjudicatory hearing and the trial court's findings of fact do not support the conclusion that Jonah was neglected, we reverse.

1. The parties stipulated to this pseudonym to protect the child's privacy.

I. Background

Jonah was born out of wedlock in September 2012 and thereafter resided with his mother ("respondent-mother"). Respondent-mother has three older children who were placed in foster care in 2010. While in foster care, respondent-mother's eldest daughter disclosed prior sexual abuse by respondent-father.[2] In November 2011, respondent-father pled guilty to taking indecent liberties with a minor. He received a suspended prison sentence and was placed on supervised probation for three years. As a condition of his probation, respondent-father was forbidden "to socialize or communicate with individuals under the age of eighteen (18) in work or social activities unless accompanied by a responsible adult who is aware of the abusive patterns and is approved in writing by the supervising [probation] officer."

On 1 May 2014, Wake County Human Services ("WCHS") received a report that respondent-mother "was homeless and living from place to place" with Jonah; that she was allowing respondent-father to have contact with Jonah; and that she was using marijuana in Jonah's presence. After meeting with a WCHS social worker, respondent-mother signed a safety plan on 2 May 2014 agreeing not to allow respondent-father to have any contact with Jonah. Respondent-father signed a similar safety plan on 8 May 2014 agreeing to have no contact with his son.

On 2 June 2014, WCHS obtained nonsecure custody of Jonah and filed a juvenile petition claiming that he was neglected and dependent. The petition alleged that respondent-father had been arrested for violating his probation after police observed Jonah sitting on his lap on 22 May 2014. It accused respondent-mother of "willingly allowing this contact to occur." The petition further alleged that respondent-mother had "lost her housing through the Raleigh Rescue Mission . . . for not complying with the program recommendations" and had obtained temporary shelter for herself and Jonah at the Salvation Army through 12 June 2014. Moreover, at the time WCHS took Jonah into custody, respondent-mother "was not able to provide an appropriate alternative placement option for the child."

At the 4 November 2014 adjudicatory hearing, a Raleigh police officer testified that on 22 May 2014, he observed respondent-mother "in the company" of respondent-father, who was "pushing a stroller." The officer saw respondents get onto a Capital Area Transit ("CAT") bus. He

2. The judgment revoking respondent-father's probation indicates that the sexual abuse occurred in December 2006.

followed them onto the bus and observed respondent father "sitting on the CAT bus . . . with a small child on his lap." The officer left the bus and reported the incident to respondent-father's probation officer, who filed a violation report based thereon. Respondents both testified that they had encountered each other by chance at the bus stop and were taking the bus to different destinations.

The trial court entered an order adjudicating Jonah neglected on 1 December 2014. At the hearing, the court made the following findings in support of the adjudication:

> 8. . . . [Respondent-mother's] three older children came into foster care June 11, 2010 due to unstable housing and lack of proper care. Her youngest child was adopted and the two older children were placed in the Guardianship of [her] mother. [Respondent-mother's] parental rights to one child have been terminated.
>
> 9. Respondent-mother's] daughter disclosed sexual abuse by [respondent-father], and he was arrested and pled guilty to four counts of indecent liberties in 2013.
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> 10. That on May 1, 2014, a report was made alleging that [respondent-]mother was homeless and living from place to place with [Jonah]. [Respondent-mother] had stayed with a friend for as many as four months, had resided at a Super 8 motel for a couple of months, at a rooming house and at the Raleigh Rescue Mission. At the time of the filing of the petition the mother and child were residing at the Salvation Army and would need to find another residence by June 12, 2014.
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> 11. . . . [O]n May 2, 2014, the Social Worker and mother met and entered a safety plan, whereby she agreed to not allow [respondent-father] to have contact with the child.
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> 12. As a condition of his parole [respondent-father] was not allowed to be in the presence of any child and on May 8, 2014, [he] signed a safety plan to not have any contact with [Jonah].
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> 13. On May 22, 2014, Raleigh Police [O]fficer Alexander Johnson observed [Jonah] sitting on the lap of [respondent-father]. [Respondent-mother] willingly allowed this contact to occur. [Respondent-father] was arrested for

> violating this term of his probation and he remains incarcerated for this incident. . . .
>
> 14. That [Jonah] was neglected at the time of the filing of the petition in that he was subjected to an injurious environment, did not receive proper care and supervision and lived in a home where another juvenile was subjected to abuse and neglect by an adult who regularly lived in the home.

The court found insufficient evidence to support an adjudication of dependency under N.C. Gen. Stat. § 7B-101(9) (2013).

II. Discussion

On appeal, respondent-father argues that the trial court's adjudication of neglect is not supported by the evidence at the adjudicatory hearing or by the court's findings of fact. This Court reviews an adjudication of neglect under N.C. Gen. Stat. § 7B-807 (2013) to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence" and whether the court's findings, in turn, support its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Findings supported by competent evidence are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). Moreover, "erroneous findings unnecessary to the determination do not constitute reversible error" where an adjudication is supported by sufficient additional findings grounded in competent evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

As an initial matter, we agree with respondent-father that certain of the trial court's findings of fact are unsupported by competent evidence adduced at the adjudicatory hearing. Finding nine lacks evidentiary support insofar as it states that respondent-father pled guilty to "four counts of indecent liberties in 2013." The record shows respondent-father's conviction of a single count of this offense in November 2011. Finding twelve also erroneously refers to respondent-father being on "parole" rather than probation in May 2014. We will disregard these unsupported findings for purposes of our review. *See In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240.

We further agree with respondent-father that no evidence supports the trial court's averment in Finding fourteen that Jonah "lived in a home where another juvenile was subjected to abuse and neglect by an adult

who regularly lived in the home." *See* N.C. Gen. Stat. § 7B-101(15). While it appears that respondent-mother's older children were placed in foster care, the court received no evidence regarding the circumstances of these placements.[3] WCHS made no proffer that respondent-mother "subjected" her older children "to abuse and neglect[;]" that respondent-father "regularly live[d] in the home" with respondent-mother's older children; or that respondent-father "regularly lives in the home" with Jonah, as contemplated by N.C. Gen. Stat. § 7B-101(15).

In pertinent part, the Juvenile Code defines a "neglected juvenile" as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, . . . or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15). "[T]he decisions of this Court require there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline' in order to adjudicate a juvenile neglected." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (citations, internal quotation marks, and emphasis in original omitted). "Whether a child is 'neglected' is a conclusion of law which must be supported by adequate findings of fact." *Id.*

The trial court's adjudicatory findings focus primarily on respondent-father's contact with Jonah on 22 May 2014, which violated both the conditions of respondent-father's probation and the safety plan developed by WCHS and signed by both parents. The findings further show that respondent-father is a convicted child sex offender, having pled guilty to taking indecent liberties with respondent-mother's eldest daughter.

In *In re J.C.B.*, the respondent-father was accused of sexually abusing his first cousin's twelve-year-old step-daughter R.R.N. during

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3. During her testimony, respondent-mother acknowledged a "history of Child Protective Services involvement" involving "unstable housing" and "a lack of income[.]" If WCHS was going to rely on this basis for removal of Jonah, it is incumbent that it offer further evidence.

her overnight visit to the residence that respondent-father shared with his wife, their twelve-year-old son J.C.B., and their nieces C.R.R. and H.F.R. __ N.C. App. __, __, 757 S.E.2d 487, 488, *disc. review denied*, 367 N.C. 524, 762 S.E.2d 213 (2014). Absent some additional indicia that respondent-father's actions posed a threat of harm to the other children in the home, we found his actions insufficient to support their adjudication as neglected:

> Even if we assume arguendo that respondent-father abused R.R.N., a juvenile, in the home where J.C.B., C.R.R., H.F.R., and respondent-father lived, this fact alone does not support a conclusion that J.C.B., C.R.R., and H.F.R. were neglected. . . . The trial court made virtually no findings of fact regarding J.C.B., C.R.R., or H.F.R., and wholly failed to make any finding of fact that J.C.B., C.R.R., and H.F.R. were either abused themselves or were aware of respondent-father's inappropriate relationship with R.R.N. Additionally, the trial court failed to make any findings of fact regarding other factors that would support a conclusion that the abuse would be repeated. As a result, the findings of fact do not support a conclusion that respondent-father's conduct created a substantial risk that abuse or neglect of J.C.B., C.R.R., and H.F.R. might occur.

Id. at __, 757 S.E.2d at 489-90 (citations and internal quotation marks omitted).

As in *In re J.C.B.*, the evidence and the trial court's findings are insufficient to show that respondent-father's single contact with Jonah on 22 May 2014 either harmed the child or created a substantial risk of such harm. The court received no evidence regarding the nature of respondent-father's prior sex offense, including the age of respondent-mother's daughter at the time of the abuse. Moreover, the court heard no evidence and made no findings tending to show that respondent-father was at risk of sexually abusing his own nineteen-month-old son. Accordingly, the findings about the bus incident do not establish neglect under N.C. Gen. Stat. 7B-101(15).

Respondent-mother's lack of stable housing likewise is insufficient to support the trial court's adjudication of neglect, absent some evidence of harm or a substantial risk of harm to Jonah. The court made no finding that Jonah was ever without shelter or that he suffered harm or a substantial risk of harm from respondent-mother's frequent moves. WCHS social worker Paula Hill acknowledged that it was the incident on

the bus with respondent-father, rather than respondent-mother's housing situation, that led the department to file the petition in this cause:[4]

> Q. Is it true that the only reason that this petition was filed by your agency is because of the events that happened on the day of the bus incident?
>
> A. [That was] the initial evidence that precipitated our filing the petition, yes.
>
> Q. And so had those events not occurred, you would not have filed a petition?
>
> A. Probably not.

A lack of stable housing may certainly contribute to a juvenile's status as neglected. *E.g.*, *In re Adcock*, 69 N.C. App. 222, 226, 316 S.E.2d 347, 349 (1984) (noting, *inter alia*, "that respondents moved approximately eight times within an eighteen-month period"). Here, however, there is no evidence or finding that respondent-mother's housing instability impeded her care and supervision of Jonah or exposed the child to an environment injurious to his welfare. The fact that respondent-mother had just ten more days to stay at the Salvation Army at the time WCHS filed its petition does not alter our conclusion. *See generally In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) ("[P]ost-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not an adjudication of neglect[.]"); *see also* N.C. Gen. Stat. § 7B-802 (2013).

Our Supreme Court has characterized parental behavior constituting "neglect" as "either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). Considering as we must the totality of the evidence, *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 127 (2007), we conclude that neither the evidence nor the trial court's findings are sufficient to establish Jonah as a neglected juvenile. Accordingly, we reverse the court's adjudication.

Respondent-father also challenges the provision of the order requiring him to maintain stable housing and income, arguing that it exceeds the trial court's dispositional authority under N.C. Gen. Stat. § 7B-904(d1)(3)

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4. Regarding the report that respondent-mother had used marijuana in Jonah's presence, Hill testified, "I never observed her to be impaired or have any signs of impairment. There was no never [sic] any reason to suspect" such drug use.

(2013). Having reversed the underlying adjudication, we need not address this issue.

REVERSED.

Judges BRYANT and INMAN concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY CAROL A. RAWLS AND DEWEY GEORGE RAWLS DATED JANUARY 24, 2005 AND RECORDED IN BOOK 1538 AT PAGE 1243 IN THE CALDWELL COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA15-248

Filed 6 October 2015

1. Mortgages and Deeds of Trust—foreclosure—note indorsed in blank

On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals held that the trial court did not err by concluding that E*Trade (petitioner) was the holder of the note. Petitioner's production of the original note indorsed in blank established that petitioner was the holder of the note.

2. Appeal and Error—foreclosure—default—issue not raised at trial—not preserved

On appeal from an order authorizing the substitute trustees to proceed with a foreclosure sale, the Court of Appeals did not consider the merits of respondent's argument that respondent had not personally defaulted on the loan. Respondent failed to raise the issue of default at trial, thereby failing to preserve the issue for appellate review.

Appeal by Respondent from order entered 12 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 26 August 2015.

Shapiro & Ingle, LLP, by Jason K. Purser, for petitioner-appellee.

Lindley Law, PLLC, by Trey Lindley, and Clontz & Clontz, PLLC, by Ralph C. Clontz III, for respondent-appellant.

ZACHARY, Judge.

Turnip Investments, LLC (respondent) appeals from an order authorizing the substitute trustee to proceed with a foreclosure sale to recover money owed on a debt secured by a note and deed of trust on property located in Hickory, North Carolina (the property). On appeal, respondent argues that the trial court erred by allowing the foreclosure to proceed, on the grounds that E*Trade (petitioner) failed to prove that it was the holder of the note evidencing the debt, and that respondent had not personally defaulted on the loan. We conclude that the trial court did not err by concluding that petitioner was the holder of the note, and that respondent failed to preserve the issue of default for appellate review.

I. Factual and Procedural Background

On 24 January 2005 Carol Rawls executed a Home Equity Credit Line Agreement in favor of Capital One F.S.B. (Capital One) in exchange for an $85,500.00 credit line loan. On the same date, Ms. Rawls and her husband, Dewey Rawls, executed a Deed of Trust for the property to secure the loan. The note and deed of trust were later indorsed in blank and possession was transferred to petitioner. The last payment towards the loan was made on 25 June 2012. On 12 April 2013 the substitute trustees, Grady I. Ingle or Elizabeth B. Ells, filed a notice of a hearing on foreclosure of the deed of trust. At some point prior to the filing of the foreclosure notice, respondent had purchased the property at an execution sale, subject to the deed of trust; however, the record does not indicate the date of respondent's purchase. The notice, which was directed both to Dewey and Carol Rawls and to respondent, alleged that respondent was the present owner of the property and that the loan was in default. On 22 July 2013 the Ford Firm, PLLC, was appointed substitute trustee. On 30 July 2013 the Assistant Clerk of Superior Court of Caldwell County entered an order permitting the foreclosure to proceed.

Respondent appealed the order to the Superior Court, where a hearing was conducted on 2 June 2014. At the hearing, petitioner "tender[ed the] court file and the documents therein" to the trial court. In addition, petitioner proffered the "original promissory note indorsed in blank" for the trial court to review and compare to the copy in the court file. Petitioner also informed respondent and the trial court that it had been unable to secure service on the Rawls, who are not parties to this appeal. On 12 June 2014 the trial court entered an order allowing foreclosure.

Respondent appeals.

II. Standard of Review

Respondent appeals from the trial court's order entered following a bench trial on petitioner's right to proceed with foreclosure. "When an appellate court reviews the decision of a trial court sitting without a jury, 'findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary.' " *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)). " 'Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.' " *Id.* (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). "When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review." *In re Simpson*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011) (citing *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997), and *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008)).

III. Analysis

On appeal, respondent challenges the trial court's determination that petitioner was entitled to proceed with foreclosure. Respondent argues that the trial court erred by finding that petitioner was the holder of a valid debt and that it was error to find the existence of default on the debt. The elements of a valid foreclosure proceeding are well established:

> [C]ertain elements must be established by the clerk of superior court before a mortgagee or trustee may proceed with a foreclosure by power of sale, including findings of a "(i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b)[.]". . . When a foreclosure action is appealed to the superior court, the trial court is limited to a *de novo* review of those same elements. N.C. Gen. Stat. § 45-21.16(d) (2011).

In re Manning, __ N.C. App. __, __, 747 S.E.2d 286, 290 (2013) (quoting N.C. Gen. Stat. § 45-21.16(d)).

A. Petitioner as Holder of Valid Debt

[1] Respondent argues first that in its order the trial court made no specific findings of facts as to who had possession of the promissory note, instead grouping the paragraphs of the court's order into one "findings of fact and conclusions of law." It is clear that this Court may categorize the findings of fact and conclusions of law. *Id.* Respondent also asserts that there was no competent evidence that at the time of the hearing petitioner was the holder of the promissory note securing the debt. Specifically, respondent contends that petitioner's production of the original note indorsed in blank did not establish that petitioner possessed the note, and that affidavits submitted by petitioner contained hearsay which should not have been considered by the trial court. We find petitioner's production of the original note indorsed in blank to be dispositive.

Under North Carolina law, "[i]n order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt, we must find (1) competent evidence of a valid debt, and (2) that the party seeking to foreclose is the current holder of the Note." *Manning*, __ N.C. App. at __, 747 S.E.2d at 291 (citing *In re Foreclosure of Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 709 (2010)). "This Court has determined that the definition of 'holder' in North Carolina's adoption of the Uniform Commercial Code ('UCC') is applicable to the term as it is used in N.C.G.S. § 45-21.16 for foreclosures under powers of sale." *Adams*, 204 N.C. App. at 322, 693 S.E.2d at 709 (2010) (citing *Connolly v. Potts*, 63 N.C. App. 547, 551, 306 S.E.2d 123, 125 (1983)). We next review the applicable definitions under the UCC.

A "promissory note is a 'negotiable instrument' under N.C. Gen. Stat. [§] 25-3-104(a)." *Franklin Credit Recovery Fund v. Huber*, 127 N.C. App. 187, 189, 487 S.E.2d 825, 826 (1997). N.C. Gen. Stat. § 25-1-201(b)(21) defines a "holder" in relevant part as the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" and thereafter at N.C. Gen. Stat. § 25-1-201(b)(27) defines "person" to include "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture . . . public corporation, or any other legal or commercial entity[.] "Bearer" is defined by the same statute in part as "a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank." An "indorsement is 'a signature . . . that alone or accompanied by other words is made on an instrument for the purpose

of . . . negotiating the instrument.' " *Bass*, 366 N.C. at 468, 738 S.E.2d at 176 (quoting N.C. Gen. Stat. § 25-3-204(a)).

The Uniform Commercial Code differentiates between two types of indorsements: special and blank. If an indorsement is "made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a 'special indorsement.' " N.C. Gen. Stat. § 25-3-205(a). "If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a 'blank indorsement'. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." N.C. Gen. Stat. § 25-3-205(b). The distinction between a "special indorsement" and an indorsement "in blank" may be significant in determining whether a petitioner has shown possession of the note. As stated in the Official Comments to N.C. Gen. Stat. § 25-3-205:

> If the indorsement is made by a holder and is not a special indorsement, it is a blank indorsement. For example, the holder of an instrument, intending to make a special indorsement, writes the words 'Pay to the order of' without completing the indorsement by writing the name of the indorsee. The holder's signature appears under the quoted words. The indorsement is not a special indorsement because it does not identify a person to whom it makes the instrument payable. Since it is not a special indorsement it is a blank indorsement and the instrument is payable to bearer. The result is analogous to that of a check in which the name of the payee is left blank by the drawer.

Thus, as noted by the Fourth Circuit, "[n]egotiable instruments like mortgage notes that are endorsed in blank may be freely transferred. And once transferred, the old adage about possession being nine-tenths of the law is, if anything, an understatement. Whoever possesses an instrument endorsed in blank has full power to enforce it." *Horvath v. Bank of New York, N.A.*, 641 F.3d 617, 621 (4th Cir. 2011).

Applying the above definitions, this Court concludes that the "holder" of a promissory note may be a bank or other lending institution that is in possession of a note that has been indorsed in blank:

> Under the Code, the party in possession of a negotiable instrument indorsed in blank is presumptively the holder. N.C. Gen. Stat. § 25-1-201(b)(21) (2013); N.C. Gen. Stat.

> § 25-3-109 (2013). *See also*, *In re Manning*, __ N.C. App. __, __, 747 S.E.2d 286, 291-92 (2013) (presentation of the original note to the court, indorsed in blank, "serves as competent evidence to support the trial court's finding that [the party] was the present holder.").

In re Dispute over the Sum of $375,757.47, __ N.C. App. __, __, 771 S.E.2d 800, 806 (2015). Our conclusion in this regard finds support in several unpublished opinions of this Court, in addition to opinions from federal bankruptcy court which, although not binding on this Court, we find persuasive. *See*, *e.g.*, *In re Gibbs*, 765 S.E.2d 122, 2014 N.C. App. LEXIS 948 (unpublished):

> In a recent case addressing a similar issue, this Court stated that, "[w]here petitioner, at a foreclosure hearing before the trial court, produced the original mortgage loan note reflecting a blank indorsement and an affidavit stating that the lienholder was in possession of the Note, such was sufficient to establish the lienholder as the holder of the Note." Although we are not bound by our prior unpublished decisions, we believe that *Cornish* sheds additional light on our decision that the record contains sufficient evidence to establish that Petitioner held Respondents' note.

Gibbs, 765 S.E.2d at *17 n.4 (quoting *In re Cornish*, 757 S.E.2d 526 at *1, 2014 N.C. App. LEXIS 216 (unpublished), and citing *United Services Automobile Assn. v. Simpso*n, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339 (1997)). *See also*, *e.g.*, *In re Hernandez*, 2014 Bankr. LEXIS 5146 (Bankr. E.D.N.C. Dec. 24, 2014) ("At the hearing . . . counsel for [petitioner] presented the original Note with a blank endorsement. While [petitioner's counsel] was in actual possession of the Note, he was acting as attorney, agent and proxy for [petitioner] and it is clear from the court's examination of the Note that it was the original document clearly in the possession of [petitioner]."), and *In re Robinson*, No. 07-02146-8-JRL, 2011 Bankr. LEXIS 4504 (Bankr. E.D.N.C. Nov. 22, 2011) ("At the hearing, [petitioner] entered the original promissory note with the blank indorsement into evidence. Thus [petitioner] is clearly the holder of the note because it is in possession of the original note indorsed in blank.").

Based on the plain language of N.C. Gen. Stat. § 25-3-205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."), and the reasoning of cases such as those cited above, we hold that a petitioner's production of an original note indorsed in blank establishes that

the petitioner is the holder of the note. In this case it is undisputed that petitioner produced the original note indorsed in blank, and we hold that this was sufficient to support the trial court's conclusion that petitioner was the holder of the note.

Respondent concedes on appeal that petitioner produced the original note at the hearing, but contends that this was insufficient to establish that petitioner was the holder of the note. Respondent's position is based upon a quote from *Simpson*, in which we stated that "[p]roduction of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument[.]" *Simpson*, 211 N.C. App. at 491, 711 S.E.2d at 171. *Simpson*, however, which did not hold that production of an original note could never be adequate to establish a petitioner's right to enforce a note, is factually distinguishable from the instant case. *Simpson* did not involve a note indorsed in blank, but instead concerned a note that had been indorsed to a specific entity which was "not the party asserting a security interest in Respondent's property." *Id.* at 493, 711 S.E.2d at 172. Significantly, *Simpson* specified that it was "[b]ecause the indorsement does not identify Petitioner and is not indorsed in blank or to bearer, [that] it cannot be competent evidence that Petitioner is the holder of the Note." *Id.* at 493, 711 S.E.2d at 173 (emphasis added).

Given that we have concluded that petitioner's production of the original note indorsed in blank was sufficient to allow the trial court to conclude that petitioner was the holder of the note, we find it unnecessary to reach respondent's arguments concerning the admissibility of the affidavits proffered at the hearing. Respondent also argues that the trial court erred by holding that petitioner was the holder of the note without making a specific finding that petitioner was in physical possession of the note. In this case, there was no dispute that petitioner was in possession of the note. Moreover, we have held that:

> "[W]hen a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." There is no dispute that petitioner had physical possession of the note at the hearing . . . Therefore, the only inference that can be drawn from the evidence is that petitioner . . . was in physical possession of the note at the time of the hearing.

In re Foreclosure of Yopp, 217 N.C. App. 488, 499, 720 S.E.2d 769, 775 (2011) (quoting *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999)). We conclude that respondent's argument lacks merit.

B. Default

[2] In its second argument, respondent asserts that because it was not the original borrower, it could not personally be in default under the terms of the loan. Respondent does not dispute, however, that it purchased the property subject to the note and deed of trust. Moreover, respondent did not raise any argument challenging the issue of default at the hearing before the trial court. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that in order "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must "obtain a ruling upon the party's request, objection, or motion." By failing to raise the issue of default at trial, respondent has failed to preserve it for appellate review. *See*, *e.g.*, *Basmas v. Wells Fargo Bank N.A.*, __ N.C. App. __, __, 763 S.E.2d 536, 539 (2014), which held:

> Plaintiffs argue that the trial court erred by finding that their default on the loan after entry of [an earlier order] constituted new facts or circumstances[, and] . . . assert that their mortgage debt was discharged in bankruptcy[.] . . . We do not reach the merits of this issue, because plaintiffs failed to preserve for appellate review the effect of a discharge in bankruptcy on the foreclosure action.

For the reasons discussed above, we conclude that the trial court did not err and that its order must be

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

North Carolina Industrial Commission, I.C. Nos. 459234, 271904
DOROTHY JANE KETCHIE and CLEGG LEE JOINES, Employees, Plaintiffs
v.
FIELDCREST CANNON, INC., Insolvent Self-Insured Employer,
N.C. SELF-INSURANCE SECURITY ASSOCIATION, Defendants

No. COA15-140

Filed 6 October 2015

Workers' Compensation—asbestosis—last exposure prior to Security Association—not covered claims

The Full Industrial Commission's conclusion in a workers' compensation case that plaintiffs' claims for were not "covered claims" for purposes of compensation was affirmed where plaintiffs suffered from asbestosis, their last injurious exposure occurred prior to their employers becoming members of the North Carolina Self-Insurance Security Association, and their employer (Fieldcrest) became bankrupt. Because the Security Association was not created until 1 October 1986, after each of plaintiffs' last injurious exposure to asbestos occurred, these claims do not constitute "covered claims" within the scope of the statutes. While the Workers' Compensation statutes must be liberally construed, the Court of Appeals must not enlarge the definition of "covered claims" beyond the clearly expressed language of the statutes.

Appeal by Plaintiffs-Appellants from order entered 29 October 2014 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 13 August 2015.

Wallace and Graham, P.A., by Michael B. Pross, Edward L. Pauley, and Cathy A. Williams, for Plaintiffs-Appellants.

Stuart Law Firm, PLLC, by Catherine R. Stuart and Susan J. Vanderweert, for Defendants-Appellees.

INMAN, Judge.

Plaintiffs-Appellants are appealing the Full Commission's order denying their claims on the grounds that their claims are not "covered claims," as that term is defined in N.C. Gen. Stat. § 97-130(4), because their last injurious exposure to asbestos occurred before Fieldcrest was a member of the North Carolina Self-Insurance Security Association ("the Security Association"). After careful review, we affirm.

When workers who suffer from occupational disease incurred their last injurious exposure to asbestos prior to a self-insurer joining the Security Association, this Court cannot interpret the statute in a manner contrary to its plain and unambiguous language, even if this interpretation bars recovery by workers who have no other recourse due to the employer's bankruptcy.

Factual and Procedural Background

Plaintiff-Appellant Clegg Lee Joines ("Mr. Joines") was employed for various periods of time by Defendant-Appellee Fieldcrest Cannon, Inc. ("Fieldcrest") beginning in 1941 and ending 24 September 1986. It is undisputed that Mr. Joines was exposed to asbestos during his employment with Fieldcrest. The parties stipulated that Mr. Joines's last injurious exposure to asbestos occurred during the seven months prior to 24 September 1986. Mr. Joines was diagnosed with mesothelioma in 2003 and died on 9 May 2004.

Plaintiff-Appellant Dorothy Jane Ketchie ("Ms. Ketchie") was employed by Fieldcrest from 1972 to 1974. Her last date of employment was 31 January 1974. The parties stipulated that her last injurious exposure to asbestos occurred within the seven months prior to 31 January 1974. In 2000, Ms. Ketchie was diagnosed with asbestosis as a result of her exposure to asbestos during her employment with Fieldcrest.

The General Assembly created the Security Association on 1 October 1986 after several large, self-insured trucking companies became insolvent which resulted in many injured employees' outstanding claims not being paid. The Security Association's enabling statute states that the purpose of the Security Association is, among other things, "to provide mechanisms for the payment of covered claims against member self-insurers, to avoid excessive delay in payment of covered claims, [and] to avoid financial loss to claimants because of the insolvency of a member self-insurer[.]" N.C. Gen. Stat. § 97-131(a) (2013). This same language was used in the original 1986 version of section 97-131(a).

Fieldcrest (which later became a subsidiary of Pillowtex Inc. and Pillowtex Corporation) was a member of the Security Association from 1 October 1986 until 19 December 1997, at which time Fieldcrest purchased workers' compensation insurance. In 2000, Pillowtex filed for bankruptcy in Delaware. However, the bankruptcy court ordered relief from the automatic stay to allow Pillowtex to continue resolving workers' compensation claims that had arisen prior to Fieldcrest's membership in the Security Association, *i.e.*, claims that arose prior to 1 October 1986. Pillowtex reorganized and emerged from bankruptcy.

Pillowtex filed for a second bankruptcy in 2003. At that time, Fieldcrest defaulted on its workers' compensation claims incurred during its period of self-insurance—claims that arose prior to Fieldcrest joining the Security Association on 1 October 1986. Plaintiffs'-Appellants' claims, and approximately 15 other similarly situated former employees' claims, fell into this category—their employment and their last injurious exposure to asbestos both occurred prior to 1 October 1986 but their asbestos-related diseases were not diagnosed until after Fieldcrest's bankruptcies. Because Plaintiffs-Appellants were diagnosed with their asbestos-related diseases after Fieldcrest declared bankruptcy in 2003 and defaulted on all of its outstanding workers' compensation claims, their last resort to seek compensation is the Security Association.

Both Plaintiffs-Appellants filed workers' compensation claims against Fieldcrest and the Security Association in the Industrial Commission in 2009. The matter came on for hearing before the Full Commission on 4 August 2014. The Full Commission concluded that the language of section 97-130(4) was plain and unambiguous and statutorily excluded both Plaintiffs'-Appellants' claims because "covered claims" only includes those claims that relate to an injury that occurred while the employer was a member of the Security Association. Here, because Plaintiffs-Appellants were not injured but had asbestos-related diseases, the Full Commission relied on N.C. Gen. Stat. § 97-57, which provides that in latent occupational disease cases, "liability attaches to the employer or carrier who is on the risk when the last injurious exposure occurs." Thus, because "Fieldcrest was not a member of [the] Security Association on the alleged date of last injurious exposure," the Plaintiffs'-Appellants' claims were not "covered claims" under section 97-130(4). Plaintiffs-Appellants appeal.

Standard of Review

"The Industrial Commission's conclusions of law are reviewable *de novo* by this Court." *Moore v. City of Raleigh*, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999). "Although the Workers' Compensation Act should be liberally construed, judges must interpret and apply statutes as they are written" to ensure that the legislative intent is accomplished. *Clark v. ITT Grinnell Indus. Piping, Inc.*, 141 N.C. App. 417, 426, 539 S.E.2d 369, 375 (2000). As our Supreme Court has noted:

> This Court has interpreted the statutory provisions of North Carolina's workers' compensation law on many occasions. In every instance, we have been wisely guided by several sound rules of statutory construction which

> bear repeating at the outset here. First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation." Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced.

Shaw v. U.S. Airways, Inc., 362 N.C. 457, 462-63, 665 S.E.2d 449, 452-53 (2008).

Analysis

The only issue on appeal is whether N.C. Gen. Stat. § 97-130(4) can be interpreted to include Plaintiffs'-Appellants' claims even though their last injurious exposure occurred prior to Fieldcrest becoming a member of the Security Association.

The Security Association is a nonprofit, unincorporated entity created to, among other things, "provide mechanisms for the payment of covered claims against member self-insurers, to avoid excessive delay in payment of covered claims, [and] to avoid financial loss to claimants because of the insolvency of a member self-insurer." N.C. Gen. Stat. § 97-131(a) (2013). All individual and group self-insurers are required to be members of the Security Association as a condition of being licensed to self-insure by the Commissioner of Insurance. N.C. Gen. Stat. § 97-131(b) (2013). "An individual self-insurer or group self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs." N.C. Gen. Stat. § 97-131(b)(2) (2013). "Covered claims" are the unpaid claims against insolvent self-insurers "that relate[] to an injury that occurs while the [self-insurer] is a member of the Association and that is compensable under [the Workers' Compensation Act]." N.C. Gen. Stat. § 97-130(4) (2013).

The plain language of sections 97-130 and 97-131 restricts the scope of compensation to those claims that arise while a self-insured company

is both (1) insolvent and (2) a member of the Security Association. Thus, the only claims that the Security Association would be obligated to pay on behalf of Fieldcrest are those that "relate to an injury" that occurred—or in this case, relate to an occupational disease where the last injurious exposure occurred—while Fieldcrest was a member of the Security Association. Because the Security Association was not created until 1 October 1986, a date *after* each of Plaintiffs'-Appellants' last injurious exposure to asbestos occurred, these claims do not constitute "covered claims" within the scope of the statutes. Thus, the Full Commission properly concluded that Plaintiffs-Appellants are not eligible for compensation pursuant to N.C. Gen. Stat. § 97-130(4) and § 97-131.

Plaintiffs-Appellants contend that the plain meaning approach to interpreting the statutes is "overly narrow" for two reasons. First, Plaintiffs-Appellants argue that because the General Assembly used only the word "injury" in N.C. Gen. Stat. 97-130(4), "the General Assembly simply never contemplated some of the unique issues found in disease claims when it enacted the Security Association statutes." Therefore, as Plaintiffs-Appellants contend, the laws regarding the Security Association must be "flexibly construe[d]" to effectuate the intent of the legislature to compensate victims of occupational disease in addition to victims of injuries. This argument fails because section 97-52 (2013) of the Workers' Compensation Act provides that the disablement or death from an occupational disease "shall be treated as the happening of an injury by accident." Thus, the General Assembly's use of the word "injury" necessarily included any claims for occupational disease. Therefore, it is not necessary to "flexibly" expand our interpretation of what constitutes a "covered claim" based on the General Assembly's failure to use the word "occupational disease" in the relevant statutes.

Second, Plaintiffs-Appellants allege that the amendments to the statutes when the Security Association was first created in 1986 evidence a legislative intent that "all claims arising due to an insolvency whether before or after 1986 would be paid by the Security Association." Following Plaintiffs'-Appellants' logic, "covered claims" would include even those claims that had arisen before a self-insurer became a member of the Security Association; in other words, once a self-insurer joined the Security Association, all claims were retroactively covered. We disagree with this interpretation of the amendments.

As noted, while we must liberally construe workers' compensation statutes, this Court must not enlarge the definition of "covered claims" beyond the clearly expressed language of the statutes. *See Shaw*, 362 N.C. at 462-63, 665 S.E.2d at 453. Plaintiffs-Appellants rely on the

original 1986 version of section 97-133(a)(4), which has been subsequently amended, that states:

> The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings *that occurred prior to the effective date of this Article*; provided that any assessments made to pay such claims may be credited towards the tax paid by the self-insurers under G.S. 97-100.

1986 N.C. Sess. Laws 208, 208-09, ch. 928, § 1 (emphasis added). Plaintiffs-Appellants interpret this language to mean that any claims that arose "prior to the effective date" of the Security Association statutes are covered. However, Plaintiffs-Appellants have misinterpreted this statute; the clause "that occurred prior to the effective date of this Article" refers to when the insolvency occurred, not when the claims arose. This original version of the statute required the Security Association to pay claims that had arisen prior to 1 October 1986 only if the self-insurer had become insolvent prior to the creation of the Security Association, in order to cover the existing workers' compensation claims against the insolvent trucking companies. However, the original language does not reflect an intent to cover pre-existing claims against companies that were solvent prior to creation of the Security Association. In other words, there is no coverage for pre-1986 claims if the insolvency of the self-insurer occurred after the Security Association was created.

In addition to misconstruing the original language of section 97-133(a)(4), Plaintiffs-Appellants completely disregard the plain language of the original version of section 97-131(b)(2):

> A self-insurer shall be deemed to be a member of the Association for purposes of its own insolvency when: (a) the self-insurer is a member of the Association *when the insolvency occurs*, but claims relating to a compensable event that occurred prior to the date the self-insurer joined the Association are not included hereunder[.]

1986 N.C. Sess. Laws 402, 403, ch. 1013, § 1 (emphasis added). This language plainly precluded claims that arose before a self-insurer joined the Security Association if the self-insurer was solvent prior to the creation of the Security Association. Moreover, even under the original version of the statutes, a "covered claim" still only included those claims that related to an injury that occurred while the self-insurer was a member of the Security Association. *Id.* Plaintiffs'-Appellants' interpretation of the

1986 version of section 97-133(a)(4) cannot be reconciled with the other provisions of the statutes expressly precluding coverage for pre-existing claims against self-insurers who were solvent at the time the Security Association was created. Thus, even if this Court were to conclude that the language is ambiguous, and look to the legislative history to discern intent, the original 1986 statutes precluded Plaintiffs'-Appellants' claims from being "covered claims" because: (1) Fieldcrest was solvent when it joined the Security Association on 1 October 1986; and (2) Plaintiffs'-Appellants' last injurious exposure occurred prior to Fieldcrest becoming a member.

Finally, Plaintiffs-Appellants contend that the Full Commission's order violates their due process and equal protection rights. However, because Plaintiffs-Appellants fail to raise any constitutional argument before the Industrial Commission, they waived these arguments on appeal. *See Powe v. Centerpoint Human Servs.*, 215 N.C. App. 395, 412, n.3, 715 S.E.2d 296, 307, n.3 (2011) (refusing to address a plaintiff's constitutional argument when she failed to raise this issue before the Industrial Commission).

Conclusion

Based on the plain and unambiguous language of the statutes governing the Security Association, we affirm the Full Commission's conclusion that Plaintiffs'-Appellants' claims are not "covered claims" for purposes of compensation.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

DABEERUDDIN KHAJA, PLAINTIFF
v.
FATIMA HUSNA, DEFENDANT

No. COA14-701

Filed 6 October 2015

1. Divorce—marriage in India—procedural posture—issues addressed separately

An "incredibly complex" divorce case was organized by separately looking at the each of the issues addressed by the Divorce

Judgment. Although the trial considered a motion to dismiss based upon subject matter jurisdiction, the wife chose not to pursue the motion and there were no arguments about it on appeal. The wife's motion to dismiss based upon Rule 12(b)(6) was converted to a motion for summary judgment, but only on the claim for absolute divorce. The wife did not contest the denial of the motion to dismiss based on an Indian annulment and also did not contest the granting of the claim for absolute divorce, which was affirmed. The wife did, however, contest the trial court's use of findings from the divorce judgment in the alimony order.

2. Injunctions—preliminary—divorce—use of findings

A preliminary injunction in a divorce case was affirmed where the wife did not present any substantive challenge to the entry of the preliminary injunction itself but argued that the trial court erroneously relied on findings from the preliminary injunction in its Alimony Order.

3. Evidence—affidavit not considered—waiver of privilege involved—affidavit ultimately not offered

There was no error in a complicated divorce case where the trial court did not consider the wife's affidavit in opposition to the motion for sanctions/in limine filed against the wife. Considered in the context of the entire hearing, the wife wanted to blame her prior attorneys for her failures to respond to discovery requests, which she sought to do by her affidavit without waiving attorney-client privilege. When the trial court noted that she would be waiving attorney-client privilege if it accepted the affidavit, she chose not to waive the privilege, did not challenge the trial court's interpretation of the affidavit or its stance on privilege, and declined to present the affidavit. The affidavit was not admitted because the wife's attorney made the strategic decision not to offer it.

4. Discovery—sanctions order—sanctions—abuse of discretion not argued or shown

There was no abuse of discretion in a divorce case in the exclusion of an affidavit as a discovery sanction where the wife did not introduce the affidavit, argue abuse of discretion, or demonstrate abuse of discretion. Moreover, considered in context, the trial court did not require her to do the impossible.

5. Discovery—sanctions order—date of entry—argument waived

The wife in a divorce case waived on appeal any argument regarding the date of the entry of a sanctions order where she

essentially argued that she was not aware of her discovery obligations until it was too late. The wife's counsel did not mention any concerns about the entry of the sanctions order at the alimony trial, despite the discussion of various portions of the order at the hearing.

6. Divorce—alimony—prior findings

An alimony order was reversed and remanded where the trial court made it clear that it thought it was bound by all judgments and orders that had preceded the hearing. The trial court was not actually bound by the prior findings of fact. The trial court used findings from the divorce judgment that went beyond the facts needed to address the limited issues before it. Those unnecessary findings from the divorce judgment should have been irrelevant to the trial court when considering alimony.

7. Divorce—preliminary injunction—findings—not binding

Findings from a preliminary injunction were not binding upon the trial court at an alimony hearing.

8. Divorce—sanctions order—findings

Viewed within context, as an order addressing discovery issues and violations, a Sanctions Order in a divorce case remained binding on remand, including its prohibition on the wife's presentation of evidence of marital fault by husband. The order was remanded because the appellate court had no way of knowing exactly which prior findings of fact the trial court erroneously relied upon or whether the trial court might otherwise have found differently.

9. Divorce—wife's income—Bureau of Labor Statistics

In a divorce case remanded on other grounds, the trial court erred by taking judicial notice of Bureau of Labor Statistics information on salaries in defendant's occupation and relying so heavily upon these statistics for its finding of fact regarding her earning capacity.

Appeal by defendant from judgments entered 11 December 2012 and 4 January 2013, preliminary injunction entered 3 January 2013, orders entered 22 May and 3 June 2013 by Judge Debra Sasser in District Court, Wake County, and order entered 26 August 2013 by Judge Michael J. Denning, in District Court, Wake County. Heard in the Court of Appeals 19 March 2015.

Sandlin Family Law Group, by Deborah Sandlin and Debra Griffiths, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

STROUD, Judge

Defendant, former wife, appeals several judgments, a preliminary injunction, and orders regarding her divorce and alimony obligations to plaintiff, her former husband. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

This incredibly complex case, with a record, a supplemental record, and transcripts totaling over 3,500 pages, arises from a very short marriage. Unfortunately, this case is not the only litigation spawned by the two parties, as defendant ("wife") has also filed a separate tort action against plaintiff ("husband") in Superior Court, Wake County and brought both criminal charges and a civil action against him in India. Perhaps it goes without saying that the parties agree on very little, but it is undisputed that the parties met through an Indian marriage website, began communicating in June of 2007, and were married in India on 19 October 2007. Sometime in 2008 they separated, though the exact date of separation is disputed.

The issues relevant to this appeal arise from husband's divorce and alimony claim against wife. On 24 October 2011, husband filed a complaint in Wake County seeking an absolute divorce, alimony, and attorney fees. On 3 February 2012, wife filed "MOTIONS AND ANSWER" in which she moved to dismiss husband's claims based upon subject matter jurisdiction and failure to state a claim upon which relief could be granted, arguing that the parties were no longer married due to an annulment in November of 2011 in India. Wife also raised various affirmative defenses, including the annulment; constructive and actual abandonment; "physical[], sexual[] and psychological[] abuse[] . . . [due to] cruel and barbarous treatment endangering her life and well being[;]" "indignities to [wife] as to render her condition intolerable and her life burdensome[;]" a lie that "induce[d] her into entering" the marriage; "fraudulent[] induce[ment] . . . in order to gain entry into the United States and to procure immigration through her[;]" and "fraud and unclean hands . . . for alimony" purposes. From this point forward, we will outline the chronology of this case by reviewing the judgments, preliminary injunction, and orders on appeal.

A. Preliminary Injunction

On 4 December 2012, the trial court issued a "TEMPORARY RESTRAINING ORDER" ("TRO") on behalf of husband due to (1) ongoing disputes between the parties regarding discovery, particularly wife's failure to turn over electronic devices such as computers and flash drives, and (2) wife's "pursuing false criminal charges against [husband] in India, having [husband's] family members arrested," . . . "attempt[ing] to have [husband's] medical license revoked[,] "effort to interfere with [husband's] immigration status[,]" and "false police reports to the Morrisville Police Department[,]" which ultimately culminated in husband being arrested by Immigration and Custom Enforcement

> and held for 21 days as a result of [wife's] interference and lies. [Husband's] passport has been impounded as a result of her lies and he was placed on Interpol's Most Wanted because of her lies which he has only recently been able to rectify after substantial work and attorneys' fees.

The TRO ordered wife to immediately

> surrender . . . all computers, laptops, sim cards, flash drives, cd drives, hard drives and other modes of electronic storage equipment, in [wife's] possession, custody or control or that [wife] used at any time between August 200[][1] to the present . . . by 5:00 pm on Wednesday, December 5, 2012.
>
> 2. [Wife] is to immediately cease any harassment (as defined by NCGS § 14[-]277.3A(b)(2)) or interference with [husband] or his family, including but not limited to contacting the State Department, Department of Homeland Security, Immigration Services, any Congressman's office, any governmental agency in India regarding [husband]. [Wife] is also prohibited from submitting any further documentation to any Indian official without a court order allowing her to do so. This prohibition applies to both direct and indirect harassment and interference. [Wife] is to tell any person acting on her behalf to stop all such contact.

The TRO set "[t]his matter" for hearing on 13 December 2012.

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1. The final digit of the year is illegible.

As set by the TRO, on 13 December 2012, the trial court held the hearing, and on 3 January 2013, based on the 13 December 2012 hearing, the trial court entered a Preliminary Injunction. The Preliminary Injunction included extensive findings of fact regarding the inception of the parties' relationship, the relationship's demise, wife's efforts to have husband arrested and deported, the ensuing litigation outside of this case, and wife's repeated refusals to comply with discovery requests and orders.[2]

Despite the title of the order, it was not a Preliminary Injunction in the usual sense of the term since it mainly addressed discovery issues. *See Jeffrey R. Kennedy, D.D.S. v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333, ("A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." (citation and quotation marks omitted)). Essentially, the Preliminary Injunction addressed wife's noncompliance with the discovery process; in other words, had wife complied with discovery requests and orders, no preliminary injunction would have been needed. The Preliminary Injunction required wife to preserve her "electronic devices . . ., including but not limited to cellular phones, smart phones, laptops, computers, storage devices such as flash drives or external hard drives, table[t]s, disks, etc.[,]" "provide her email addresses and passwords[,]" to Mr. Ellington, an expert in computer forensics and analysis, and "[b]y December 20, 2012, . . . submit an affidavit . . . detail[ing] . . . any [and] all communication that [wife] has had with any governmental agency that may directly or indirectly impact [husband]."[3] The Preliminary Injunction set another hearing on 3 January 2013 for consideration of "remaining discovery issues [and] any issues regarding the implementation of this order."

B. Judgment for Absolute Divorce

On 11 December 2012, exactly one week after the TRO was entered and two days before the hearing which would result in the Preliminary

2. Husband had previously served various discovery requests upon wife, and the trial court had entered an order compelling discovery which is not a subject of this appeal.

3. The TRO did enjoin wife from continuing to "harass" husband and from reporting him to various agencies, but this language was not included in the decretal portion of the Preliminary Injunction.

Injunction, the trial court entered a "JUDGMENT FOR ABSOLUTE DIVORCE[.]" On 4 January 2013, the trial court entered an "AMENDED JUDGMENT FOR ABSOLUTE DIVORCE" ("Divorce Judgment") to correct a "typographical error[.]" The Divorce Judgment noted that wife "withdrew her motion to dismiss for lack of subject matter jurisdiction based on lack of domicile of either party and proceeded with her Rule 12(b)(6) claim asserting the affirmative defense of an Indian annulment."

The trial court made several findings of fact, including the following which are relevant to the issues raised on appeal:

> 5. . . . This court declines to recognize the Indian annulment decree under the principles of comity in that the petition was filed at a time when neither [husband] nor [wife] was a domiciliary of India. . . .
>
> 6. The parties were married on October 19, 2007. Plaintiff left the marital residence on February 9, 2008 when Defendant asked him to leave. The parties worked on reconciling the marriage for sometime. Defendant made the decision to remain separate and apart from Plaintiff beginning in September 2008. The parties have in fact remained separate and apart since September 2008.

C. Order for Sanctions and Injunction

As set by the Preliminary Injunction, on 3 January 2013, the same day the Preliminary Injunction was entered, the trial court held a hearing regarding "[husband's] request for an injunction and for sanctions related to spoliation of evidence and non-production of discovery[;]" on 22 May 2013, the trial court entered the resulting "ORDER FOR SANCTIONS AND INJUNCTION" ("Sanctions Order"). The Sanctions Order has extensive findings of fact, including findings of fact regarding the contents of wife's provided electronic devices, her continued failure to fully comply with the prior orders regarding discovery, and her extensive interference in husband's life. The trial court concluded that wife had no "legal merit" in her objections regarding discovery compliance and that there was "no just cause" for wife's failure to comply with discovery requests. The trial court ordered:

> 1. [Wife] is hereby precluded from presenting any evidence regarding any marital fault on the part of [husband].

2. [Wife] is hereby precluded from providing any testimony that is not solicited by [husband's] attorney regarding any contact or communication with any third party or third party agency regarding [husband].

3. [Wife] is hereby precluded from presenting any evidence regarding [husband's] earning capacity. [Wife] may only present evidence regarding [husband's] financial need for alimony.

4. [Wife] may not solicit testimony from any witness that she has not fully disclosed to [husband].

It is important to note, that like the Preliminary Injunction, the "injunction" portion of the Sanctions Order addresses discovery issues. Wife was not actually "enjoined" from any activity but rather was ordered to comply with discovery and sanctioned for not having already done as ordered. The trial court also noted that "[t]he issue of attorneys' fees amount and expert fees shall be entered by separate order."

D. Order for Alimony and Attorney Fees

On 22 May 2013, the same date the Sanctions Order was entered, the trial court began a three-day trial on husband's alimony and attorney's fee claim; on 26 August 2013, the trial court entered the resulting "ORDER FOR ALIMONY AND ATTORNEYS' FEES" ("Alimony Order"). The Alimony Order has 16 single-spaced pages with extensive findings of fact and conclusions of law. Ultimately, on 26 August 2013, the trial court entered an order requiring wife to pay alimony to husband in the amount of $1,600 per month, starting 1 September 2013 and continuing until 30 August 2016 and to pay additional attorney fees to husband's counsel in the amount of $40,000.

E. Order for Attorney Fees

On 3 June 2013, the trial court entered an "ORDER FOR ATTORNEYS' FEES" ("Fees Order"), pursuant to its Sanctions Order in which it had informed the parties it would be entering an order at a later time. The Fees Order required wife to pay $20,000 to husband's counsel and $2,500.00 to "Mr. Ellington for the forensic evaluations and court testimony[.]" Wife filed a notice of appeal from most of the aforementioned orders and judgments, even if interlocutory, on 25 September 2013.

II. Divorce Judgment

"We made a mess of it."[4]

To understand wife's first argument on appeal we must turn back from the Amended Divorce Judgment to the Divorce Judgment as originally entered. The introductory paragraph in the original Divorce Judgment stated that

> [t]he parties, through counsel, presented evidence during Defendant's motion to dismiss, thus converting the motion to dismiss to a summary judgment hearing. The court having heard testimony of the parties, examined various exhibits and examined extensive case law finds that no genuine issue of material fact exists and that [husband] is entitled to summary judgment divorce for the following reasons[.][5]

On 28 November 2012, the trial court held a testimonial hearing to address wife's two motions to dismiss and husband's divorce claim. Wife first proceeded on her motions to dismiss for lack of subject matter jurisdiction and failure to state a claim; both these arguments, according to wife, were based on the annulment of the parties' marriage issued by a court in India.[6] In order to address the jurisdictional issues, the parties presented testimony and other evidence. Since hearings on motions to dismiss under Rule 12(b)(6) typically do not include testimony, this put the case in an interesting procedural posture because the testimony and exhibits the trial court was considering for the jurisdictional motion should not have been considered for the Rule 12(b)(6) motion. *See Hillsboro Partners v. City of Fayetteville*, ___ N.C. App. ___, ___, 738 S.E.2d 819, 822 ("As a general proposition, a trial court's consideration of a motion brought under Rule 12(b)(6) is limited to examining the legal

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4. Throughout this case, the parties' counsel and trial court remained keenly aware of the level of complexity and chaos involved. For this reason, the record includes comments which seem to summarize each of the issues raised on appeal, and we have quoted these as introductions to each section. We appreciate husband's counsel for her candor in this particular remark about the procedural posture of the case during the divorce hearing.

5. We recognize that this quoted portion was removed from the Amended Divorce Judgment, but as we noted, this procedural summary is helpful to understand wife's argument on appeal.

6. Wife's motion to dismiss states, "The Court lacks subject matter jurisdiction over Plaintiff's Claim for Absolute Divorce because the parties are no longer married." In a later motion for relief from order, wife raises another issue with subject matter jurisdiction regarding "residency and domiciliary[,]" claiming that she resided in South Carolina.

sufficiency of the allegations contained within the four corners of the complaint."), *disc. review denied*, 367 N.C. 236, 748 S.E.2d 544 (2013).

Husband testified first, followed by wife. During wife's examination, the trial court made it clear that the annulment in India was not really a jurisdictional issue and addressed the procedural quagmire:

> There's a first motion to dismiss, lack of subject matter jurisdiction because parties are no longer married.
>
> That's what it says, which is not subject matter jurisdiction.
>
> The second motion to dismiss is it doesn't state a claim upon which relief can be granted.
>
> MS. CONNELL [Wife's Counsel]: Correct. I will concede that the first motion to dismiss for lack of subject matter jurisdiction raised there is inappropriate.
>
> THE COURT: OK. Again, remember on a motion to dismiss is you look at the four corners of the document.
>
> You don't rely on other information. And I don't know what's in the document, itself.
>
> But that's why I don't understand why we're having all this testimony on the issue of dismissal, 12(b)6.
>
> I'm looking at the complaint.
>
> MS. SANDLIN [Husband's Counsel]: Your Honor, I think it can be turned into a summary judgment.
>
> THE COURT: It can be turned into a summary judgment motion because that's basically what we're going to do, is summary judgment on that issue.
>
> If you bring in extraneous information, the Court can allow it and it would be treated as a motion for summary judgment.
>
> MS. CONNELL: I believe that's where we are at this point, Your Honor.
>
> THE COURT: Yeah. I am a big nitpicker on civil procedure. I wish someone had filed a motion for summary judgment instead of--and we'll proceed on that as we go.
>
> Y'all work out the documents.

MS. CONNELL: And just to clarify what I was going to say, the 12(b)6, now summary judgment, and then our contention is that the subject matter jurisdiction fails because no one was a domiciliary—

THE COURT: (Interposing) Well, you just got through telling me you're not--I'm talking only about the motions to dismiss right now.

MS. CONNELL: I apologize. I'm jumping ahead.

THE COURT: I'm only talking about the motions to dismiss.

MS. CONNELL: OK.

THE COURT: You've already told me that you're not doing the motion to dismiss alleged in the complaint.

MS. CONNELL: Yes, ma'am.

THE COURT: And you haven't filed another motion to dismiss the complaint based on anything else other than the two asserted in your answer?

MS. CONNELL: Yes, ma'am.

THE COURT: So I'm only talking about the motions to dismiss right now. . . .

After the lunch recess, the trial court resumed by clarifying:

Folks, just to kind of carry on the discussion we had before we left, I do believe that this is being converted to a motion for summary judgment, which everyone realizes that even though it's [wife's] motion, I can grant summary motion in favor of the [husband] at the conclusion of this.

Whereas, if it were just a motion to dismiss, that would be my only option, would be to dismiss it in its entirety.

So if I were to find that there was --that the evidence regarding annulment was insufficient, that there was a valid marriage, I can grant summary judgment on the divorce claim, because that's what you've moved--you've moved to dismiss the entire complaint, but I certainly can grant summary judgment on the divorce claim.

> Not on the alimony, because I don't think all the elements will be presented in evidence.

At this point wife's attorney stated that wife would only be proceeding on the Rule 12(b)(6) motion that had been "converted" to a summary judgment motion due to the testimony and exhibits the trial court was to consider. With this background in mind, we turn to wife's argument on appeal.

[1] Wife's first argument is that "the trial court erred in making factual findings in the summary judgment proceeding which impacted the supposed duration of the marriage and subsequent alimony award." (Original in all caps.) (Quotation marks omitted.) Wife argues that the trial court improperly made findings of fact in the Divorce Judgment which created "a snowball effect" in the Alimony Order, as the trial court considered the findings of fact from the Divorce Judgment the law of the case. The focus of wife's argument is not the validity of the absolute divorce itself but instead the trial court's later reliance upon its findings of fact in the Alimony Order. Thus, we turn to the Divorce Judgment and the issues it actually intended to and did address.

Although the procedural posture of the case was a "mess[,]" we can organize the mess by separately looking at each of the issues addressed by the Divorce Judgment. First, the trial court considered the motion to dismiss based upon subject matter jurisdiction. Wife chose not to pursue this motion, and there are no arguments regarding it on appeal. Secondly, the trial court considered wife's motion to dismiss based upon Rule 12(b)(6) that was "converted" to a motion for summary judgment only on the claim for absolute divorce. Ultimately, wife does not contest the basis of the trial court's denial of the motion to dismiss because it did not recognize the annulment in India. Wife has not raised any arguments that the annulment should have been recognized.

Lastly, there was the divorce claim. North Carolina General Statute § 50-6 provides,

> Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months.

N.C. Gen. Stat. § 50-6 (2011). Thus, to grant a summary judgment divorce the trial court need only find that there was no genuine issue of material

fact that the parties had been separated for a year, although the exact date is not a necessary finding as long as the time period was a year or more, and that one of the parties had resided in North Carolina for six months preceding the filing of the complaint. *See id.*, *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011) ("The judgment sought shall be rendered forthwith 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.").

Wife does not contest that the parties had been separate and apart for at least a year or that she or husband had resided in North Carolina for six months. Thus, wife does not contest the granting of husband's claim for absolute divorce. Wife does contest the trial court's reliance on the findings of fact in the Divorce Judgment when it later entered the Alimony Order. For the reasons we have just stated, we agree that findings of fact beyond not recognizing the annulment in India, that the parties had been separated and apart for a year, and that either husband or wife had resided in North Carolina for six months were not necessary for the trial court to make in the Divorce Judgment. However, because the determinations of the Divorce Judgment itself are not challenged, we affirm the Divorce Judgment. Yet this does not end our inquiry regarding the Divorce Judgment, because we must consider the extent to which the trial court wrongfully used the extraneous findings of fact in the Divorce Judgment in support of its Alimony Order. We will address this issue in our analysis of the Alimony Order.

III. Preliminary Injunction

> "The particular marital fault that there has been testimony about in the past with regard to this case . . . there are findings of fact about it in this order."[7]

[2] Wife's argument here is similar to the argument we just addressed, although more plainly stated as she contends that in the Alimony Order "[t]he trial court improperly granted conclusive and preclusive effect to the factual findings in an earlier entered preliminary injunction order." (Original in all caps.) Just as in the last section, here, wife contends that the trial court improperly relied upon findings of fact made in the Preliminary Injunction in its Alimony Order. Wife does not present any substantive challenge to the entry of the Preliminary Injunction itself.

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7. Husband's counsel made this argument to the trial court at the alimony hearing as to the effect of the findings of fact in the Preliminary Injunction.

Thus, we affirm the Preliminary Injunction, and to the extent that the trial court relied upon findings of fact from the Preliminary Injunction in its Alimony Order, we will address this in our analysis of the Alimony Order.

IV. Sanctions Order

Wife makes two arguments as to the Sanctions Order, and we separately address each.

A. Failure to Consider Wife's Affidavit

> "That's fine. I withdraw it. I'll withdraw the affidavit."[8]

[3] Wife argues that "the trial court improperly failed to consider wife's affidavit in opposition to the motion for sanctions/in limine filed against wife." (Original in all caps.) Wife contends that had the trial court considered her affidavit, it would have ruled differently regarding the Sanctions Order, but she does not argue any other substantive challenge to the actual Sanctions Order.

Wife's argument on appeal focuses on a few limited statements made by the trial court from two separate parts of the hearing:

> [T]he trial court would not consider Wife's affidavit in opposition to the motions pending before the court. . . . The trial court said it would not consider the affidavit unless it was "presented" as "evidence." The trial court noted that Wife "[didn't] have to file a response" to the outstanding motions. . . . Later in the hearing, when Wife's counsel actually sought to introduce the affidavit into "evidence," the trial court refused the entry of the affidavit.

But defendant's summary of what happened at the hearing takes the trial court's statements out of context; we shall seek to place them back in proper perspective.

On 3 January 2013, at the beginning of the hearing, the trial court stated:

> We're here, I think it's called Plaintiff's Motion in Limine on my calendar. I know it was a carry-over from a previous court date with regard to some discovery sanctions.

---

8. This quote is from wife's counsel.

. . . .

> MS. SANDLIN: December 4th, Your Honor. And you signed the TRO that day and you entered a preliminary injunction following that hearing, which we had December the 13th.
>
> THE COURT: Right.
>
> MS. SANDLIN: And as part of the December 13th hearing, you ordered certain things. And that's something else that we're here about today, which is also covered in the motion in limine.
>
> And you ordered certain things to happen back in September of 2012 and you've subsequently made other orders, just re-enforcing your order from September of 2012.
>
> The other thing that is on the calendar, Your Honor, is when we were here, Ms. Connell consented for Ms. Husna for the entry and continuation of the preliminary injunction as it related to electronic devices.
>
> THE COURT: Right.

Thereafter, Mr. Will Cherry, wife's new counsel, stated that he would like to hand up wife's affidavit

> that responds to various things that I think are going to be at issue today.
>
> THE COURT: Counsel, I'm going to tell you if you expect me to read that affidavit, it counts against your time.

The trial court then thoroughly explained the "parameters" around its consideration of the affidavit. Then husband's attorney objected to the affidavit:

> MS. SANDLIN: Your Honor, I have some objections to the affidavit. Primarily my biggest objection is it has attached what purports to be attorney/client communication between Ms. Husna and her counsel, Ms. Connell and Ms. Tanner, which purports to explain some of her behavior.
>
> THE COURT: Are you waiving the attorney/client privilege, Counsel?

MR. CHERRY: As the affidavit states, it is waived with respect to those—

THE COURT: (Interposing) No. When you open the door, you open the door.

MR. CHERRY: Your Honor, that—

THE COURT: (Interposing) And it's not in evidence yet, so no door has been opened.

MR. CHERRY: *That's fine. I withdraw it. I'll withdraw the affidavit.*

(Emphasis added.)

Thereafter, the trial court, to put it bluntly and colloquially, expressed its concern that wife was attempting to throw her prior attorneys "under the bus" and that this would not be allowed without hearing also from the attorneys themselves. The trial court then explained it would only consider the affidavit if it came in as evidence, and this was one of the portions of the transcript noted in wife's brief:

THE COURT: So to the extent you want to move that affidavit into evidence, I haven't made any rulings on it.

But just handing it up to the Court for something other than evidence I don't think is appropriate.

At the point you want to present it as evidence, well, you can certainly jump through the evidentiary hoops and try to get it in.

MR. CHERRY: *For the time being, I think we'll address the matters through Defendant's testimony.*

(Emphasis added.)

Turning to the second portion of the transcript noted in wife's brief, later in the hearing, wife did testify on direct with husband's counsel, and part of this testimony involved a lengthy and confusing discussion regarding wife's failure to properly provide discovery. During the testimony, the following exchange took place:

Q. (By Ms. Sandlin) Ma'am, you attached this affidavit[9], and you said, "This is evidence that I asked the Indian

9. In context, "this affidavit" is the affidavit wife had previously attempted to hand up to the trial court and then withdrawn.

> Police Department and the Public Prosecutor to produce the computer."
>
> Isn't that the purpose that you did this?
>
> A. Yes.
>
> . . . .
>
> MR. CHERRY: I would like to move this affidavit into evidence since we've been talking about it so that you can consider—
>
> THE COURT: (Interposing) The affidavit is not coming into evidence. You're going to have her on the stand. You can get it in before me. Alright?
>
> MR. CHERRY: Yes, ma'am.
>
> THE COURT: *And then it can come into evidence, just to basically corroborate her testimony.*

(Emphasis added.) Thereafter, wife never attempted to offer the affidavit into evidence.

Regardless of the merits of wife's legal arguments as to when and how an affidavit may generally be presented in opposition to a motion, a review of the entire hearing puts the issue in its proper context. Wife wanted to blame her prior attorneys for her failures to respond to discovery requests, and she sought to do this by her affidavit, without waiving her attorney-client privilege and without calling the attorneys to testify. The trial court noted that if it accepted wife's affidavit she would be waiving her attorney-client privilege. Wife chose not to waive the attorney-client privilege, and she did not challenge the trial court's interpretation of her affidavit or the trial court's stance on privilege either before the trial court or on appeal. The trial court then gave wife an opportunity to present the affidavit as evidence, but wife's counsel declined, and chose to "address the matters through Defendant's testimony."

Thereafter, during wife's testimony on direct for husband's attorney, wife's counsel again asked to offer the affidavit as evidence, and the trial court explained it would accept the affidavit as evidence during wife's time "on the stand[,]" in other words, during her presentation of evidence, not during husband's case-in-chief.[10] Wife's counsel did not

10. Black's Law Dictionary defines "case-in-chief" as "1. The evidence presented at trial by a party between the time the party calls the first witness and the time the party

disagree with the trial court's ruling on the appropriate time for the affidavit to be admitted into evidence. And although wife did present evidence during her case in chief, she did not proffer the affidavit again.

The affidavit was not admitted into evidence because wife's attorney made the strategic decision not to offer it. Perhaps this decision was based upon attorney-client privilege, or because he believed that wife's testimony was sufficient, or a myriad of other possible reasons, but the fact remains that the trial court plainly stated it would accept the affidavit as evidence during wife's presentation of evidence if properly offered, and wife's attorney chose not to offer it. This argument has no merit.

B. Extent of Discovery Required

> "So I guess to answer your question, every device that I've been given has been either misrepresented or tampered with in some way."[11]

[4] Wife next argues that "the trial court improperly sanctioned wife for failing to produce items she was under no obligation to produce." (Original in all caps.) (Quotation marks omitted.) "Our standard of review of an order imposing discovery sanctions under N.C. Gen. Stat. § 1A–1, Rule 37 is abuse of discretion." *Ross v. Ross*, 215 N.C. App. 546, 548, 715 S.E.2d 859, 861 (2011).

We have already concluded that wife's affidavit was not received into evidence because she did not introduce it. Thus, to the extent that wife relies on the same affidavit as evidence of errors in the Sanctions Order, her argument is rejected. Wife's argument is hypertechnical and focused on a few words in husband's discovery requests, in which he requested discovery of "regularly used" or "primarily used" electronic devices, while, during the hearing and in the Sanctions Order, the trial court addressed "any" electronic device she has been exposed to over the course of litigation. But considering the entirety of the Sanctions Order in context, the trial court did not, as wife argues, require her to do

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rests. 2. The part of a trial in which a party presents evidence to support the claim or defense." Black's Law Dictionary 244 (9th ed. 2009). Normally each party offers exhibits into evidence during his or her case-in-chief and not during the opponent's case-in-chief. *See generally id.* Under N.C. Gen. Stat. § 8C-1, Rule 611(a), "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C. Gen. Stat. § 8C-1, Rule 611(a) (2011).

11. This quote is from Mr. Ellington.

the impossible by providing every single electronic device she had been exposed to, whether or not it belonged to her. Instead, the Sanctions Order quite logically addresses discovery violations such as wife's denial of use of an email address which the evidence showed she had used *after* the date she claimed she had last used it and tampering with devices she eventually did turn over for discovery. On appeal, wife does not actually contest a single finding of fact regarding her devious conduct during discovery nor does she challenge the propriety of the trial court's ultimate sanction which bars her from presenting certain evidence, including evidence of husband's marital fault, at the alimony hearing. Wife has failed to argue, much less demonstrate, an abuse of discretion. *See id.*

Once again, the focus of wife's arguments regarding the Sanctions Order is the trial court's later reliance on findings from the Sanctions Order in the Alimony Order. Wife's only heading in this section of her brief is entitled, "A specific illustration of how the trial court's error in the sanction/in limine order illegally prejudiced Wife *at the alimony trial.*" (Emphasis added.) In fact, wife concludes her argument regarding the Sanctions Order by stating, "For that reason and others cited herein, the alimony order and the corresponding order on attorneys' fees must be vacated[,]" and does not even mention vacating, reversing, or remanding the Sanctions Order.

[5] Lastly, we note that wife filed a reply brief and argued,

> assuming *arguendo* the trial court could change the terms [to "any" device instead of "regularly" or "primarily" used devices] if wife's obligations to provide discovery responses from those of the original requests and the trial court's own order to compel, wife could not be bound by those changed terms until a written order on sanctions was issued.

(Original in all caps.)

The trial court rendered its decision at the hearing regarding sanctions on 3 January 2013, but did not enter the written Sanctions Order until 22 May 2013, the first day of the alimony hearing. Wife claims that since "no written order on the sanctions had been entered . . . it was unclear what Wife's obligations were pending entry of such an order." Wife essentially argues that she was not aware of her discovery obligations until it was too late. Although we acknowledge that in some cases a delay in entry of an order of this sort could be problematic, as a party truly may not know what is required of her by the trial court, that did not happen here. We know this because at the alimony trial, which began on

22 May 2013, the same day that the Sanctions Order was signed and filed, wife's counsel does not mention any concerns whatsoever regarding the date of entry of the Sanctions Order, despite the fact that various provisions of the order are discussed during the hearing. If wife believed that she was prejudiced by the delayed entry of the Sanctions Order and did not understand her obligations, she should have mentioned it that day, when the trial court could have addressed the issue with both parties and counsel. Wife has thereby waived any argument on appeal regarding the date of entry of the Sanctions Order. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"); *see also State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716-17 (2010) ("As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal.") Thus, we affirm the Sanctions Order,[12] and finally turn to the crux of this entire appeal, the Alimony Order.

V. Alimony Order

"[I]f the Court is stuck with those findings of fact, which I think we are–we can't go back and relitigate those."[13]

Finally, we turn to the Alimony Order. Wife essentially raises two arguments as to the Alimony Order, and we address each in turn.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.
>
> An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, ___ N.C. App. ___, 747 S.E.2d 268, 272-73 (2013) (citation and quotation marks omitted).

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12. Wife does not make a separate argument regarding the Attorney Fees Order, and thus it too is affirmed.

13. This quote is from the trial court.

A. Trial Court's Reliance on Prior Orders

[6] As we have noted several times so far, most of wife's arguments regarding other judgments and orders are that the trial court improperly relied on various findings of fact in these prior judgments and orders in the Alimony Order. Indeed, the trial court made it clear at the alimony hearing that it was bound by all judgments and orders that had preceded this hearing; and as to marital fault, a main focus of the Alimony Order, the trial court stated that what had been determined about fault was "the law of the case, and it's done." Because the trial court was not actually "stuck" with all of the prior findings of fact, we must reverse and remand the Alimony Order.

We consider first the trial court's reliance on findings of fact in the summary judgment Divorce Judgment. As we noted in the section regarding the Divorce Judgment, the trial court did indeed make some findings of fact, particularly finding 6, that went beyond the facts needed to address the limited issues before it.[14] Our Court has previously recognized as to findings of fact in summary judgment proceedings that "[t]he Findings of Fact entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on this appeal and are irrelevant to our decision." *Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975) (citations and quotation marks omitted). The unnecessary findings of fact in the Divorce Judgment should also have been irrelevant to the trial court when considering alimony, *see generally id.*, but unfortunately they were not. The irrelevant findings of fact in the Divorce Judgment include the date of separation of September 2008, as this was a contested issue. Essentially, the parties agree they ceased living together on 9 February 2008, but husband contends, and the trial court found in the Divorce Judgment, that the parties separated in September 2008, apparently based upon "defendant's" formation of the intent to remain separate and apart from "plaintiff."[15]

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14. During rendition of the divorce ruling, the trial court recognized that a summary judgment divorce order should not have findings of fact: "So I'm granting summary judgment in favor of the Plaintiff on the divorce claim. . . . But of course, it's a summary judgment, folks, so there's not a lot of findings in there."

15. Based upon the evidence presented and the arguments on appeal, we think that perhaps this finding may also include a "typographical error" in referring to the parties. Based upon the evidence that the trial court appeared to find the most reliable, husband's evidence, it is likely the trial court actually found that *husband* formed his intent to remain separate and apart in September, and not that *wife* formed an intent then; but either way, the result is the same on appeal, since the trial court will have to make a new finding of fact on the date of separation on remand.

Although it might be appropriate to reverse and remand the Alimony Order for this reason alone, since we have no way of knowing how much weight the trial court gave the findings of fact it relied upon from the Divorce Judgment, such as the date of separation, or if the unnecessary findings of fact had any effect on the final ruling, we will address the other issues as well in the hope of limiting and clarifying the determinations which will have to be made on remand.

[7] The findings of fact from the Preliminary Injunction were also not binding upon the trial court at the alimony hearing. *See Childress v. Yadkin Cty.*, 186 N.C. App. 30, 43, 650 S.E.2d 55, 64 (2007) (citation and quotation marks omitted). ("[F]indings and conclusions made in the grant of an injunction are not authoritative as the law of the case for any other purpose[.]") Indeed, our Supreme Court has explained the "relevant rules" regarding Preliminary Injunctions:

> 1. The purpose of an interlocutory injunction is to preserve the status quo of the subject matter of the suit until a trial can be had on the merits. . . .
>
> . . . .
>
> 7. *The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits.* Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing.

Huskins v. Hospital, 238 N.C. 357, 360-62, 78 S.E.2d 116, 119-21 (1953) (citations omitted). Upon remand the trial court should not rely upon any of the findings of fact in the Preliminary Injunction to make findings required for husband's alimony claim, including the findings regarding marital fault.

[8] We now consider the Sanctions Order. We have already affirmed the Sanctions Order, and this order bars wife from presenting certain evidence, including any evidence of marital fault by husband. Yet, even if wife could not present evidence of marital fault by husband, the trial court was not "stuck" with all of the prior findings of fact regarding marital fault committed by wife. We also note that in the trial court's consideration of marital fault, the actual date of separation will determine whether wife's actions alleged as marital misconduct occurred during the marriage or after the date of separation. N.C. Gen. Stat. § 50-16.3A (b)(1)(2011) (determining the amount and duration of alimony requires,

if relevant, consideration of "[t]he marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]") Again, we have no way of knowing exactly which prior findings of fact the trial court erroneously relied upon or if the trial court might have found differently if not bound by prior findings, so we must remand the Alimony Order. Furthermore, from our review, the Sanctions Order's findings of fact addressed the issues of discovery and non-compliance with the discovery process, but they properly did not address non-relevant issues such as the date of separation and marital fault for purposes of alimony, so to the extent these findings could even be inferred from the Sanctions Order, they would not be binding on the claim for alimony as this claim is separate and apart from the discovery issues. But viewed within context, as an order addressing discovery issues and violations, we have affirmed the Sanctions Order, so it remains binding on remand, including its prohibition on wife's presentation of evidence of marital fault by husband.

B. Judicial Notice

"Her earning capacity is an ultimate fact. And to say, 'OK, I pulled this up on the website and I want you to take judicial notice that this is what she can earn,' without any further evidence about what she can earn, I would object."[16]

[9] Wife's last argument is that "the trial court erred in taking judicial notice of the Bureau of Labor Statistics concerning supposed salaries for electrical engineers, [wife's occupation,] as these statistics do not constitute undisputed adjudicative facts capable of being judicially noticed." (Original in all caps.) (Quotation marks omitted.) The trial court found:

> Defendant is an accomplished electrical engineer who hold several patents. She has been published more than 20 times. Defendant's area of expertise is that of semiconductor and other electrical components. The court takes judicial notice of the occupational employment statistics, occupational employment and wages for 2012 as published by the national Bureau of Labor Statistics. The national average salary for an electrical engineer

16. This statement is wife's counsel's objection to the trial court taking judicial notice of the labor statistics.

> with Defendant's qualifications is $99,540 annually. The mean salary for an electrical engineer in North Carolina is $126,000. Defendant has the ability to earn at least $99,540 annually. Defendant is capable of earning a substantial income but is choosing to not do so in order to avoid her support obligation to Plaintiff.

North Carolina General Statute § 8C-1, Rule 201 of the Rules of Evidence governs judicial notice:

> (a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.
>
> (b) Kinds of facts.--A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When discretionary.--A court may take judicial notice, whether requested or not.
>
> (d) When mandatory.--A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) Opportunity to be heard.--In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen Stat. § 8C-1, Rule 201 (2011).

In *Greer v. Greer*, this Court noted:

> Rule 201(b) of the North Carolina Rules of Evidence specifies that a judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . .

> *Any subject, however, that is open to reasonable debate is not appropriate for judicial notice.*

175 N.C. App. 464, 472, 624 S.E.2d 423, 428 (2006) (emphasis added) (citation, quotation marks, and brackets omitted).

As part of husband's evidence regarding wife's earning capacity, his attorney asked the trial court "to take judicial notice of the Department of Labor Statistics with regard to salaries for electrical engineers." Wife's counsel objected, noting that "[t]his is the sort of thing that if they wanted to call in a vocational expert to talk about what she's capable of earning, then I wouldn't have any objection to it." After further discussion, husband's counsel noted that "what I'm asking you to take judicial notice of is what the average salary is for someone with her qualifications." The trial court then took judicial "notice of what she can earn[.]"

According to wife's brief, her "earning capacity was highly disputed[,]" and the trial court made an unchallenged finding of fact regarding her prior earnings. The trial court found in finding of fact 13 that wife was employed by Cree Inc. at the time of the marriage and earned $58,685.00 annually. In 2008, she earned $63,783.00, and in 2009, $89,242.53. In 2010, wife's income from Cree Inc. and Nitek was $57,328.00. Wife also began pursuing her PhD and Nitek was paying her tuition, which was "substantial" and unreported on her income tax returns. In 2011, wife was paid $24,023 by Nitek, and in 2012, she was paid "about $25,000.00" and sold stock "in excess" of $17,000.00. In August of 2012, wife quit her job. Furthermore, the trial court found, and wife does not dispute, that she "is an accomplished electrical engineer who hold several patents" and "has been published more than 20 times[;]" her area of expertise is "semi-conductor and other electrical components." The trial court then found wife's earning capacity to be $99,540.00 annually, based upon the "national average salary" for an electrical engineer with wife's qualifications.

Given the evidence at trial, and the trial court's own recitation of wife's varying salaries through the years, wife's earning capacity actually was and is "open to reasonable debate[.]" *Id.* Even if the labor statistics alone are undisputed, their applicability to wife is still open to question. Wife may contend, and apparently does, that she does not have the capacity to earn as much as the average electrical engineer with her qualifications or perhaps her capacity to earn is even greater than average, considering her patents and publications. Either way, her earning capacity is not the type of undisputed fact of which the trial court could take judicial notice under Rule 201. *See id.*

Husband argues that even if the trial court erred in taking judicial notice of the statistics regarding average salaries, the error is harmless based upon the evidence of her actual earnings before quitting her job, particularly her earnings of $88,512.00 in 2009 and her stock option benefits. But wife is correct that there is no evidence to support the trial court's finding of fact as to her earning capacity of $99,540.00, and this finding was explicitly based upon the judicially noticed statistics. This amount, $99,540.00, is substantially greater than wife's earnings for most of the years addressed in finding of fact 13. We agree that the trial court erred by taking judicial notice of the statistics and relying so heavily upon these statistics for its finding of fact regarding wife's earning capacity. We have already determined that the Alimony Order must be reversed and remanded, but we address this issue so that the trial court does not make the same error upon remand in determining wife's earning capacity.

VI. Conclusion

In conclusion, we affirm the Divorce Judgment, Preliminary Injunction, Sanctions Order, and Attorney Fees Order. We reverse and remand only the Alimony Order. On remand, the trial court must, if wife should request to do so, permit her to present additional evidence regarding the date of separation and her intent to separate, to the extent that this evidence is not barred by the Sanctions Order. As to this issue, the parties must have the opportunity to present additional evidence since wife did not previously have the opportunity to present this evidence because of the trial court's reliance on the finding of fact as to the date of separation in the Divorce Judgment. Due to the affirmed Sanctions Order, wife still may not present evidence of marital fault by husband or any other evidence barred by the Sanctions Order. However, the trial court should make its own independent determination of marital misconduct by wife as it is not bound by any prior judicial determination. Of course, this opinion does not prevent the trial court from making the same findings of fact on remand, so long as the findings are based upon its independent consideration of the evidence for purposes of determining the alimony claim. Since it has been over two years since the entry of the Alimony Order, we leave it in the trial court's sole discretion as to whether the parties should be permitted to present additional evidence. It would be entirely appropriate for the trial court to enter its new order based upon the evidence that was before it in 2013, but this Court has no way of knowing the current circumstances of the parties or if the trial court would prefer to receive additional evidence prior to entering a new alimony order; so the determination of whether to permit the

parties to present additional evidence on remand and the extent of any evidence allowed can only be made by the trial court.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges DILLON and DAVIS concur.

NORTH CAROLINA STATE BAR, Plaintiff
v.
DAN L. MERRELL, Attorney, Defendant

No. COA14-1334

Filed 6 October 2015

1. Attorneys—professional conduct violation—notice to attorney

On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals rejected defendant's argument that, because he did not receive adequate notice of the conduct upon which the Bar ultimately relied in finding a violation, his due process rights were violated. The factual allegations in the complaint gave defendant sufficient notice of the primary misconduct alleged, and the use of the client's name instead of the client's LLC's name in the complaint did not constitute a material difference depriving defendant of notice. Even assuming the allegations of the complaint were materially different from the findings in the order, the State Bar's pleading was amended by implied consent to conform to the proof presented at trial.

2. Attorneys—professional conduct violation—real estate transaction—misappropriation of funds—conflict of interest

On appeal from an order of discipline of the N.C. State Bar concluding that defendant attorney violated the Rules of Professional Conduct during the course of a commercial real estate transaction, the Court of Appeals held that the Bar's findings of facts were supported by the evidence and that the conclusions of law were supported by the findings of fact. The evidence showed that defendant transferred funds without receiving the owner of the funds' permission and then failed to take steps to ensure that the funds were not

misappropriated. Defendant also engaged in a conflict of interest and failed to provide full disclosure to one of the clients.

Appeal by defendant from order entered 2 December 2013 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 7 May 2015.

N.C. State Bar, by Counsel Katherine Jean, Deputy Counsel David R. Johnson, and Deputy Counsel Maria Brown, for plaintiff-appellee.

Phillip H. Hayes for defendant-appellant.

GEER, Judge.

Defendant Dan L. Merrell appeals from an order of discipline of the Disciplinary Hearing Commission of the North Carolina State Bar (the "DHC") concluding that defendant violated the Rules of Professional Conduct by: (1) failing to safeguard and hold in trust clients' entrusted funds in violation of Rule 1.15-2(a) and (2) engaging in a conflict of interest by representing both parties to a commercial real estate transaction without first obtaining written and informed consent in violation of Rule 1.7(a). We hold that the DHC's findings of fact are supported by substantial evidence in the record, and the findings, in turn, support the DHC's conclusions of law. Consequently, we affirm.

Facts

The North Carolina State Bar commenced this disciplinary action against defendant by filing a complaint on 12 April 2012. This case arises out of defendant's representation of Michael Lam, a real estate developer. In its order of discipline, the DHC found, in pertinent part, the following facts.

In late 2005, Lam sought to develop a residential community, initially to be called Blue Water Cove, in Tyrrell County, North Carolina. Lam had entered into contracts to purchase the land that he wished to develop, but did not have the funds to finance the project. Lam solicited Thomas and James Gordon, who were residents of the State of Maryland, to participate in an investment project to buy and develop the land for Blue Water Cove. With the assistance of John Bollech, Lam created a term sheet for Blue Water Cove that included a description of the project with cost and profit projections. The term sheet stated that the cost of acquiring the land for the project was $1.5 million. Lam advised the Gordons that he needed to move quickly because his contracts to purchase the land had either expired or were about to expire.

On 20 December 2005, Lam and Bollech met with defendant at his office to discuss the Blue Water Cove project. Lam informed defendant that he wanted to form an LLC for the project and that the Gordons had committed to fund $2,450,000.00 toward the project with $1,500,000.00 designated for the purchase of the land. The Gordons were represented by Steven Nemeroff, an attorney licensed to practice in Maryland. Between late December 2005 and 12 January 2006, defendant communicated with Nemeroff and lawyers representing Bollech in the drafting of a memorandum of understanding ("MOU") among the individuals and entities who would have an ownership interest in the project.

On 29 December 2005, defendant filed articles of organization to form Deepwater Development Company, LLC ("Deepwater") -- Lam was the sole member of Deepwater. On 13 January 2006, Lam, the Gordons, Bollech, Bernard Brooks, and Bill Reidy executed an MOU related to the development of Blue Water Cove. The MOU contemplated that a company would be formed to carry on the business of the project and that the Gordons would loan $1.5 million to that company to acquire the land. The MOU contained a provision prohibiting self-dealing by Lam or any other party to the MOU.

On 18 January 2006, defendant drafted the articles of organization for Development Company of Columbia, LLC ("DCC"), the company created for purchasing and developing the land for Blue Water Cove. The articles named Lam as the organizer and registered agent and used Lam's home address as DCC's registered office. Also on 18 January 2006, the Gordons wired $1.5 million to defendant's general trust account maintained at the Bank of Currituck. The Gordons expected Merrell to hold their funds in trust to be disbursed to pay for DCC's purchase of the land at closing. Although the funds belonged to the Gordons, they were recorded in defendant's trust account ledger under the name of Lam.

The following day, defendant wrote a note to an associate in his law office, Bill Stott, advising Stott that Lam intended to purchase a parcel of the Tyrrell County land for $360,000.00 and then sell it to DCC for $650,000.00, and that Lam also wanted to buy two parcels from other owners of the Tyrrell County land using investor money and convey only one parcel to DCC, with Lam and Bollech keeping the second parcel, consisting of more than 80 acres, free and clear. Defendant advised Stott that he saw potential for criminal and civil liability in both transactions and directed Stott to draft a letter to Lam and a disclosure letter.

On 23 January 2006, defendant filed the articles of organization for DCC with the Secretary of State. On or about that day, defendant sent a letter to Lam advising him that the series of transactions that he contemplated could constitute fraud and violate state and federal law. Defendant advised Lam that he would not represent him in the transactions unless full and complete disclosure was made to Lam's investors and potential partners and all of them acquiesced in the proposed arrangement. Defendant stated that his office would prepare disclosure documents to be executed after he verified that full disclosure had been made to all parties.

Despite the language of the 23 January 2006 letter, defendant did not draft a disclosure letter. Lam told defendant that he had made full disclosure to all interested parties, including the Gordons, of the fact that he planned to acquire the land for less than $1.5 million. Defendant believed Lam and did not insist on any written documentation that full disclosure had in fact been made.

On 24 January 2006, defendant transferred the Gordon's $1.5 million to a certificate of deposit account ("CD account") at Bank of America in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC." The address given for the account was Lam's address, and the tax identification number used was that of DCC. Defendant did not ensure that there was a signature card that would limit signatory authority on the account to him.

Although not signed by the members until 1 March 2006, the operating agreement of DCC, by its terms, became effective 1 February 2006. The operating agreement provided that Lam was the manager of DCC and, through Deepwater, was also a member of DCC. The term "property" under the agreement was defined as four separate parcels or interests referred to as the Sykes tract, the Davis tract, Ludford Landing, and an easement in an existing canal on the Taylor tract. Lam, as a manager of DCC, was prohibited by the agreement from self-dealing.

In February 2006, defendant was the closing attorney for Lam in Lam's purchase, through Deepwater, of the following tracts of land: on 3 February 2006, the Sykes tract for $360,000.00; on 9 February 2006, the Taylor tract for $267,500.00; on 14 February 2006, the Pinner interest in Ludford Landing for $16,666.00; on 15 February 2006, the Cahoon interest in Ludford Landing for $50,000.00, and the Davis tract for $300,000.00. In all, Deepwater paid a total of $726,666.00 to acquire the properties. Although defendant was aware that Deepwater acquired the entire Taylor tract for only $267,500.00, on 16 February 2006, defendant

contacted Nemeroff on behalf of Lam to confirm that the Gordons would provide an additional $295,000.00 for DCC to purchase a license and easement for use of the existing canal on the Taylor tract.

Meanwhile, funds were withdrawn from the Bank of America CD account without the Gordons' knowledge, permission, or approval on 27 January 2006, 14 February 2006, and 1 March 2006. These withdrawals were used for Lam's benefit, including funding Deepwater's purchase of the Tyrrell County land. Defendant was not, however, aware that the funds were wrongfully withdrawn from the CD account without his authorization until sometime in September 2006.

On 2 March 2006, defendant was the closing attorney for the transaction in which DCC bought the Tyrrell County land and the Taylor tract easement from Deepwater for $1,745,000.00. Defendant represented DCC, Lam, and Deepwater at the closing. The transaction resulted in a profit of close to $1 million to Deepwater at the expense of DCC.

The 1 March 2006 withdrawal from the CD account closed out the account. However, defendant did not provide the Gordons with a written accounting of the receipts and disbursements of the $1.5 million upon the complete disbursement of the funds and did not account for the interest earned on the funds while in the CD account.

Based upon these findings, the DHC concluded that defendant's conduct constituted grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2) (2013) in that defendant violated the Rules of Professional Conduct:

> a. By moving the Gordons' funds from defendant's trust account to a certificate of deposit account at Bank of America in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC" with Lam's mailing address on the account, using DCC's tax identification number, failing to ensure access to the account was limited to himself, and failing to provide an accounting, along with other factors noted above, Merrell failed to safeguard and hold in trust the Gordons' entrusted funds in violation of Rule 1.15-2(a).
>
> b. By representing both Deepwater and DCC at the closing on March 2, 2006 when Defendant's representation of DCC was materially limited by his responsibilities to Deepwater and he had not obtained the written

> informed consent of the clients to the dual representation, Defendant engaged in a conflict of interest in violation of Rule 1.7(a).

The DHC suspended defendant's law license for two years and stayed the suspension for a period of two years contingent on defendant's compliance with certain conditions. Defendant timely appealed the order to this Court.

I

[1] On appeal, defendant argues that the DHC violated his due process rights because the allegations in the complaint did not provide him with adequate notice of the conduct upon which the DHC ultimately relied in concluding that defendant violated Rules 1.15-2(a) and 1.7(a) of the Rules of Professional Conduct. This Court has explained that

> "[n]otice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution. Accordingly, prior to the imposition of sanctions, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions."

N.C. State Bar v. Barrett, 219 N.C. App. 481, 485-86, 724 S.E.2d 126, 129 (2012) (quoting *In re Small*, 201 N.C. App. 390, 395, 689 S.E.2d 482, 485-86 (2009)). Thus, "[a]n attorney facing disbarment is entitled to 'procedural due process, which includes fair notice of the charge' made against [him]." *Id.* at 486, 724 S.E.2d at 129-30 (quoting *In re Ruffalo*, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122, 88 S. Ct. 1222, 1226 (1968).

Correspondingly, the State Bar rules provide that "[c]omplaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint[,]" 27 N.C. Admin. Code 1B.0114(c) (2014), and that "[p]leadings and proceedings before a hearing panel will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein[,]" 27 N.C. Admin. Code 1B.0114(n).

Rule 8(a)(1) of the Rules of Civil Procedure, in turn, requires "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series

of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" This Court has explained that "[b]y enacting section 1A-1, Rule 8(a), our General Assembly adopted the concept of notice pleading." *Wake Cnty. v. Hotels.com, L.P.*, ___ N.C. App. ___, ___, 762 S.E.2d 477, 486, *disc. review denied*, 367 N.C. 799, 766 S.E.2d 608 (2014). "Under notice pleading, 'a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought.' " *Id.* (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970)). " 'Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.' " *Id.* (quoting *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988)). Thus, "detailed fact-pleading is no longer required" so long as the pleading "gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and -- by using the rules provided for obtaining pretrial discovery -- to get any additional information he may need to prepare for trial." *Sutton*, 277 N.C. at 104, 176 S.E.2d at 167.

Here, defendant argues that the DHC based its conclusion that defendant violated Rule 1.15-2(a) and Rule 1.7(a) on conduct by defendant that was outside of the allegations of the complaint. With respect to Rule 1.15-2(a), the DHC concluded that defendant:

> By moving the Gordons' funds from defendant's trust account to a certificate of deposit account at Bank of America in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC" with Lam's mailing address on the account, using DCC's tax identification number, failing to ensure access to the account was limited to himself, and failing to provide an accounting, along with other factors noted above, Merrell failed to safeguard and hold in trust the Gordons' entrusted funds in violation of Rule 1.15-2(a).

Defendant argues that the complaint alleged only that defendant violated Rule 1.15-2(a) "[b]y moving the Gordons' funds from his trust account to a CD account in the name of DCC and with Lam's mailing address[.]" Therefore, defendant asserts, the complaint alleged a different name for the CD account and failed to allege (1) that defendant

used DCC's tax identification number, (2) that defendant failed to ensure access to the account was limited to himself, and (3) that defendant failed to provide an accounting.

We first note that in characterizing the allegations of the complaint, defendant relies exclusively on the allegations contained in the final conclusory paragraphs of the complaint, setting forth which Rules of Professional Conduct defendant violated, and completely ignores the factual allegations alleged in support of that conclusion. The factual allegations of the complaint state more specifically, in pertinent part, that on 24 January 2006, Merrell transferred the Gordons' funds, without their knowledge or permission, to a CD account at Bank of America "in the name of 'Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC', not in the name of the Gordons or as trustee for the Gordons." The complaint further alleged that "[f]unds were withdrawn from this CD account without the Gordons' knowledge, permission, or approval on January 27, 2006, February 14, 2006, and March 1, 2006" and that these withdrawals were for Lam's benefit, including covering Lam's costs to acquire the Tyrrell County property which was later resold to DCC.

These allegations not only gave defendant notice of the name of the CD account as found in the DHC's order, but also of the underlying conduct that is the subject of the complaint: that defendant's transfer of the Gordons' funds, without their permission, resulted in the funds being accessed by and for the benefit of someone other than the owner of the funds. Although the complaint does not specifically allege that defendant used DCC's tax identification number or that he failed to provide the Gordons with an accounting, these facts are incidental to the primary misconduct alleged: defendant's failure to safeguard and hold in trust the Gordons' funds. We hold that the allegations in the complaint were sufficient under the notice pleading standard to give defendant "sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it . . . and -- by using the rules provided for obtaining pretrial discovery -- to get any additional information he may need to prepare for trial." *Sutton*, 277 N.C. at 104, 176 S.E.2d at 167.

With respect to the Rule 1.7(a) violation, defendant argues that the allegations of the complaint materially differ from the findings of fact and conclusions of law in the order because the complaint alleged that defendant engaged in a conflict of interest "[b]y representing both DCC and Lam in DCC's purchase of the Tyrrell County property," whereas the order concludes that the violation is based upon defendant's

representation of both DCC and Deepwater at the closing. Defendant argues that there is a material difference between Deepwater and Lam because Deepwater is an LLC and Lam is an individual. While this is true, we do not agree that the difference between Lam and Deepwater deprived defendant of notice of the basis for the alleged conflict of interest. The complaint makes it clear that the DHC considered Lam and Deepwater, for all intents and purposes, as one and the same. The complaint alleged that Deepwater was Lam's company and that defendant was the closing attorney "for a series of transactions in which Lam, through his company Deepwater" purchased the Tyrrell County land. It also alleged that DCC's purchase of the property resulted in a profit of nearly $1 million going to "Lam/Deepwater." We therefore hold that the allegations of the complaint are not materially different from the findings of fact and conclusions of law in the order.

Furthermore, the State Bar argues, and we agree, that even assuming that the allegations of the complaint were materially different from the findings in the order, the State Bar's pleading was amended by implied consent to conform to the proof presented at trial. The doctrine of implied consent is based upon Rule 15(b) of the Rules of Civil Procedure, which provides:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

As explained by our Supreme Court, "[u]nder 15(b) the rule of 'litigation by consent' is applied when no objection is made on the specific ground that the evidence offered is not within the issues raised by the

pleadings." *Roberts v. William N. & Kate B. Reynolds Mem'l Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 726 (1972) (emphasis omitted). "[T]he effect of this rule is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case." *Id.* at 59, 187 S.E.2d at 727.

Here, defendant did not object at the hearing to the admission of the evidence presented in support of the findings that he now challenges on appeal. Specifically, he did not object to the admission of evidence regarding the name of the CD account, the use of DCC's tax identification number for the CD account, defendant's failure to provide an accounting, or his representation of Deepwater, rather than Lam, at the 2 March 2006 closing. Further, defendant makes no argument as to how the introduction of this evidence prejudiced him or deprived him of a fair opportunity to defend his case. Accordingly, we hold that the order did not violate defendant's due process rights. *Compare Barrett*, 219 N.C. App. at 488, 724 S.E.2d at 131 (holding DHC violated attorney's due process rights where complaint contained one allegation of misconduct related to misrepresentations by closing attorney in a HUD statement, but at the hearing the lender presented a second HUD statement and made additional allegations of misconduct based on that document and attorney objected to evidence on grounds that she had never seen the document before, had no notice of its existence, and had not prepared a defense to the additional allegations of misconduct).

II

[2] We now turn to the substance of the order. This Court reviews disciplinary orders of the DHC under the whole record test "to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.]" *N.C. State Bar v. Talford*, 356 N.C. 626, 632, 576 S.E.2d 305, 309 (2003).

> Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to

> support its findings and conclusions must rise to the standard of clear[, cogent,] and convincing.

Id., 576 S.E.2d at 309-10 (internal citations and quotation marks omitted).

Defendant first challenges the DHC's conclusion that defendant violated Rule 1.15-2(a) of the Rules of Professional Conduct. Pursuant to Rule 1.15-2(a), "[a]ll entrusted property shall be identified, held, and maintained separate from the property of the lawyer, and shall be deposited, disbursed, and distributed only in accordance with this Rule 1.15." "Entrusted property" includes "trust funds" which are "funds belonging to someone other than the lawyer that are received by or placed under the control of the lawyer in connection with the performance of legal services." N.C.R. Prof. Conduct 1.15-1(e), (n). Rule 1.15 provides, in pertinent part, that all trust funds received by a lawyer must be deposited in either a general trust account, also known as an IOLTA account, or a dedicated trust account. N.C.R. Prof. Conduct 1.15-2(b). IOLTA accounts are subject to the requirements set forth in 27 N.C. Admin. Code 1D.1316. *Id.* A lawyer should place trust funds in an IOLTA account if the funds "in the lawyer's good faith judgment, are nominal or short-term." *Id.* Otherwise, the funds may be placed in a dedicated trust account, which is "a trust account that is maintained for the sole benefit of a single client or with respect to a single transaction or series of integrated transactions." N.C.R. Prof. Conduct 1.15-1(c). The interest earned in a dedicated trust account is the property of the client. N.C.R. Prof. Conduct 1.15-2(p). Comment 3 following Rule 1.15-3 contains a list of factors to be considered when determining whether there is a duty to invest the funds on behalf of a client by depositing the funds into a dedicated trust account.

Rule 1.15-3 sets forth the record keeping and accounting requirements for all trust accounts and provides in pertinent part that a lawyer shall maintain "complete and accurate records of all entrusted property received by the lawyer" and shall "render to the client a written accounting of the receipts and disbursements of all trust funds . . . upon the complete disbursement of the trust funds[.]" N.C.R. Prof. Conduct 1.15-3(e), (g). Comment 19 to Rule 1.15-3 explains that the "lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible."

In this case, the DHC concluded that defendant violated Rule 1.15-2(a) by: (1) moving the Gordons' funds from defendant's trust

account to a CD account at Bank of America; (2) putting the CD account in the name of "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC;" (3) having Lam's mailing address as the address on the account; (4) using DCC's tax identification number; (5) failing to ensure access to the account was limited to himself; and (6) failing to provide an accounting.

Defendant contends that the evidence is insufficient to support several of the findings of fact supporting the conclusion that defendant violated Rule 1.15-2(a). Defendant first challenges finding of fact 25 that "[t]he address given for the [CD] account was Lam's address, not the Gordons' or Merrell's." Defendant does not dispute that Lam's address is the address associated with the CD account in Bank of America's records. Rather, he argues that Lam's address was put on the account because of the mistaken assumption of William Ashley Gurganus, the Bank of America employee who set up the account, and not because defendant directed the bank to put Lam's address on the account. Defendant points out that the check transferring the funds from his general trust account to the CD account had his address on it and that the assistant who opened the account at defendant's direction testified that she did not provide Bank of America with any other address. Mr. Gurganus testified that he could not specifically recall where he obtained the address, but that he knew that Lam had other accounts at Bank of America and that Lam was associated with DCC. Even assuming, without deciding, that there is insufficient evidence to support a finding that defendant provided Bank of America with Lam's address for the account, it is undisputed that Lam's address was in fact associated with the account, and defendant took no action to correct it.

Defendant next argues that there is insufficient evidence to support the portion of finding of fact 27 that defendant "knew that withdrawals were made from the CD account without any requirement that [defendant] sign anything." Defendant misinterprets this as a finding that defendant was aware of the unauthorized withdrawals on 27 January and 14 February when they occurred. However, the DHC found in finding of fact 32 that defendant was not aware of those unauthorized withdrawals until September 2006. Finding of fact 27 merely states that defendant was aware that a withdrawal could be made from the CD without his signature. This finding is supported by evidence that defendant was able to withdraw funds from the account on 1 March 2006 and close the account without having to sign anything.

Defendant also challenges finding of fact 31 that the withdrawals on 27 January and 14 February "were for Lam's benefit, including covering

Lam's costs to acquire the Tyrrell County land that he later resold at a higher price to DCC." This finding is supported by ample evidence in the record, including a report of a forensic accounting analysis performed by Derek W. Royster.

Finally, defendant challenges finding of fact 48 that defendant "did not provide the Gordons [with] a written accounting of the receipts and disbursements of the $1.5 million upon the complete disbursement of the funds, nor did he account for the interest earned on the $1.5 million while in the Bank of America CD account." Defendant concedes that he "did not specifically account for the interest earned separate and apart from the principal," but points to evidence that he had his legal assistant send copies of the closing documents, including the HUD statement, to Mr. Nemeroff, the Gordons' legal counsel. These documents, however, only included the final disbursement of the funds for the closing, and did not account for the unauthorized withdrawals made in January and February 2006.

We now turn to the question whether the findings of fact are sufficient to support a conclusion that defendant violated Rule 1.15-2(a). We agree with defendant that moving the Gordons' funds from defendant's general trust account to a CD account at Bank of America, in and of itself, would not have violated the rule. As defendant correctly points out, Rule 1.15 contemplates that funds that are not nominal or short term will be deposited in a dedicated trust account so that the client can earn interest on the funds. *See* N.C.R. Prof. Conduct 1.15-2(b) ("Trust funds placed in a general account are those which, in the lawyer's good faith judgment, are nominal or short-term."); N.C.R. Prof. Conduct 1.15-3, cmt. 3 (funds must be deposited in a general trust account "if there is no duty to invest on behalf of the client" and, in determining whether there is a duty to invest, lawyer should consider, among other factors, amount of funds, duration of the deposit, and interest rate at financial institution where funds are to be deposited).

However, in this case, the evidence shows that when the Gordons transferred their funds to defendant's general trust account, defendant identified the funds in his client ledger as belonging to Lam, not the Gordons. Then, when defendant transferred the funds to the Bank of America CD account, he again misidentified the owner of the funds as DCC, not the Gordons. By labeling the account "Dan L. Merrell, Special Trustee for Development Company of Columbia, LLC" and using DCC's tax identification number, he improperly identified DCC as the owner of the funds. Even assuming, without deciding, that defendant provided his own address, and not Lam's, when creating the account, his mislabeling

of the beneficiary of the account caused employees at the bank to believe that DCC owned the funds in the account and that Lam, as the manager of DCC, was authorized to access the funds in the account. In other words, defendant did not take any steps to ensure that the bank was aware that the account was a trust account for the benefit of the Gordons and that defendant was the only authorized signatory on the account. This failure led to the funds being misappropriated by Lam. In sum, defendant never notified the Gordons that he had transferred their funds to a different account, did not receive their permission for the transfer, and did not take any steps to ensure that the funds were not misappropriated.

We conclude that these findings of fact are sufficient to support the conclusion that defendant violated Rule 1.15-2(a). *See* N.C.R. Prof. Conduct 1.15-3, cmt. 19 ("The lawyer is responsible for keeping a client, or any other person to whom the lawyer is accountable, advised of the status of entrusted property held by the lawyer. In addition, the lawyer must take steps to discover any unauthorized transactions involving trust funds as soon as possible.").

Defendant next challenges the DHC's conclusion that defendant engaged in a conflict of interest in violation of Rule 1.7(a) by representing both Deepwater and DCC at the 2 March 2006 closing. Although defendant purports to challenge the sufficiency of the evidence to support several of the findings of fact upon which this conclusion is based, his arguments on appeal do not actually challenge the evidentiary basis for the findings, but rather argue the legal significance of the findings and whether they are sufficient to support the conclusion that defendant engaged in a conflict of interest.

Comment 8 to Rule 1.7 explains that "[e]ven where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client." Here, the DHC concluded that defendant's representation of DCC was materially limited by his responsibilities to Deepwater because defendant knew that Lam, through Deepwater, had engaged in self-dealing and could not disclose this information to DCC.

Defendant argues that there was no conflict of interest because Lam did not engage in self-dealing. Self-dealing is "[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty." *Black's Law Dictionary* 1481 (9th ed. 2009). A fiduciary relationship is "one in which 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . and in which there is confidence reposed on one side, and resulting domination and influence on the other.' " *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 408-09, 742 S.E.2d 535, 541 (2012) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001)).

> "Business partners, for example, are each other's fiduciaries as a matter of law. In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified. Thus, the relationship can arise in a variety of circumstances . . . and may stem from varied and unpredictable factors."

Id. at 409, 742 S.E.2d at 541 (quoting *HAJMM Co. v. House of Raeford Farms*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991)).

Defendant argues that Lam did not owe a fiduciary duty to DCC until the Operating Agreement was signed on 1 March 2006. He reasons that the 13 January MOU was nonbinding and argues that there is no evidence that the parties intended the operating agreement to have retroactive effect. However, the DHC found that "[b]y its terms, the operating agreement was effective February 1, 2006." The operating agreement was submitted into evidence and supports this finding.

An operating agreement is a contract, and this Court has explained that:

> "With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. The intent of the parties may be derived from the language in the contract.
>
> It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. When the language of the

> contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties."

Bank of Am., N.A. v. Rice, ___ N.C. App. ___, ___, 750 S.E.2d 205, 209 (2013) (quoting *Stovall v. Stovall*, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010)).

Therefore, when interpreting the terms of a contract, our courts have applied the parol evidence rule.

> "The parol evidence rule is not a rule of evidence but of substantive law. . . . It prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement. Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract. Thus, it is assumed the [parties] signed the instrument they intended to sign[,] . . . [and, absent] evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud[,] . . . the court [does] not err in refusing to allow parol evidence[.]"

Drake v. Hance, 195 N.C. App. 588, 591, 673 S.E.2d 411, 413 (2009) (quoting *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002)).

Here, the operating agreement plainly states that the agreement "is made effective as of this 1st day of February 2006 by and among the signatories hereto." This language is clear and unambiguous. Defendant has failed to point to any proof of "mental incapacity, mutual mistake of the parties, undue influence, or fraud," *id.*, with respect to the effective date of the operating agreement. Accordingly, the plain language of the operating agreement controls. The operating agreement was effective beginning 1 February 2006 and prohibited Lam from engaging in self-dealing. It is undisputed that Deepwater's purchase and reselling of the properties to DCC benefitted Lam at the expense of DCC. Accordingly, we hold that the DHC did not err in concluding that Lam engaged in self-dealing when he purchased the properties in February and resold them to DCC for a profit at the 2 March 2006 closing.

Defendant next argues that the parties gave written informed consent to his dual representation at the closing by signing the operating

agreement, which stated, among other things, that "the parties have been advised that a potential conflict exists among their individual interests[.]" Acknowledging that a potential conflict exists, without identifying the potential conflict, does not provide the parties with informed consent. *See* Comment 18 to Rule 1.7 ("Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."); Comment 19 to Rule 1.7 ("Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent."). In this case, the parties could not give informed consent of dual representation without full disclosure from Lam.

Furthermore, the DHC's conclusion that defendant's dual representation created a conflict of interest is consistent with 2015 Formal Ethics Opinion 14 ("2015 FEO 14"), which held that in most instances, common representation in a commercial real estate closing is a "nonconsentable" conflict. "While not precedential authority for this Court, formal ethics opinions, as defined in the Procedures for Ruling on Questions of Legal Ethics of the North Carolina State Bar, 'provide ethical guidance for attorneys and to establish a principle of ethical conduct.' " *N.C. Baptist Hosps., Inc. v. Crowson*, 155 N.C. App. 746, 752 n.5, 573 S.E.2d 922, 925 n.5 (J. Campbell dissenting) (quoting 27 N.C. Admin. Code 1D.0101(10) (2001)), *aff'd per curiam*, 357 N.C. 499, 586 S.E.2d 90 (2003). Thus, this Court has looked to formal ethics opinions for guidance when determining whether an attorney has violated the Rules of Professional Conduct. *See, e.g., Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602-03, 617 S.E.2d 40, 45-46 (2005) (when reviewing plaintiff's argument that attorney breached attorney-client relationship, citing formal ethics opinions in support of conclusion that attorney-client relationship existed), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006).

Here, although 2015 FEO 14 did not come out until 23 January 2015, its reasoning is persuasive. The opinion cites *Baldasarre v. Butler*, 132 N.J. 278, 295-96, 625 A.2d 458, 467 (1993), in which the Supreme Court of New Jersey held that an attorney may not represent both the buyer and seller in a complex commercial real estate transaction even if both parties give their informed consent:

> The disastrous consequences of [the lawyer's] dual representation convinces us that a new bright-line rule

> prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller.

Formal Ethics Opinion 14 concludes:

> [D]ual representation of the borrower and the lender for the closing of a commercial real estate loan is a nonconsentable conflict of interest unless the following conditions can be satisfied: (1) the contractual terms have been finally negotiated prior to the commencement of the representation; (2) there are no material contingencies to be resolved; (3) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (4) it is unlikely that a difference in interests will eventuate and, if it does, it will not materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that should be pursued on behalf of a client; (5) the lawyer reasonably concludes that he will be able to act impartially in the representation of both parties; (6) the lawyer explains to both parties that his role is limited to executing the tasks necessary to close the loan and that this limitation prohibits him from advocating for the specific interests of either party; (7) the lawyer discloses that he must withdraw from the representation of both parties if a conflict arises; and (8) after the foregoing full disclosure, both parties give informed consent confirmed in writing.

Defendant has failed to show that these conditions were satisfied in this case. Significantly, the DHC's findings, which we have held are supported by the evidence in the record, show that defendant had obtained information through his representation of Lam and Deepwater that would have been material to DCC in determining whether to go forward with the closing and that defendant failed to disclose to DCC before representing both DCC and Deepwater in the closing. There can be no question that a conflict of interest arises when an attorney obtains information through his representation of one party that is material to the attorney's representation of a second party, and the attorney cannot or

does not disclose that information to the second party. *See In re Shay*, 756 A.2d 465, 476 (D.C. 2000) (holding attorney's "duties to her respective clients . . . were irreconcilable and resulted in a conflict of interest" where attorney drafted will for one client and did not disclose material information, obtained from a second client, which was necessary for first client to make informed decision regarding disposition of property); *Matter of LaVigne*, 146 N.J. 590, 607, 684 A.2d 1362, 1371 (1996) ("Respondent engaged in an impermissible conflict of interest, in violation of *RPC* 1.7(b) and (c), by his representation of the seller and two separate sets of purchasers when his own pecuniary interest materially limited his ability to counsel his clients. He failed fully to disclose and explain the nature of the conflict to the respective purchasers and lenders and made no effort to obtain their express consent to his multiple representation, in violation of *RPC* 1.7(b).").

In short, we hold that there is sufficient evidence to support the DHC's finding of fact that Lam engaged in a conflict of interest and failed to provide full disclosure of his actions to the other members of DCC. These findings, in turn, support the DHC's conclusion that defendant engaged in a conflict of interest in violation of Rule 1.7(a) because defendant's representation of DCC at the closing was materially limited by his responsibilities to Deepwater and he had not obtained written informed consent to the dual representation.

AFFIRMED.

Judges ELMORE and DILLON concur.

LESLIE FREDERICK QUINN, PLAINTIFF
v.
DANNY S. QUINN AND WIFE, PATRICIA QUINN, DEFENDANTS

No. COA14-979

Filed 6 October 2015

1. Deeds—validity of deed—notarization—alteration after execution

There was no material issue of fact as to the validity of a contested deed where the deed was void, whether due to its notarization or due to the fact that it was altered after execution without plaintiff's knowledge or consent.

2. Adverse Possession—under color of title—intent

The trial court erred by granting summary judgment for defendants on an adverse possession under color of title claim where there was a material issue of fact as to defendants' subjective intent. The issue of adverse possession cannot be answered without consideration of intent.

Judge BRYANT concurring in the result only.

Appeal by plaintiff from order entered 27 February 2014 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Court of Appeals 20 January 2015.

White & Allen, P.A., by E. Wyles Johnson, Jr. and Ashley Fillippeli Stucker, for plaintiff-appellant.

Wooten & Coley, by William C. Coley III and Everette L. Wooten, Jr., for defendant-appellees.

STROUD, Judge.

Plaintiff appeals order granting summary judgment in favor of defendants. For the following reasons, we reverse and remand.

I. Background

This case would make a good bar exam question, or perhaps several questions, since so many legal issues are raised. The briefs in this case have been of limited assistance to this Court, since both parties argue important facts diametrically opposed to those they previously asserted in their pleadings or depositions or both.

On 10 May 2004, the deed which is the subject of this dispute was recorded in the Lenoir County Register of Deeds in Book 1378, Page 691 of the Lenoir County Register of Deeds ("recorded deed").[1] The date on the deed when it was executed is 12 March 1999, but it was not notarized until 10 May 2004, the same day as recordation, by defendant Patricia Quinn. The recorded deed has no revenue stamp but recites that it was given for consideration. Plaintiff alleges in his complaint it was a gift deed.

1. Other individuals are involved, at times, as grantors and grantees on the deeds discussed, but because their involvement is not at issue, we limit listing grantors and grantees to those individuals necessary for an understanding of this case.

It is undisputed in deposition testimony that the recorded deed arose from an agreed-upon exchange of two parcels of property between plaintiff and his brother, Thomas Quinn and wife, Inez Quinn. The deed from Thomas and Inez Quinn to plaintiff, which is not a subject of this case, was also executed on 12 March 1999 and not recorded until 10 May 2004 in Book 1378, Page 689 of the Lenoir County Register of Deeds.

In March of 2013, plaintiff filed a verified complaint against defendants. In the complaint, plaintiff alleges that he "made and executed" a gift deed from himself to defendants in 1999. Defendant Patricia Quinn notarized the deed in 2004, and it was then recorded. Plaintiff alleges that defendant Patricia Quinn "was disqualified to notarize" the deed "because she stood to receive directly from" it, and thus the deed should be treated as unrecorded. Plaintiff also alleged that because the deed was a gift that went unrecorded for more than two years, it is now void. Plaintiff made claims for a declaratory judgment, quiet title, and ejectment.

In May of 2013, defendants filed a motion to dismiss and answered plaintiff's complaint denying that plaintiff had "made and executed" a deed to *them* and asserting that the deed was not a gift and that defendant Patricia Quinn had indeed notarized the deed in 2004. Defendants denied the substantive allegations of plaintiff's claims. Defendants claimed that

> [b]efore the deed was recorded, the first page of the deed was replaced with one showing . . . Danny and Patricia as Grantees. This was done at the direction of Thomas and Inez as they intended throughout for this land to be Danny and Patricia's since it adjoined land already owned and occupied by Danny and Patricia.

Defendants alleged numerous affirmative defenses and counterclaimed in the alternative that *if the recorded deed was void* they should receive an award of damages for unjust enrichment and betterments for improvements they made to the property and *if the recorded deed was valid* they should have removal of any cloud on their title. In July of 2013, plaintiff answered defendant's counterclaims and raised numerous affirmative defenses.

On 29 August 2013, plaintiff was deposed. Plaintiff explained that he and his brother, Thomas Quinn, agreed to exchange two parcels of land. According to plaintiff, he did not sign a deed with Danny and Patricia Quinn as the grantees, but he executed a deed to Thomas Quinn as grantee. This testimony contradicts the allegations of his complaint but is consistent with the defendants' answer and forecast of evidence.

The following day, defendant Patricia Quinn was also deposed. Defendant Patricia Quinn stated that she notarized a deed signed by plaintiff as grantor and Thomas Quinn as grantee. Defendant Patricia Quinn vehemently denied numerous times throughout her deposition that she had ever notarized a deed from plaintiff to herself. According to defendant Patricia Quinn, page two of the recorded deed, the page signed by plaintiff and notarized by her, was not attached to page one as it is now recorded with defendants' names on it; defendant Patricia Quinn stated that when plaintiff signed the deed and she notarized it, page one reflected the grantee as Thomas Quinn. Defendant Patricia Quinn further opined that she did not believe plaintiff was aware the pages were switched.[2]

Thus, in summary, plaintiff filed a complaint alleging solely "technical" issues regarding the recorded deed from himself to defendants; plaintiff does not allege that the recorded deed is fraudulent or in any way not the deed he originally executed in 1999. Defendants *denied* that plaintiff had executed a deed to them as grantees. Plaintiff then clarified that the deed he executed was actually to his brother, Thomas Quinn. Defendant Patricia Quinn agreed with plaintiff and testified under oath that plaintiff signed a deed to Thomas Quinn and that is the deed she notarized. Thus, without speculation as to the family discord which most likely lies behind this scenario, because a determination of credibility can be made only by the jury or the trial judge sitting as such, there seem to be two possibilities from the facts as provided thus far: (1) If plaintiff's complaint is taken as true, plaintiff gave his land to defendants, and defendant Patricia Quinn notarized the deed to herself as a grantee or (2) if all of the other evidence is taken as true, plaintiff gave the land to his brother Thomas Quinn, and in 2004 defendant Patricia Quinn notarized that deed. Patricia Quinn believed that Thomas and Inez took the deed to their attorney after it was signed by plaintiff in an attempt "to save money and time or whatever to just not have it recorded in their names" because they would have to switch it later to put the land into defendants' names, but again, this scenario is based

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2. Although this fact is directly contrary to defendant Patricia Quinn's own emphatic and repeated deposition testimony, defendant-appellees' brief states that "Appellant . . . executed the deed . . . to Appellees." The recorded deed was notarized by Appellee Patricia W. Quinn. Thus, the facts as argued in defendants' brief contradict both defendants' answer and defendant Patricia Quinn's deposition which both assert that plaintiff signed and defendant Patricia Quinn notarized a deed to Thomas Quinn. For purposes of our discussion, we are using the version of the facts presented by defendants' pleadings and defendant Patricia Quinn's deposition, instead of the one argued by defendants' counsel in defendants' brief, although in the end, the result is the same either way.

upon defendant Patricia Quinn's speculations, and not even she asserts this is what actually occurred. However, even taking defendant Patricia Quinn's assumptions as true, this would mean that plaintiff never properly signed the deed as it was recorded. We are not aware of any evidence brought forth by defendants that indicates plaintiff executed a deed to them; rather their pleadings and defendant Patricia Quinn's deposition indicate the opposite.

On 7 October 2013, plaintiff filed a motion for summary judgment. On 20 February 2014, the trial court entered an order granting defendants' motion to dismiss plaintiff's claim for a declaratory judgment and denying defendants' motion to dismiss plaintiff's claims for quiet title and ejectment.[3] On 27 February 2014, the trial court granted summary judgment on plaintiff's claim for quiet title and ejectment *in favor of defendants*; the trial court also granted summary judgment in favor of defendants on their claim of quiet title and "ordered that any 'cloud on title' of the Defendants by any claim of the Plaintiff . . . is hereby removed." Thus, because the recorded deed was not determined to be void, all claims were resolved. Plaintiff appeals only the summary judgment order in which the trial court dismissed plaintiff's claims for quiet title and ejectment and granted summary judgment for defendants on their counterclaim to quiet title and remove any cloud on title.

II. Standard of Review

> A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.

3. The order dismissing plaintiff's claim for declaratory judgment was not appealed, and we have been unable to discern to what effect, if any, this order has upon the case. It is not clear why the trial court dismissed the declaratory judgment claim, while thereafter ruling upon other claims based upon all of the same factual and legal allegations. It seems that both the trial court and parties disregarded the labels of the claims in the complaint and simply addressed the legal dispute as to the validity of the deed.

> Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the nonmoving party. When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care, summary judgment is inappropriate. We review orders granting or denying summary judgment using a *de novo* standard of review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.

Trillium Ridge Condominium v. Trillium Dev., ___ N.C. App. ___, ___, 764 S.E.2d 203, 210–11 (citations, quotation marks, and brackets omitted), *disc. review denied*, ___ N.C. ___, 766 S.E.2d 619, *disc. review denied*, ___ N.C. ___, 766 S.E.2d 646, *disc. review denied*, ___ N.C. ___, 766 S.E.2d 836 (2014); *see* N.C. Gen. Stat. § 1A-1, Rule 56 (2013).

III. Summary Judgment

[1] It is elementary that summary judgment is proper only where there is no genuine issue of a material fact when the evidence is viewed in the light most favorable to the non-movant, and a party is clearly entitled to prevail based on the law. *See id.* Here, there are factual disputes, and we must consider whether the factual issues are material to the various legal theories raised by both plaintiff's claims and defendant's counterclaims. Here, plaintiff was the party who moved for summary judgment, and plaintiff argues on appeal that the trial court should have granted summary judgment for him, although the trial court granted summary judgment for defendants. Defendants naturally argue that summary judgment in their favor was proper. Since both plaintiff and defendants argue that summary judgment was proper, if granted in their own favor, both argue that the material facts are undisputed, but then they draw differing inferences of the facts. Thus we must consider how the law fits in with this conflict.

Turning to the law, summary judgment here was granted in favor of defendant's on the legal claim of quiet title while plaintiff's claim for quiet title was dismissed.[4]

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4. The trial court granted summary judgment in favor of defendants on plaintiff's claim titled "EJECTMENT." We assume that what plaintiff meant by ejectment is a request for the trial court to order defendants to vacate the property upon determining that plaintiff owed it. However, ejectment would actually seem to be a remedy and not a claim;

> An action to quiet title to realty pursuant to section 41-10 of the North Carolina General Statutes requires two essential elements: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest.

New Covenant Worship Ctr. v. Wright, 166 N.C. App. 96, 103, 601 S.E.2d 245, 250-51 (2004); *see* N.C. Gen. Stat. § 41-10 (2013). The trial court also granted defendant's request to remove cloud on title, and the elements of this claim are the same as those for quieting title. *See Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 596-97 (1997) ("An action to remove a cloud on title: May be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired. N.C. Gen. Stat. § 41–10 (1996). In order to establish *a prima facie case* for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest." (ellipses and brackets omitted)), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

A. Notarization

Plaintiff argues this Court should have granted summary judgment in his favor due to the fact that defendant Patricia Quinn improperly notarized the deed as recorded, or if in fact she properly notarized the deed to Thomas Quinn, the pages of the recorded deed were switched, and thus plaintiff as grantor did not even sign the recorded deed; either way, the deed would be void. *See* N.C. Gen. Stat. § 22-2 (2013). If plaintiff did sign the deed to defendants as recorded, the deed was not properly acknowledged by defendant Patricia Quinn because she was a grantee. *See* N.C. Gen. Stat. § 10B-20(c)(5-6) (2013) ("A notary shall not perform a notarial act if . . . . [t]he notary is a signer of, party to, or beneficiary of

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furthermore, this remedy is only appropriate in the context of a landlord-tenant relationship. *See Adams v. Woods*, 169 N.C. App. 242, 244, 609 S.E.2d 429, 431 (2005) ("The summary ejectment remedy provided for in N.C. Gen. Stat. § 42–26 is restricted to situations where the relationship of landlord and tenant exists. The district court has jurisdiction to hear a summary ejectment proceeding even if the plaintiff does not allege a landlord-tenant relationship in the complaint, but this relationship must be proven in order for the plaintiff's remedy to be granted. If the record lacks evidence to support a finding of a landlord-tenant relationship, the court must dismiss the plaintiff's cause of action." (citations omitted)).

the record, that is to be notarized" or "[t]he notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration[.]") Thus, if defendant Patricia Quinn did acknowledge the recorded deed to herself, the whole deed fails. *See also Lance v. Tainter*, 137 N.C. 249, 250, 49 S.E. 211, 212 (1904) ("The acknowledgment being a nullity, so was the probate by the clerk based thereon, and the registration. . . . . It follows, therefore, that this instrument, not having been legally acknowledged, probated, nor registered, is invalid . . . and should be canceled as a cloud upon the title which might injuriously affect the administration of the estate in the plaintiff's hands.")

Defendants contend that North Carolina General Statute § 47-62 "cures the [notary] problem." In other words, defendants argue that even if defendant Patricia Quinn notarized the deed to herself and her husband – something she claims did not happen – North Carolina General Statute § 47-62 validates the deed. North Carolina General Statute § 47-62 provides that

> [t]he proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March 11, 1907, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel *or otherwise* in such instruments.

N.C. Gen. Stat. § 47-62 (2013) (emphasis added). Defendants contend that the "or otherwise" includes defendant Patricia Quinn in her capacity as both notary and grantee. We disagree.

We first note that

> [a] court must be guided by the fundamental rule of statutory construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. Thus, courts must harmonize such statutes, if possible, and give effect to each, that is, all applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible.

Transportation Servs. of N.C., Inc. v. Wake Cnty. Bd. of Educ., 198 N.C. App. 590, 595, 680 S.E.2d 223, 226 (2009) (citations and quotation marks

omitted). Secondly, we consider the listing of those interested as "attorney, counsel or otherwise" under *ejusdem generis*, which is the rule

> that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

State v. Lee, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citations and quotation marks omitted).

To read North Carolina General Statute § 47-62, as defendants argue, would render North Carolina General Statute § 10B-20(c)(5-6) meaningless as *any* interested person acting in *any* capacity could act as the notary and thereafter have it cured by North Carolina General Statute § 47-62. *See* N.C. Gen. Stat. §§ 10B-20(c)(5-6), 47-62. Our legislature amended North Carolina General Statute § 10B-20(c) as recently as 2013 and intentionally clarified which interested persons would be allowed to notarize documents; as North Carolina General Statute § 10B-20(c)(5) now provides:

> a disqualification under this subdivision shall not apply to a notary who is named in a record solely as (i) the trustee in a deed of trust, (ii) the drafter of the record, (iii) the person to whom a registered document should be mailed or sent after recording, or (iv) the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.

N.C. Gen. Stat. § 10B-20(c)(5); *see* N.C. Gen. Stat. § 10B-20 Effects of Amendments. Reading North Carolina General Statute § 10B-20(c)(5) in conjunction with North Carolina General Statute § 47-62 indicates that "attorney, counsel or otherwise" was meant to include persons that may have drafted or otherwise participated in the preparation of the document. N.C. Gen. Stat. § 47-62; see N.C. Gen. Stat. § 10B-20(c)(5); *see also Transportation Servs. of N.C., Inc.*, 198 N.C. App. at 595, 680 S.E.2d at 226. Furthermore, using the rule of *ejusdem generis* leads to the same conclusion as the "general word[]" "otherwise" is "presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." N.C. Gen. Stat. § 47-62; *Lee*, 277 N.C. at 244, 176 S.E.2d at 774. Thus, North Carolina General Statute § 47-62 cannot cure any

defect in notarization as to defendant Patricia Quinn if she was in fact a grantee under the deed she notarized.

B. Validity between the Parties

Defendants next contend that even if "the recording of the deed is not valid" the deed is still "[v]alid [b]etween the [p]arties" and cites to *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939), which stated that an unrecorded deed is valid as between the parties to the deed. *See Patterson* at 553, 5 S.E.2d at 851. Of course, one problem here is determining who the "parties" to the deed actually were. We know that plaintiff was a party, but defendants may not have been. If plaintiff did sign the deed to defendants as recorded, the deed was void because defendant Patricia Quinn could not take under the deed as notary. If plaintiff did not sign the deed as it was recorded but instead signed a deed to Thomas Quinn, the deed is void here too as plaintiff did not sign this deed. *See generally* N.C. Gen. Stat. § 22-2 (2013). *Patterson* is inapplicable as it does not address when the deed itself is void, but rather when multiple valid deeds are filed regarding the same property; *Patterson* does not address a deed that was not properly executed or acknowledged as the recorded deed is here. *See id.*, 216 N.C. 550, 5 S.E.2d 849. In other words, in *Patterson* the issue was a *faulty recording* of a deed, here the issue is a *faulty deed* itself. *See id.* The recordation or non-recordation of this deed does not change the defect in its creation and cannot make it valid "between the parties," whomever they may be.

C. Adverse Possession

[2] Until now, no matter which factual scenario we proceeded under, the legal conclusion has been the same -- defendants cannot prevail. However, defendants now raise an argument where this is no longer the case as they contend they have "[g]ood [t]itle through [a]dverse [p]ossession" under color of title as they have possessed the land at issue since 2004 when the deed was recorded.[5]

N.C. General Statute § 1–38 governs adverse possession under color of title. *See* N.C. Gen. Stat. § 1–38 (2013).

> When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and

5. Adverse possession without color of title requires 20 years of possession. *See* N.C. Gen. Stat. § 1-40 (2013).

> under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same.
>
> N.C. Gen. Stat. § 1–38(a) (2011). Furthermore, this Court has defined color of title as a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used. However, in order to constitute color of title, defendants must have accepted the deed and entered the . . . Property in good faith. *Farabow v. Perry*, 223 N.C. 21, 25, 25 S.E.2d 173, 176 (1943).

Adams Creek Associates v. Davis, ___ N.C. App. ___, ___, 746 S.E.2d 1, 7 (2013) (citation, quotation marks, and ellipses omitted).

Adverse possession under color of title is a complicated issue, in part, because it requires substantive consideration of subjective intent on the part of the grantee; in this case it is a particularly bewildering consideration since even the facts as solely presented by defendant Patricia Quinn leave us baffled as to what exactly happened here. *See id.* ("[I]n order to constitute color of title, defendants must have accepted the deed and entered the . . . Property in good faith."); *see also Walls v. Grohman*, 315 N.C. 239, 246, 337 S.E.2d 556, 560 (1985) (noting that "doubt" indicates a lack of hostility which is required for adverse possession); *New Covenant Worship Center*, 166 N.C. App. at 105, 601 S.E.2d at 252 ("It is well settled that, if the grantee knows a deed is fraudulent, the deed cannot qualify as color of title.") However, we need not address every possible alternative and its result since defendants' subjective intent is certainly a "genuine issue of material fact[,]" and the issue of adverse possession cannot be answered without consideration of their intent. *Trillium Ridge Condominium*, ___ N.C. App. at ___, 764 S.E.2d 203, 210–11.

D. Change in Grantees

Lastly, defendants contend that even if the grantee on the deed was changed after plaintiff executed it, the change will not "put title back" to plaintiff. Defendants note quite correctly that plaintiff alleged in his complaint that he signed the deed to defendants. Of course, we also have defendant's sworn testimony that the deed plaintiff signed was to Thomas Quinn, not defendants. Yet this issue of fact is not material because the deed fails either way.

Defendants' argument is as follows:

> [Plaintiff] signed a deed for the property to someone. If the front page was changed to a new grantee, that would not put title back into [plaintiff]. *See Dugger v. McKesson*, 100 N.C. 1, 11, 6 S. E. 746, 750 (1888).
>
> In the case of *Bowden v. Bowden*[,] 264 N.C. 296, 300, 141 S. E. 2d 296, 300, (1965) the court found that the alteration of a deed by adding another grantee does not ordinarily divest the title and estate conveyed to the original grantee in the deed in its original form. In *Bowden*, *supra*, the court found that the burden of proof as to such alteration is on the party attacking the altered deed.

Bowden states that "[w]here it has been established that alterations were made after execution and delivery of a deed, the burden is upon those claiming under the altered deed to prove that the alterations were made with the knowledge and consent of the grantor." *Bowden*, 264 N.C. at 301, 141 S.E.2d at 626. Defendants are the parties "claiming under the altered deed" so the burden is on them to show "that the alterations were made with the knowledge and consent of the grantor." *Id.* Defendants have not forecast any evidence plaintiff knew that the first page of the deed was switched after he executed it or that he consented to this change. In fact, defendant Patricia Quinn stated that she did not believe that plaintiff was aware of the change. The evidence only supports two scenarios here: either the first page of the deed was switched after it was executed by the grantor and notarized, and plaintiff was not aware of the change or the deed was actually recorded as it was executed, but that means the deed was notarized by defendant Patricia Quinn and fails for that reason.

IV. Conclusion

So where does that leave this convoluted case? Despite the conflicting evidence, there is no genuine issue of material fact as to the validity of the deed. The deed is void, whether due to notarization by Patricia Quinn if the deed was to her and her husband or due to the fact that the deed was materially altered after execution without plaintiff's knowledge or consent. Either way it is not valid as between plaintiff and defendants and case law regarding later changes to the grantees with the grantor's knowledge is inapplicable. However, we must reverse the trial court's order granting summary judgment in favor of defendants because there is a genuine issue of material fact as to whether defendants acquired

title to the land by adverse possession under color of title. In addition, if a jury were to determine that defendants did not acquire title by adverse possession, defendants' counterclaims for unjust enrichment and betterments must then be determined. For the foregoing reasons, we reverse and remand.

REVERSED and REMANDED.

Judge HUNTER, JR. concurs.

Judge BRYANT concurs in the result only.

WILLIAM SHANNON, M.D., PLAINTIFF
v.
BOB TESTEN, JOSPEH P. JORDAN, AND NORTH CAROLINA PHYSICIANS HEALTH PROGRAM, INC., DEFENDANTS

No. COA15-64

Filed 6 October 2015

1. Physicians—peer review evaluation—statutory immunity

Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Pursuant to N.C.G.S. § 90-21.22(f), which governs peer review agreements by the North Carolina Medical Board, defendants had statutory immunity absent allegations of bad faith. Plaintiff's complaint merely asserted that defendants' evaluation contained factual errors, and it failed to allege bad faith.

2. Physicians—peer review evaluation—private cause of action

Where a medical doctor (plaintiff) sued defendants, who performed an evaluation that served as the basis for the termination of plaintiff's hospital staff privileges, the trial court did not err by dismissing the complaint for failure to state a claim. Plaintiff could not pursue a claim under the federal peer review law because that law does not provide a private cause of action. In addition, even assuming the state peer review law provided a private cause of action, the allegations in the complaint established that defendants complied with the statute.

SHANNON v. TESTEN

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

Appeal by plaintiff from judgment entered 5 September 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Wyrick, Robbins, Yates & Ponton, LLP, by Tobias S. Hampson, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Michael E. Weddington and Robert E. Desmond, and Cranfill Sumner & Hartzog LLP, by Beth R. Fleishman, Jaye E. Bingham-Hinch, and Ginger B. Hunsucker, for defendants-appellees.

DIETZ, Judge.

In 2010, Defendants performed an assessment of Plaintiff William Shannon, a physician, at the request of Gaston Memorial Hospital, where Dr. Shannon had staff privileges. Based on Defendants' evaluation, the hospital terminated Dr. Shannon's staff privileges.

Dr. Shannon then sued Defendants alleging that they breached statutory duties owed to him during the evaluation process. Dr. Shannon also alleged that Defendants violated statutory due process rights established by applicable federal and state peer review laws. The trial court dismissed Dr. Shannon's complaint for failure to state a claim upon which relief could be granted, and Dr. Shannon timely appealed.

We affirm the trial court. Dr. Shannon concedes that N.C. Gen. Stat. § 90-21.22(f) provides a statutory immunity to Defendants absent allegations of bad faith. Here, Dr. Shannon's complaint alleges that Defendants' evaluation contained factual errors and omissions, but does not allege that those errors and omissions were intentional or otherwise done in bad faith. As a result, the complaint fails to allege facts sufficient to overcome Defendants' statutory immunity.

Likewise, Dr. Shannon's due process allegations fail to state a claim upon which relief can be granted. Even assuming Dr. Shannon can bring a direct cause of action against Defendants under the statutory due process language on which he relies, that language requires only that "peer review agreements shall include provisions assuring due process." N.C. Gen. Stat. § 90-21.22(b). Here, Dr. Shannon's complaint alleges that the agreement contains provisions ensuring that Defendants' activities will "be in accordance with due process." Thus, on its face, the complaint fails to allege facts sufficient to state a claim for violation of the statute. Accordingly, we affirm the trial court's judgment.

Facts and Procedural History

The following facts are taken from Dr. Shannon's complaint, accepting all allegations as true and drawing all reasonable inferences in his favor. *See Thompson v. Waters*, 351 N.C. 462, 462-63, 526 S.E.2d 650, 650 (2000) (citations omitted).

Dr. Shannon is a licensed medical doctor practicing ophthalmology in Gastonia, North Carolina. He had staff privileges at Gaston Memorial Hospital, where he had been on the medical staff since 1980. As a result of two patient incidents, Gaston Memorial requested Dr. Shannon "undergo a comprehensive neuropsychiatric assessment as part of their evaluation." Gaston Memorial made this request to assess whether Dr. Shannon had any physical, psychiatric, emotional, or substance abuse related illness, or personal health issues that may have contributed to the incidents in question. Dr. Shannon's Gaston Memorial privileges were temporarily suspended, pending the results of this requested evaluation.

Dr. Shannon cooperated with Gaston Memorial's request and submitted to evaluations by both a psychologist and a psychiatrist in Charlotte in late August and early September of 2010. The psychiatrist reported that his and the psychologist's evaluations revealed no cognitive defects, psychiatric disorders, delusional thinking, hallucinations, or memory issues. He also concluded that Dr. Shannon did not exhibit dementia or psychiatric illnesses that would affect his performance as a medical doctor.

Gaston Memorial then referred Dr. Shannon to North Carolina Physicians Health Program, Inc. ("NCPHP") and the two individual defendants for further evaluation. Dr. Shannon met with Defendants Testen and Jordan for approximately two hours on or about 29 November 2010. At the time of the meeting, Testen was a licensed clinical social worker and served as a consultant and clinical coordinator for NCPHP. Jordan was a counselor and employee of NCPHP. NCPHP is a North Carolina not-for-profit corporation operating under an agreement with the North Carolina Medical Board pursuant to N.C. Gen. Stat. § 90-21.22(b), a state law governing peer review agreements.

During the meeting, Dr. Shannon gave Testen and Jordan names of witnesses he believed would have relevant information regarding his behavior and the incidents that gave rise to the evaluation by NCPHP. He also identified documents, including hospital and patient records, that supported his position and explained the two incidents. However, Testen and Jordan did not consult these witnesses and documents.

Following the 29 November 2010 meeting, Testen and Jordan prepared an "initial assessment" letter and gave it to the North Carolina Medical Board and Gaston Memorial. The letter stated that Dr. Shannon had no alcohol or substance abuse issues, no legal issues, and no history of psychiatric illness. The letter also stated that Dr. Shannon was "cooperative and forthcoming," and complied with their drug testing and other informational requests "without hesitation." But, according to Dr. Shannon, the assessment letter contained factual errors and significant omissions regarding the two incidents in question.[1] Testen and Jordan concluded their assessment letter with a recommendation that Dr. Shannon immediately obtain further professional evaluation.

Testen and Jordan repeated their recommendation for further professional evaluation in a 4 January 2011 letter sent to Dr. Shannon and copied to the North Carolina Medical Board. In this letter Testen and Jordan also stated that they had continued to gather information from Dr. Shannon's earlier psychological and psychiatric evaluations in Charlotte and that, "this information has been informative and concerning." The January letter did not explain what was "concerning" about the information Testen and Jordan had gathered.

In December 2010, Gaston Memorial informed Dr. Shannon that, based on information provided by Defendants, his staff privileges would not be reinstated. Dr. Shannon volunteered his license to the North Carolina Medical Board in February 2011.

On 26 November 2013, Dr. Shannon sued Testen, Jordan, and their employer, NCPHP, alleging that Testen and Jordan were negligent in performing their evaluations, and that NCPHP was vicariously liable as their employer. On 23 June 2014, Dr. Shannon filed an amended complaint, adding a claim for violation of due process under federal and state statutory law governing the peer review process, but leaving the original negligence claim unaltered.

Defendants moved to dismiss Dr. Shannon's amended complaint pursuant to Rule 12(b)(6), arguing that they were immune from suit under N.C. Gen. Stat. § 90-21.22(f) and that Dr. Shannon had failed to state any claim upon which relief may be granted. On 5 September 2014, the trial court granted the motion. Dr. Shannon timely appealed.

1. The complaint does not specifically identify these alleged errors and omissions.

Analysis

This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d. 794, 796 (2013). We examine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* (citations omitted). Dismissal is only appropriate if "it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim." *Scadden v. Holt*, 222 N.C. App. 799, 801, 733 S.E.2d 90, 91-92 (2012) (citations omitted).

I. Negligence Claim

[1] Dr. Shannon first argues that his complaint states a claim for breach of duties that Defendants owed him under the applicable peer review statutes. Dr. Shannon acknowledges that to state a claim in this context he must allege that the Defendants acted in bad faith, thus overcoming the statutory immunity provided in N.C. Gen. Stat. § 90-21.22(f). Dr. Shannon contends that the Court should infer bad faith from the express allegations in the complaint. For the reasons discussed below, we reject Dr. Shannon's argument.

N.C. Gen. Stat. § 90-21.22 governs peer review agreements by the North Carolina Medical Board concerning programs for impaired physicians. The statute provides an immunity to suit for those participating in the peer review process: "Peer review activities conducted in good faith pursuant to any agreement under this section shall not be grounds for civil action under the laws of this State." N.C. Gen. Stat. § 90-21.22(f). As a result, a plaintiff suing individuals or corporations involved in this statutory peer review process must allege bad faith in order to survive a Rule 12(b)(6) motion.

To allege bad faith, the complaint must do more than allege mere negligence. Bad faith requires some showing of intentional dishonesty or a wrongful motive. As our Supreme Court has observed, "[bad faith] implies a false motive or a false purpose, and hence it is a species of fraudulent conduct. Technically, there is, of course, a legal distinction between bad faith and fraud, but for all practical purposes bad faith usually hunts in the fraud pack." *Bundy v. Commercial Credit Co.*, 202 N.C. 604, 163 S.E. 676, 677 (1932).

Here, Dr. Shannon's complaint fails to allege bad faith. Indeed, the complaint does not even contain a conclusory allegation that Defendants acted in bad faith; to the contrary, the allegations read like a run-of-the-mill negligence claim. The complaint alleges that Defendants committed various mistakes in the peer review process:

> 17. Upon information and belief, the individual defendants did not interview necessary witnesses with knowledge of what had occurred on the two incidents in question.
>
> 19. The initial assessment by the individual defendants contained factual errors and significant omissions regarding the two incidents in question that cast Dr. Shannon in a poor light professionally.
>
> 23. Upon information and belief, the individual defendants did not interview the individuals who Dr. Shannon identified as having relevant information . . . and did not review the relevant hospital and patient records with him or with eyewitnesses to the events in question.

None of these allegations suggest the report's alleged "factual errors" and "omissions" were intentional. Moreover, the complaint contains a number of allegations indicating the defendants acted in *good faith*:

> 20. The individual defendants in their initial assessment, accurately stated that Dr. Shannon does not have difficulties with alcohol or substance abuse, has no history of mental or psychiatric illness or legal issues; and the defendants found Dr. Shannon "cooperative and forthcoming."
>
> 21. The individual defendants reported that Dr. Shannon "without hesitation" completed their request for a urine drug screen and complied with their request to sign a release allowing the individual defendants to speak with members of the hospital, as well as the psychologist and psychiatrist who had previously evaluated him.
>
> 27. During the December 30, 2010, telephone conversation . . . defendant Jordan extended the time limit for [Dr. Shannon] making an appointment for evaluation to January 30, 2011.

Dr. Shannon argues that this Court should *infer* bad faith from the fact that defendants provided little specific information to him during their inquiry and that their report ultimately contained at least some factual errors and omissions. But this is an inferential leap too far. In essence, Dr. Shannon contends that the Court should infer willfulness from carelessness. To do so would set aside the distinction between negligence and bad faith established in cases from this Court and our Supreme Court. *See Edwards v. Northwestern Bank*, 39 N.C. App. 261, 268, 250 S.E.2d 651, 656 (1979); *Bundy*, 202 N.C. at 607, 163 S.E. at 677.

Accordingly, we hold that the complaint fails to allege bad faith—a necessary step in overcoming the legal immunity afforded by N.C. Gen. Stat. § 90-21.22(f)—and therefore fails to state a claim upon which relief can be granted.

II. Due Process Claim

[2] Dr. Shannon next argues that his complaint states a claim for violation of statutory due process protections provided by the applicable federal and state peer review laws. We disagree.

As an initial matter, Dr. Shannon cannot pursue a claim under the federal law, the Health Care Quality Improvement Act, because that statute does not provide a private cause of action. *Hancock v. Blue Cross Blue Shield of Kan., Inc.*, 21 F.3d 373, 375 (10th Cir. 1994); s*ee also Bok v. Mut. Assurance, Inc.*, 119 F.3d 927, 928 (11th Cir. 1997) (per curiam); *Wayne v. Genesis Med. Ctr.*, 140 F.3d 1145, 1147 (8th Cir. 1998); *Singh v. Blue Cross Blue Shield of Mass., Inc.*, 308 F.3d 25, 45 n.18 (1st Cir. 2002).

Dr. Shannon concedes that he does not—and cannot—pursue a private cause of action under the Health Care Quality Improvement Act. But he argues that he can pursue a *state* common law claim for the violation of his statutory due process rights provided by the federal law. To support this novel theory, Dr. Shannon cites our Supreme Court's holding that "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). This language from *Corum* concerns rights established in the North Carolina Constitution.[2] Thus, *Corum* does not permit a litigant to bring a state common law claim to enforce an alleged violation of a federal statute simply because federal law does not permit a private cause of action. *See Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339, 678 S.E.2d 351, 355 (2009); *Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428-29 (2010) (both limiting *Corum* to violations of the state Constitution). Accordingly, Dr. Shannon's claim based on federal law fails to state a claim upon which relief can be granted.

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2. Dr. Shannon has not alleged a violation of his state constitutional due process rights in his complaint. He only alleges that Defendants violated his *statutory* due process rights under the applicable federal and state peer review laws, 42 U.S.C. § 11112 and N.C. Gen. Stat. § 90-21.22. But, even if Dr. Shannon's complaint could somehow be read to allege a constitutional violation, it never alleges the trigger of state constitutional due process rights: state action. To the contrary, it alleges that Defendant NCPHP is a private corporation and the individual Defendants are NCPHP employees.

Dr. Shannon also asserts a claim under N.C. Gen. Stat. § 90-21.22(b), which provides that "peer review agreements shall include provisions assuring due process." We are not persuaded that the General Assembly intended for this provision to provide a private cause of action against third parties like the defendants in this case, who are subject to a peer review agreement with the North Carolina Medical Board. Rather, if the Medical Board failed to comply with the statutory obligation to ensure that "peer review agreements shall include provisions assuring due process," Dr. Shannon's claim, if one exists at all, ought to be directed at the Medical Board.

In any event, even assuming Dr. Shannon can sue Defendants for the alleged violation of N.C. Gen. Stat. § 90-21.22(b), the allegations in Dr. Shannon's complaint establish that Defendants complied with the statute. The statute requires only that "peer review agreements shall include provisions assuring due process." *Id.* Dr. Shannon alleges that the " 'memorandum of understanding' between Gaston Memorial Hospital and the North Carolina Medical Board, pursuant to North Carolina General Statute § 90-21.22(b) . . . requires the activities of Defendant NCPHP to be in accordance with due process." Simply put, the complaint itself alleges that the peer review agreement includes provisions assuring due process. Thus, Dr. Shannon's complaint fails to state a claim for violation of N.C. Gen. Stat. § 90-21.22.[3]

Conclusion

For the reasons discussed above, the trial court did not err in dismissing Plaintiff William Shannon's Amended Complaint for failure to state a claim upon which relief can be granted.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

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3. We also note that agency regulations create a thorough process for NCPHP to follow in conducting its assessment, and this process readily provides the sort of notice and opportunity to be heard necessary to satisfy basic due process rights. *See* 21 NCAC 32K.0201, 32K.0202. Dr. Shannon does not allege that these requirements were violated, and the allegations in the complaint establish that they were satisfied.

STATE OF NORTH CAROLINA
v.
JOHN JOSEPH CARVALHO, II

No. COA14-1251

Filed 6 October 2015

1 Constitutional Law—speedy trial—Barker factors

The trial court did not err by determining that the State did not violate defendant's state or federal constitutional right to a speedy trial where the nearly nine-year delay, while extraordinary, was not *per se* determinative. Applying the four factors in *Barker v. Wingo*, 407 U.S. 514, defendant failed to carry his burden of showing that negligence or willfulness by the State caused the length of delay in his trial.

2. Evidence—audiotape and transcript—redacted and limiting instruction

Defendant argued the trial court erred in a prosecution for first-degree murder and armed robbery by admitting portions of an audiotape and corresponding transcript of a conversation between defendant and another inmate (Anderson). Given the importance of the credibility of Anderson's testimony to the State's case, it could not be concluded that the trial court was manifestly unreasonable in determining that the relevance of the redacted version of the transcript, combined with a limiting instruction, substantially outweighed any unfair prejudice to defendant.

3. Criminal Law—closing arguments—conversation with another inmate

The State's closing arguments were not grossly improper and did not warrant a new trial where defendant was charged with first-degree murder and armed robbery, evidence was introduced of defendant's conversation with another inmate, and the State used that evidence in its closing argument. The State did not ask the jury to use the challenged evidence to convict defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner.

Chief Judge McGEE concurring in part and dissenting in part.

STATE v. CARVALHO

[243 N.C. App. 394 (2015)]

Appeal by defendant from judgment entered 7 April 2014 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 1 June 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

TYSON, Judge.

John Joseph Carvalho, II ("Defendant") appeals from judgment entered upon jury verdicts finding him guilty of first-degree murder and of robbery with a dangerous weapon. We find no error in Defendant's conviction or judgment entered thereon.

I. Factual Background

The evidence tended to show: On 28 April 2000, George N. Kastansis ("Mr. Kastansis") died of multiple gunshot wounds at his place of business, Avondale Grocery, located in Monroe, North Carolina. A warrant was issued for Defendant's arrest on 16 November 2004, over four and one-half years later, for the murder of Mr. Kastansis. The grand jury indicted Defendant for first-degree murder and robbery with a firearm on 3 January 2005. Defendant knew Mr. Kastansis through an illegal gambling partnership they had run out of Avondale Grocery. The State's theory of guilt was that Defendant killed Mr. Kastansis, because he was preventing Defendant from continuing his involvement in their gambling partnership, costing Defendant "thousands of dollars."

On the same date, the State also charged Defendant with the murder of Robert Long ("Mr. Long"). The grand jury indicted him for the first-degree murder of Mr. Long on 3 January 2005. The State initially filed an intention to seek the death penalty for both murders, but later requested that the trial court try both cases as non-capital. The trial court ordered both cases against Defendant be tried non-capitally on 19 December 2008.

The State tried Defendant for the death of Mr. Long in 2009. The trial court declared a mistrial after the jury deadlocked. The State tried Defendant for the murder of Mr. Long a second time in 2010 and the trial court again declared a mistrial because of a deadlocked jury.

The State's primary evidence against Defendant in both murders of Mr. Long and Mr. Kastansis was the testimony of an informant, William

C. Anderson ("Anderson"). Anderson was incarcerated with Defendant in 2004. Anderson testified that during his incarceration with Defendant, Defendant purportedly confessed to killing both Mr. Long and Mr. Kastansis. Anderson testified at Defendant's first trial for the murder of Mr. Long. At Defendant's second trial for the murder of Mr. Long, Anderson invoked his Fifth Amendment right against self-incrimination and refused to testify. Anderson said he believed that if he testified he might say something incorrectly and perjure himself.

When Anderson testified at Defendant's first trial for the murder of Mr. Long, the State also entered into evidence an audiotaped conversation between Anderson and Defendant ("the audiotape"). The audiotape did not contain an actual confession, but rather a wide-ranging conversation, which touched on the murders of Mr. Long and Mr. Kastansis, as well as other potentially criminal acts. The sound quality of the audiotape was very poor and the State Bureau of Investigation ("SBI") made efforts to clarify the audiotape.

After Defendant's two mistrials for the murder of Mr. Long, the State again sought to secure the testimony of Anderson and to improve the quality of the audiotape. The SBI first contacted the Federal Bureau of Investigation ("FBI") for its assistance to clarify the audiotape on 24 March 2011. On 26 April 2011, the FBI stated it could not clarify the audiotape due to internal policies prohibiting such action and relinquished custody of the audiotape on 6 July 2011. The FBI recommended the SBI hire the Target Forensic Services Laboratory ("Target Forensic"). An SBI agent sent the audiotape to Target Forensic on 28 July 2011. Target Forensic completed work on the audiotape and sent the SBI a clarified version on 24 April 2012.

Some portions of the audiotape remained inaudible. Anderson made handwritten notes transcribing the content of the conversation on a printed copy of the transcript to supplement the inaudible portions of the audiotape. The SBI prepared a transcript of the conversation that occurred between Anderson and Defendant during their incarceration.

The conversation between Anderson and Defendant did not include a confession to the murders of either Mr. Long or Mr. Kastansis. The conversation contained details of the events surrounding Mr. Kastansis's death, including the following: (1) Defendant attended Mr. Kastansis's funeral and blessed the body with a "very . . . theatrical movement[;]" (2) Defendant mentioned investigators had charged the wrong man in connection with Mr. Kastansis's murder; (3) Defendant's knowledge of and involvement in an illegal poker scam that Defendant and Mr. Kastansis

ran out of Avondale Grocery; and, (4) Defendant's comment after investigators showed Defendant a picture of Mr. Kastansis's children, in which Defendant stated "he didn't care about [Mr. Kastansis's] kids."

The remainder of the conversation covered a wide range of criminal activity, including stealing money, acting as hitmen, using firearms to kill, killing a "Gypsy," how to attain serial killer status, committing murder "with control," and how to dismember a body and feed it to catfish. The conversation ended soon after Defendant suspected Anderson was wearing a wire, and said: "[I]t [sic] my life. The rest of my life . . . you're the only one in here I talk to . . . you're the only one here I trust only one I trust . . . you don't think they know that?"

Investigators met with Anderson on 9 December 2011 to determine his willingness to testify at Defendant's trial for the murder of Mr. Kastansis. Anderson told investigators he had refused to testify in Defendant's second trial for Mr. Long's murder "because of the way he was treated" by Union County, while in its custody. Anderson was concerned for his safety because Union County held him with other inmates, who knew he was testifying against someone in a murder trial. Anderson agreed to testify after investigators agreed to some of his stipulations. Anderson reiterated everything he had said during Defendant's trial for the murder of Mr. Long.

The State initiated plea bargain discussions with Defendant in December 2012. The State and Defendant did not reach a plea agreement and discussions ended on 9 April 2013. Defendant filed a motion to dismiss the charges based upon a speedy trial violation on 3 December 2012, before the State began plea negotiations with Defendant.

In his motion, Defendant asserted he was denied his constitutional right to a speedy trial due to the overall length of his imprisonment, as well as a lack of evidence sufficient to obtain a conviction due to Anderson's unwillingness to testify. Defendant also alleged his lengthy imprisonment had "crushed" any ability to post his one million dollar bond. Defendant stated defense counsel had "repeatedly" asked about the State's intentions regarding his cases, but Defendant had "received no definitive answer."

The State provided the following reasons for the potential delay at the hearing on Defendant's motion to dismiss:

> (1) The complex nature of the cases. While factually separate and distinct from one another the two cases are intertwined in that Bill Anderson is the key witness in each case.

> (2) That with two separate murder charges significant amounts of discovery were generated.
>
> (3) Prior to both trials (Long and Kastansis) the State and defense engaged in substantial plea negotiations in an effort to find a resolution that was mutually satisfying to each Party.
>
> (4) The defendant was arraigned on the Long murder on December 16, 2008; tried in this case on September 9, 2009 which resulted in a hung jury and a mistrial on September 15, 2009.
>
> (5) The defendant was retried on the Long murder on March 22, 2010 which resulted in a hung jury and a mistrial on March 30, 2010.
>
> (6) Following the mistrial on March 30, 2010, the State sought to enhance the quality of the audio tape conversation between the defendant . . . and Bill Anderson.
>
> (7) The efforts to clarify the audio recording began in March 2011 and were completed in July 2012.
>
> (8) Efforts to resolve issues with Bill Anderson to secure his testimony in future trials.

On 6 June 2013, the trial court held a hearing on Defendant's motion to dismiss and entered an order denying Defendant's motion on 2 January 2014. In its written order, the trial court made the following conclusions of law:

> 2. The length of delay 4 years 10 months (November 16, 2004 to September 8, 2009) and 5 years 4 months (November 16, 2004 to March 22, 2010) between the date the defendant was charged and his two trials in Richard Long's murder cases and a period of 8 years 7 months (November 16, 2004 to June 6, 2013) between the date the defendant was charged and the hearing on defendant's Motion to Dismiss (Speedy Trial) is sufficient enough in each case to trigger analysis of the speedy trial factors.
>
> 3. The defendant . . . has failed to offer any evidence to establish that neglect or willfulness by the State is the reason for delay in each case.

> 4. The State's reasons for the delay in the trial of each murder case . . . are reasonable and valid justifications for the delay in each case.
>
> 5. The defendant . . . until his Motion to Dismiss filed on December 3, 2012, never asserted his right to a speedy trial.
>
> 6. The defendant . . . failed to establish that he suffered actual, substantial prejudice as a result of the delay in the trial of his two murder cases.
>
> 7. The Court in its evaluation and balancing of the four factors enumerated in Baker v. Wingo, concludes as a matter of law that the defendant's right to a speedy trial has not been violated.

The State tried Defendant for the murder of Mr. Kastansis and robbery with a firearm on 7 October 2013. The trial court declared a mistrial after the jury deadlocked. Six months later, Defendant was tried a second time for the murder of Mr. Kastansis and robbery with a firearm on 1 April 2014. Defendant moved to dismiss the charges at the close of the State's evidence, and again at the close of all of the evidence. The trial court denied Defendant's motions.

A jury found Defendant guilty of first-degree murder and robbery with a firearm on 7 April 2014. The trial court arrested judgment on Defendant's conviction for robbery with a dangerous weapon and sentenced Defendant to life imprisonment without parole on the first-degree murder conviction.

Defendant gave notice of appeal in open court.

II. Issues

Defendant asserts three arguments on appeal: (1) that the almost nine years between his arrest in 2004 and his trial for the murder of Mr. Kastansis in 2013 violated his constitutional right under the Sixth Amendment to the United States Constitution and Article I, Section 8 of the North Carolina Constitution; (2) that the trial court should have denied admission of a jailhouse audiotape and corresponding transcript because of its irrelevancy and unfairly prejudicial effect; and (3) that the trial court should have intervened in the State's closing arguments because the State used evidence, limited by the trial court to a narrow purpose, as substantive proof of Defendant's guilt.

III. Analysis

A. Speedy Trial

[1] Defendant first contends the State violated his state and federal constitutional rights to a speedy trial because an almost nine-year delay occurred between his 2004 indictment for the murder of Mr. Kastansis and Defendant's motion to dismiss in 2012.

1. Standard of Review

This Court applies a *de novo* standard of review for a constitutional issue on appeal. *See State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). It is a defendant's burden to demonstrate prejudicial and reversible error. If the appellate court finds error, the State carries the burden to rebut by showing the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A 1443 (2013).

2. Analysis

The Supreme Court of the United States established a four-factor balancing test to assess a potential violation of a defendant's right to a speedy trial, as cited by the trial court. *See Barker v. Wingo*, 407 U.S. 514, 530–33, 33 L. Ed. 2d 101, 115–19 (1972). These factors are: (1) the "[l]ength of delay;" (2) "the reason for the delay[;]" (3) "the defendant's assertion of his right[;]" and, (4) "prejudice to the defendant." *Id.* at 530, 33 L. Ed. 2d at 117.

"[N]one of the four factors identified [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533, 33 L. Ed. 2d at 118. While the four factors guide the process, "these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.*

The right to a speedy trial is unique among other constitutional guarantees "in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself[.]" *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978). "[I]t is impossible to determine precisely when the right has been denied; . . . and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial." *Id.*

(a) Length of Delay

In order to "trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold

dividing ordinary from presumptively prejudicial." *Doggett v. United States*, 505 U.S. 647, 651–52, 120 L. Ed. 2d 520, 528 (1992) (internal quotation marks omitted). As time passes, "the presumption that pretrial delay has prejudiced the accused intensifies." *Id.* at 652, 120 L. Ed. 2d at 528. "Depending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." *Id.* at 652 n.1, 120 L. Ed. 2d at 528 n.1.

Here, almost nine years elapsed between the time the State indicted Defendant in 2004 and the time of the June 2013 hearing on his motion to dismiss. This delay clearly passes the demarcation into presumptively prejudicial territory and triggers the *Barker* analysis. *See State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997) (explaining "presumptive prejudice does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry" (internal quotation marks omitted)), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *see, e.g.*, *Doggett*, 505 U.S. at 652, 120 L. Ed. 2d at 528 (calling an eight-and-one-half-year-long delay "extraordinary").

The almost nine-year delay, while also "extraordinary," "is not *per se* determinative of whether a speedy trial violation has occurred," and requires careful analysis of the remaining factors. *Id. See State v. Webster*, 337 N.C. 674, 678-79, 447 S.E.2d 349, 351 (1994) (deciding sixteen-month delay from arrest to trial did not presumptively indicate a speedy trial violation had occurred, but was enough to "trigger examination of the other factors").

(b) Reason for Delay

A defendant must demonstrate the delay stemmed from either negligence or willfulness on the part of the State. *State v. Marlow*, 310 N.C. 507, 521, 313 S.E.2d 532, 541 (1984). Ordinary or reasonable delays do not create prejudice. *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969). A speedy trial claim prevents only those delays that were "purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *Id.*

"A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *Id.* at 269, 167 S.E.2d at 278. Once a defendant shows a *prima facie* case for negligence or willfulness, the State bears the burden of showing there were reasonable circumstances surrounding the delay. *See McKoy*, 294 N.C. at 143, 240 S.E.2d at 390.

Defendant has failed to show the delay stemmed from either negligence or willfulness on the part of the State. *Compare Webster*, 337 N.C. at 679, 447 S.E.2d at 351 (finding a sixteen-month delay, where the district attorney calendared the trial six different times, did not demonstrate negligence or willfulness), *with McKoy*, 294 N.C. at 141–42, 240 S.E.2d at 389 (finding delay factor in favor of defendant because defendant presented evidence that the "failure to bring defendant to trial during the next ten months . . . was due to the willful neglect of the prosecution and could have been avoided by reasonable effort"). Defendant presented no evidence of negligence or willfulness by the State in his motion to dismiss, or at the hearing on his motion.

Defendant merely established the timeline showing how the two murder cases had proceeded over time. As discussed *supra*, the length of delay alone does not prove the State denied Defendant a speedy trial. *See Webster*, 337 N.C. at 678, 447 S.E.2d at 351. Although Defendant asserted in his motion to dismiss that defense counsel had asked "repeatedly" for information on the progression of the cases and had received "no definitive answer," no other motions were filed and Defendant did not present any evidence regarding those inquiries.

Evidence described the timelines of all four trials and the actions the State took to bring the two distinct murder cases to trial. The more significant elements that contributed to the length of the proceedings were: (1) changing the trials for Mr. Long's and Mr. Kastansis's murders from capital to non-capital; (2) plea discussions between Defendant and the State; (3) clarification of the audiotape and generation of a transcript, including seeking help from the SBI, the FBI and Target Forensic; (4) securing the testimony of the State's key witness, Anderson; and, (5) the interconnectedness of the two murders. While we are concerned about the sixteen-month delay from enhancing the audiotape previously used at Defendant's trials for the murder of Mr. Long, Defendant has failed to carry his burden of showing the reasons for the delays stemmed from either negligence or willfulness on the part of the State.

(c) Assertion of the Right

Defendant's failure to demand a speedy trial does not result in a waiver of the speedy trial violation. *See Barker*, 407 U.S. at 528, 33 L. Ed. 2d at 115. While a "[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, [it] does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Flowers*, 347 N.C. at 28, 489 S.E.2d at 407. Defendant first asserted his right to a speedy trial on 3 December 2012,

some eight years after Defendant was first indicted in 2004. No evidence in the record shows Defendant requested or moved for a speedy trial any earlier than in 2012.

(d) Prejudice Resulting from Delay

Prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118. The identified interests the constitutional right to a speedy trial protects are: (1) avoiding prolonged imprisonment; (2) reducing anxiety of the accused; and (3) creating the opportunity for the accused to assert and exercise their presumption of innocence. *See id.* The last of these interests is the most important aspect to the speedy trial right, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Defendant has not shown any affirmative proof of prejudice. He asserts only his lengthy incarceration "crushed" any financial ability to post his one million dollar bond. Defendant does not argue he was either unduly anxious or that his case preparation was impaired by the delay. *Compare Flowers*, 347 N.C. at 29, 489 S.E.2d at 407 (finding that defendant failed to show prejudice when he was already incarcerated, alleviating concerns over oppressive pretrial incarceration, and any allegation of impairment to his defense was not supported by the record), *with State v. Chaplin*, 122 N.C. App. 659, 665, 471 S.E.2d 653, 657 (1996) (finding prejudice when the defendant could no longer find his key witness).

We have reviewed and considered each of the *Barker* factors. Defendant failed to carry his burden to demonstrate a speedy trial violation. We affirm the trial court's ruling denying Defendant's motion to dismiss. We hold the trial court did not err after it determined the State did not violate Defendant's state or federal constitutional right to a speedy trial. Defendant's argument is overruled.

B. Admission of Audiotape and Corresponding Transcript

[2] Defendant argues the trial court erred in admitting, over his objection, portions of the audiotape and corresponding transcript, which included a conversation between Defendant and Anderson, while both men were incarcerated.

Defendant challenges portions of the audiotape and transcript in which Defendant discusses: (1) plans to commit a future armed robbery and murder; (2) how many killings it takes to become a serial killer; (3) becoming a hitman; (4) committing murder "with control;" and (5) dismembering a body and feeding it to catfish. Defendant contends the

evidence was irrelevant under Rules 401 and 404(b) and unfairly prejudicial under Rule 403, and should have been excluded. We disagree.

1. Standard of Review

Our Supreme Court held:

> when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

2. Analysis

(a) 404(b) Evidence

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a defendant's prior crimes, statements, actions and conduct is admissible, if relevant to any fact or issue other than the defendant's character. *Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159.

North Carolina Rules of Evidence 404(b) is a rule of inclusion, not exclusion. *Id.* at 131, 726 S.E.2d at 159. *See also State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

> The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial] . . . .

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (internal citations and quotation marks omitted).

Our Supreme Court has ruled Rule 404(b) is "subject to but *one exception* requiring the exclusion of evidence if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (emphasis in original) (citation omitted).

The trial court found the audiotape and transcript of portions of Defendant's conversations with Anderson served a "proper purpose," in that "these statements are necessary to show the full context of the confidential relationship between Mr. Anderson and [Defendant]."

Anderson's credibility was crucial to the State's case and this finding clearly falls within the purview of admissible evidence under Rule 404(b). *See State v. White*, 340 N.C. 264, 285-86, 457 S.E.2d 841, 853 (1995) (holding "knowledge of the relationship between [the witness] and defendant was necessary in order for the jury to assess [the witness's] credibility and determine what weight to give his testimony"); *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (noting 404(b) evidence is admissible if it serves to enhance the natural sequence or development of facts).

This evidence was properly admitted under the North Carolina Rules of Evidence, Rule 404(b). *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54 (holding Rule 404(b) is a rule of inclusion). The trial court also gave the jury a limiting instruction regarding the purpose for which the jury could consider the evidence. The jury is presumed to have followed these instructions. *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (citation omitted) ("We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with th[e limiting] instruction by the court.").

Defendant's conversation with Anderson was not admitted to show Defendant had a propensity to commit crimes. Rather, the challenged portions of the conversation were admitted for the limited purposes to show: (1) Defendant trusted and confided in Anderson; (2) the nature of their relationship, in that Defendant was willing to discuss the commission of murder and robbery with Anderson; and (3) relevant factual information to Defendant's murder charge for which he was on trial. The challenged portions of the conversations bolstered Anderson's credibility as a witness. The trial court did not err in concluding that Rule 404(b) permitted admission of these statements into evidence.

(b) Rule 403 – Unfair Prejudice

The trial court's admission of portions of the audiotape and transcript also did not violate Rule 403. "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389, S.E.2d at 56 (citation omitted). The trial court determined the probative value of this evidence was not substantially outweighed by any prejudicial effect the admission of this evidence would have on Defendant "based on the State's purpose for offering this evidence."

The trial court also gave a specific limiting instruction to the jury, both at the time the audiotape was played before the jury and during the instruction to the jury. This limiting instruction stated:

> Evidence has also been received tending to show that Bill Anderson and the defendant . . . engaged in conversations concerning the future commission of criminal acts, serial killing, and the dismembering of a body. *This evidence was received solely for the purpose of showing the nature and context of the relationship between Bill Anderson and . . . [Defendant].*

(emphasis supplied).

The trial court redacted some of the transcript, balanced the factors to allow admission of the remaining portions, and found the admission of the audiotape and transcript was for a permissible purpose under Rule 404(b). The trial court also specifically limited its use in its instructions to the jury. Defendant has failed to show the trial court's process or admission of this evidence constitutes an abuse of discretion.

Defendant argues any relevance of this evidence was outweighed by "danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Under the applicable standard of review, this Court cannot substitute its own judgment for that of the trial court. Given the importance of the credibility of Anderson's testimony to the State's case, we cannot conclude the trial court was manifestly unreasonable in determining the relevance of the redacted version of the transcript, when combined with the limiting instruction, substantially outweighed any unfair prejudice to Defendant. When combined with the trial court's limiting jury instruction, the probative value substantially outweighed any unfair prejudice to Defendant. *Id.* Defendant has failed to show the admission of this evidence violated Rule 403. *State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602 (2004) (citation and internal quotation marks omitted)

("In each case, the burden is on the defendant to show there was no proper purpose for which the evidence could be admitted [under Rule 404(b)]."). Defendant's argument is overruled.

C. Closing Arguments

[3] Defendant asserts the State's closing arguments were "grossly improper," and warrant a new trial. We disagree.

1. Standard of Review

"The standard of review when a defendant fails to object at trial is whether the closing argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. McCollum*, 177 N.C. App. 681, 685, 629 S.E.2d 859, 861-62 (2006) (citation and internal quotation marks omitted).

"In determining whether the prosecutor's argument was . . . grossly improper, this Court must examine the argument in the context in which it was given and in the light of the overall factual circumstances to which it refers." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *Id.* (citation and internal quotation marks omitted).

2. Analysis

The Supreme Court of the United States held for a new trial to be granted for remarks made during closing arguments,

> it is not enough that the prosecutor['s] remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor['s] comments so infected the trial court with unfairness as to make the resulting conviction a denial of due process.

Darden v. Wainwright, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (citations and internal quotation marks omitted).

The State used evidence from the audiotape and transcript throughout its closing argument. However, the State did not mention nor discuss Defendant's conversations with Anderson about: (1) the commission of criminal acts in the future; (2) serial killing; (3) being a hitman; or, (4) dismembering a body and feeding it to the catfish. These portions of Defendant's and Anderson's conversation were admitted into evidence solely for the limited purposes stated above.

The State did not ask the jury to use the challenged evidence to convict Defendant of the crimes for which he was on trial, nor did the State ask the jury to use the evidence admitted in any other improper manner.

To the extent Defendant's remark that murder must be committed with "control," which occurred during his discussion of serial killers and hitmen, fell within the scope of the trial court's limiting instruction, we cannot conclude the State's references to this statement were so grossly improper that the trial court should have intervened *ex mero motu*. *See State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003) (prosecutor's comments during closing argument to effect that inculpatory statement murder defendant made to sheriff deputy, offered to impeach defendant, should be considered as substantive testimony, was not so grossly improper that trial court abused its discretion in failing to intervene *ex mero motu*; instruction given was adequate to advise jury that defendant's statement, which he denied making, was being admitted for limited purpose of impeaching defendant's truthfulness).

Defendant failed to object to the State's closing arguments at trial. It is difficult, now on appeal, to credit and accept his argument that the State's closing argument constituted "an extreme impropriety." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001).

Defendant has failed to establish any gross or plain error or impropriety in the State's closing arguments to warrant a new trial. The State's closing arguments did not "so infect[] the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

IV. Conclusion

Defendant failed to carry his burden of showing either any negligence or willfulness by the State caused the length of delay in his trial. Even with a troubling and "extraordinary" almost nine-year delay, Defendant's state and federal constitutional right to a speedy trial were not violated. *Doggett*, 505 U.S. at 652, 120 L. Ed. 2d at 528.

The challenged portions of the audiotaped conversation between Defendant and Anderson were relevant and properly admitted into evidence under Rules 401, 403, and 404(b). Defendant has failed to demonstrate that the trial court abused its discretion in determining the probative value of the audiotaped conversation substantially outweighed any unfair prejudice.

Defendant has failed to carry his burden of showing any gross or plain error or impropriety in the State's use of the audiotaped conversation during closing arguments.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judge GEER concurs.

Chief Judge McGEE concurs in part and dissents in part in a separate opinion.

McGEE, Chief Judge, concurring in part, dissenting in part.

I concur in the majority's opinion that Defendant failed to carry his burden to demonstrate that the State violated his constitutional right to a speedy trial and that Defendant failed to carry his burden of showing any gross or plain error or impropriety in the State's closing arguments. However, I respectfully dissent from the majority's determination that the challenged portions of the audiotape and corresponding transcript were properly admitted as evidence under N.C. Gen. Stat. § 8C 1, Rule 404(b).

As the majority recognizes, the North Carolina Supreme Court recently held that N.C. Gen. Stat. § 8C 1, Rules 404(b) and 403 require "distinct inquiries with different standards of review." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Specifically, "[w]e review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

Rule 404(b) generally is a "rule of *inclusion*" and "evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (internal quotation marks omitted). While evidence is not admissible to prove the character of the accused, it ordinarily is admissible for purposes such as "to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, entrapment, or accident," as well as for other purposes not enumerated in the rule. *State v. Cashwell*, 322 N.C. 574, 578, 369 S.E.2d 566, 568 (1988). For

instance, our Supreme Court has concluded that a defendant's inculpatory statements to another may be properly admitted under Rule 404(b) where such testimony is necessary to "show a confidential relationship between th[at] witness and the defendant," when knowledge of such a relationship "was necessary in order for the jury to assess [the testifying witness's] credibility and determine what weight to give his testimony concerning [the] defendant's confession to th[e] crime." *State v. White*, 340 N.C. 264, 285–86, 457 S.E.2d 841, 853, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

In support of Defendant's assertion that the trial court erred by admitting the challenged portions of the audiotape and transcript in which Defendant and Anderson discussed plans to commit a future armed robbery and murder, how many killings it takes to become a serial killer, becoming a hitman, committing murder "with control," and dismembering a body and feeding it to catfish, Defendant directs this Court's attention to *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988), and *State v. White*, 340 N.C. 264, 457 S.E.2d 841 (1995).

In *Cashwell*, the defendant was charged with two counts of first-degree murder. *Cashwell*, 322 N.C. at 574, 369 S.E.2d at 566. While the defendant was in jail for an unrelated charge of the attempted murder of his girlfriend, the defendant told a fellow inmate about the charge for which he was then presently in jail and, about a month later, made incriminating statements to the same inmate concerning the details of the first-degree murder charges. *See id.* at 575–76, 369 S.E.2d at 567. At trial, the State introduced evidence from the inmate and from a detective corroborating the inmate's testimony that the defendant said he was in jail for the attempted murder of his girlfriend. *See id.* at 576, 369 S.E.2d at 567. The State argued that the inmate's testimony and the detective's corroborating testimony about the attempted murder charge "were competent for the purpose of showing the relationship between [the inmate] and [the] defendant that led up to [the] defendant's inculpatory statements a month later" concerning the first-degree murder charges. *Id.* at 577, 369 S.E.2d at 568.

However, the *Cashwell* Court determined that, in accordance with the definition of "relevant evidence" under N.C. Gen. Stat. § 8C 1, Rule 401, "the testimony of these two witnesses that [the defendant] was in jail on a charge of attempted murder of his girlfriend [wa]s not relevant," because this statement by the defendant "[did] not go to prove the existence of any fact that [wa]s of consequence in the determination of the two charges of murder on which defendant was found guilty." *Id.* The *Cashwell* Court further determined that such evidence "was not relevant

to any fact or issue other than the character of the accused[,]" contrary to the proscription of N.C. Gen. Stat. § 8C 1, Rule 404. *Id.* at 578, 369 S.E.2d at 568. Because the Court concluded "[t]he challenged testimony in no way was necessary to show the full context of [the] defendant's confession, nor was it required in order to show any confidential relationship between [the] defendant and [the testifying inmate,]" *id.*, the Court found this testimony to be "irrelevant and immaterial to the later inculpatory statements made by [the] defendant to [the inmate about the first-degree murder charges.]" *Id.* Accordingly, after determining that the admission of such testimony constituted prejudicial error, the *Cashwell* Court held that the defendant was entitled to a new trial. *Id.* at 580, 369 S.E.2d at 569.

In *White*, the defendant was tried in 1993 for the first-degree murder of her four-year-old stepson. *White*, 340 N.C. at 270–71, 457 S.E.2d at 845. After the child's death in 1973, which was originally determined to be accidental, the medical examiner "extracted a large piece of a plastic laundry bag from the child's throat," which "was tightly wadded up," "came out in one piece," and "was large enough to cover [an adult's] hand and three-fourths of [an adult's] arm." *Id.* at 271–72, 457 S.E.2d at 845. Almost twenty years later, the defendant was alleged to have conspired to kill her husband. *Id.* at 272, 457 S.E.2d at 846. During one of the six meetings the defendant had with her co-conspirators to allegedly discuss her husband's murder, one of the co-conspirators "expressed hesitation about taking someone's life, and [the] defendant encouraged [him] to murder her husband" by telling him: " '[I]t's not that hard to do. I had a step-child. I put a bag over it until it stopped breathing. It was better off.' " *Id.*

At the defendant's trial in *White* for the murder of her stepson, the defendant moved to exclude the evidence of her alleged involvement in her husband's murder on the grounds that the admission of this evidence would violate Rules 404(b) and 403, which motion was denied. *Id.* at 281, 457 S.E.2d at 851. The defendant argued that "the only probative value of this evidence was to show that she had the propensity to commit murder and that because she had conspired to murder her husband, she must also have murdered her stepson twenty years before." *Id.* at 283, 457 S.E.2d at 852.

However, in *White*, the trial court found that the evidence of the defendant's "involvement in the conspiracy" to murder her husband "was necessary for the natural development of the facts and to complete the story of this murder for the jury, in particular, to explain the context of [the] defendant's confession to [the co-conspirator] that she murdered

her stepchild by smothering him with a plastic bag." *Id.* at 284, 457 S.E.2d at 853. Our Supreme Court agreed that the defendant's confession to her co-conspirator "would have been difficult to understand without the historical details and context giving rise to the statement," *id.*, and determined that, "[a]bsent evidence of [the] defendant's relationship with [the co-conspirator], the jury would have been unable to determine [the witness's] credibility or what weight to give his testimony." *Id.* Thus, the Court concluded that, "[e]ven though the two incidents were separated by nineteen years, they were inextricably intertwined, and it would have been impossible to develop this relationship for the jury without revealing [the] defendant's participation in the conspiracy to murder her husband." *Id.* at 284–85, 457 S.E.2d at 853. Accordingly, the Court held that this evidence "was not merely probative of [the] defendant's propensity to commit murder and was properly admitted under Rule 404(b)." *Id.* at 285, 457 S.E.2d at 853.

In *White*, the Court distinguished *Cashwell* by recognizing that, in *Cashwell*, in order to show a confidential relationship between the witness and the defendant, the defendant's "inculpatory statement to his cellmate about the attempted murder of the defendant's girlfriend" was "not necessary to show the context" in which the "additional inculpatory statements to his cellmate about a different crime, a double murder, for which he was eventually tried," were made, because the first statement was "irrelevant and immaterial to the subsequent inculpatory statement." *White*, 340 N.C. at 285, 457 S.E.2d at 853. However, the Court determined that, in *White*, "knowledge of the relationship between [the co-conspirator] and [the] defendant was necessary in order for the jury to assess [the witness's] credibility and determine what weight to give his testimony concerning [the] defendant's confession to th[e] crime." *Id.* at 285–86, 457 S.E.2d at 853. The Court further determined that the defendant's statement was "inextricably intertwined with the evidence of [the] defendant's alleged involvement in her husband's murder and could not be meaningfully isolated." *Id.* at 286, 457 S.E.2d at 853–54. Thus, the *White* Court concluded that the challenged testimony was properly admitted under Rule 404(b), and that the trial court did not abuse its discretion under Rule 403 "by concluding that the probative value of the *interwoven evidence* of [the] defendant's confession and involvement in her husband's murder outweighed any prejudicial effect such evidence might have had against her." *Id.* at 286, 457 S.E.2d at 854 (emphasis added).

In the present case, Defendant objected to portions of the transcript that dealt with plans to commit a future armed robbery and murder,

how many killings it takes to become a serial killer, becoming a hitman, committing murder "with control," and dismembering a body and feeding it to catfish. As the majority recognizes, "[t]he trial court found the audiotape and transcript of portions of Defendant's conversations with Anderson served a 'proper purpose,' in that 'these statements [we]re necessary to show the full context of the confidential relationship between [Anderson] and [Defendant].' " However, I disagree with the majority's conclusion that "this finding clearly falls within the purview of admissible evidence under Rule 404(b)." Without the challenged portions of the audiotape and transcript, the remaining conversation between Defendant and Anderson would have been sufficient to demonstrate the confidential nature of their relationship. In the unchallenged portions of the audiotape and transcript, Defendant and Anderson openly discussed elements surrounding Mr. Kastansis's death, including Defendant's "theatrical" blessing of Mr. Kastansis's body, Defendant's attempt to implicate a man who sold cigarettes at Avondale Grocery as Mr. Kastansis's murderer, Defendant's knowledge and involvement in the illegal poker scam run out of Avondale Grocery, and Defendant's lack of empathy towards Mr. Kastansis's children. Furthermore, additional testimony at trial established that Anderson and Defendant knew each other before their incarceration through family connections and by Defendant's habit of frequenting Avondale Grocery. Thus, unlike *White*, the challenged portions of the audiotape and transcript in the present case were not so "inextricably intertwined" as to require their admission, nor were they "necessary in order for the jury to assess [Anderson's] credibility and determine what weight to give his testimony[.]" *See White*, 340 N.C. at 285–86, 457 S.E.2d at 853. Instead, as in *Cashwell*, "[t]he challenged testimony in no way was necessary . . . in order to show any confidential relationship between [D]efendant and [Anderson.]" *See Cashwell*, 322 N.C. at 578, 369 S.E.2d at 568.

Therefore, while I agree with the majority that "Anderson's credibility was crucial to the State's case," because I believe the challenged evidence was irrelevant and immaterial and not admitted for a proper purpose under N.C. Gen. Stat. § 8C 1, Rule 404(b), I must respectfully dissent.

STATE OF NORTH CAROLINA
v.
EZEKIEL ELIGHA GAMBLE, DEFENDANT

No. COA15-71

Filed 6 October 2015

1. Identification of Defendants—photographic lineup—folder method

On appeal from defendant's conviction for armed robbery, the Court of Appeals held that the trial court did not err by admitting the testimony of a police detective concerning an eyewitness's identification of defendant from a photo lineup. The detective's administration of the photo lineup—in which he placed the photos in a folder and shuffled them before presenting them to the eyewitness—met the statutory requirements of the N.C. Eyewitness Identification Reform Act of 2007. The detective's inability to recall which "filler" photos he used did not render his testimony inadmissible.

2. Appeal and Error—effective assistance of counsel—direct appeal

On appeal from defendant's conviction for armed robbery, the Court of Appeals dismissed defendant's ineffective assistance of counsel claim without prejudice to his right to file a motion for appropriate relief in the trial court.

Appeal by Defendant from judgment entered 28 August 2014 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 12 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Attorney Ryan McKaig, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Ezekiel Gamble ("Defendant") appeals following a jury verdict convicting him of armed robbery in which he received a sentence of 80 to 108 months' imprisonment. On appeal, Defendant argues the trial court committed plain error in allowing eyewitness testimony in violation of the North Carolina Eyewitness Identification Reform Act of 2007 ("EIRA").

Defendant also argues he received ineffective assistance of counsel at trial. After review we find the court committed no error, much less plain error in admitting the eyewitness testimony. We dismiss Defendant's ineffective assistance of counsel claim without prejudice to the right of Defendant to refile a motion for appropriate relief in the trial court.

I. Factual and Procedural History

On 20 May 2013, Defendant was indicted for armed robbery. Represented by appointed counsel, Wayne T. Baucino, Defendant pled not guilty, and trial began on 26 August 2014 in Guilford County Superior Court.

The State's evidence tended to show the following: On 11 December 2012, Maurice Stimpson lived in an apartment complex in Greensboro, North Carolina. While cleaning inside his home during the early afternoon, he heard the sound of another person outside his home. Mr. Stimpson went outside and saw Defendant running around the building searching for someone. Mr. Stimpson watched Defendant run around for fifteen minutes, and went back inside to finish his cleaning. Shortly thereafter, Defendant knocked on Mr. Stimpson's door. Defendant asked Mr. Stimpson where "Rob" lived, and Mr. Stimpson pointed out Rob's apartment. Then Defendant left with another man in a white Lexus.

About thirty minutes later, Defendant knocked on Mr. Stimpson's door again, asking about Rob. Mr. Stimpson walked outside to talk with Defendant. Once outside, Mr. Stimpson turned and saw a second man standing beside the front door. The second man was holding, but not pointing, a gun. Defendant told Mr. Stimpson to call Rob, and Mr. Stimpson obliged, telling Rob to come home and that two men were looking for him. As soon as Mr. Stimpson hung up, Defendant became upset and "got in [Mr. Stimpson's] face." Defendant insisted on being taken to Rob, but Mr. Stimpson refused. Defendant responded by demanding Mr. Stimpson's wallet. Mr. Stimpson protested to keep his money and reluctantly took out his wallet. Defendant took the wallet from Mr. Stimpson's hand, and removed all of the money, saying, "Somebody got to take the loss today." Defendant then returned the cashless wallet to Mr. Stimpson. The second man with the gun told Mr. Stimpson to take out his I.D. and put it in the man's pocket, which Mr. Stimpson did. Defendant and his accomplice left, and Mr. Stimpson went inside his home and called the police. During Mr. Stimpson's direct testimony, he identified Defendant as his assailant three times. This testimony elicited no objection from defense counsel.

Officer M. L. Schlanger of the Greensboro Police Department responded to the 911 call, and met with Mr. Stimpson. Mr. Stimpson detailed the events leading up to the robbery, the .38 caliber handgun used in the robbery, and the white Lexus he saw earlier that day. Mr. Stimpson described the robber as an African-American male in his early twenties, with dreadlock style hair, and a white t-shirt. Officer Schlanger and other officers canvassed the apartment complex and found a witness who gave them the license plate number for the suspect's white Lexus. Officer Schlanger ran the license plate number and found it registered to Tynisha Fordham of Thomasville, North Carolina. Officer Schlanger spoke with Detective Curry of the Thomasville Police Department, and informed him of the armed robbery, and asked him to be on the lookout for the suspects and the white Lexus. Detective Curry knew the Lexus owner, Tynisha Fordham, and her brother, Johnston. Detective Curry stated Defendant knew Johnston and Fordham, and Defendant fit the description of the robber. Using this information Officer Schlanger suspected Defendant as a target for further investigation.

Detective Scott Russell of the Greensboro Police Department contacted Mr. Stimpson on 12 December 2012 to arrange a meeting to conduct a photographic lineup. Detective Russell used the information Officer Schlanger had put together to select photographs of eight African-American men in their early twenties with dreadlocks, including Defendant. Detective Russell prepared the photographic lineup before meeting with Mr. Stimpson on 13 December 2012 as follows:

> I had eight photographs, but I only used six of those photographs. And what I do, I take one photograph of the possible suspect and five filler photographs of other individuals of similar color, weight, characteristics. And what I do, prior to arriving at Mr. Stimpson's house, I place one photograph in six separate [plain manila] folders. At that point, what I do is I shuffle those. . . . That's so I don't know which photograph is going to be the suspect. . . . I don't make any gestures or inferences to the victim in this case trying to pick out an alleged suspect.

Detective Russell arrived at Mr. Stimpson's residence to conduct the lineup. Detective Russell began by reading the instructions found in section 15A-284.52(b)(3) of the EIRA. Following the instructions, Detective Russell told Mr. Stimpson that he should not feel compelled to make an identification, that it is important to exclude innocent persons, and that the investigation would continue whether or not an identification was made. Both men signed, acknowledging the instructions on a form.

Detective Russell reshuffled the folders with photos. He then showed the photos to Mr. Stimpson. When Mr. Stimpson came to Defendant's picture, he said, "That's the one." Detective Russell asked Mr. Stimpson how sure he was on a scale of one to ten and Mr. Stimpson answered, "10 out of 10." The State offered all eight photos and the signed instruction sheet into evidence. This testimony elicited no objection from defense counsel.

Following Detective Russell's photographic lineup, an arrest warrant was issued charging Defendant with armed robbery. Defendant was arrested and served with the warrant on 27 January 2013. Defendant posted bond shortly thereafter.

Officer Zach Trotter of the High Point Police Department testified to Defendant's second arrest, stemming from a traffic stop while Defendant was out on bond for the armed robbery charge. On 9 February 2013, Defendant drove alone in High Point, North Carolina. Officer Trotter noticed the car had expired registration tags, and pulled it over. After stopping the car, Defendant fled on foot. In a subsequent search of the car, police found a chrome .38 caliber revolver underneath the front passenger seat. Following the traffic stop, Defendant was arrested and charged with crimes unrelated to the current appeal. While being processed at the jail for these charges, Defendant voluntarily told Officer Trotter the following:

> Man, I can't take this gun charge. I'm going to trial for a robbery in Greensboro soon and they are going to think that the gun—that gun is the gun I used in the robbery because it's the same gun— I mean, it's the same type of gun that was used.

Defense counsel cross-examined Officer Trotter about the statement, focusing primarily on Officer Trotter's note taking. The revolver was admitted into evidence during Officer Trotter's direct examination without objection.

The State rested its case and defense counsel moved to dismiss the armed robbery charge on grounds of insufficient evidence. The trial court denied Defendant's motion to dismiss.

Defendant did not testify in his own defense. However, defense counsel recalled Officer Trotter to ask additional questions about his note taking. Defendant called several witnesses for the defense, including Helen Mock, Defendant's mother, Tynisha Fordham, the Lexus owner, and Brittany Davis, Defendant's former girlfriend. Defendant rested his

case, and at the close of evidence, he renewed his motion to dismiss for insufficient evidence. The trial court denied the renewed motion and began the charge conference.

During the charge conference, Defendant requested an instruction on the identification of Defendant as the perpetrator of the crime under N.C.P.I.—Crim. 104.90. The court granted Defendant's request, instructing the jury:

> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

Although N.C.P.I.—Crim. 105.65 could have been used, Defendant did not request any other instructions pertaining to the EIRA, and did not object to the omission of any EIRA instructions. After closing arguments, the trial court charged the jury and sent the jury out for deliberation. During deliberation, the jury requested the eight photos from the lineup and Defendant raised no objection. The trial court gave the photos to the jury, and deliberation continued for approximately three hours before the jury reached a unanimous guilty verdict.

The court held the sentencing hearing the next morning, on 28 August 2014. Both parties stipulated to Defendant's prior record level III, for two prior robberies in 2009 and 2011. Defendant delivered his allocution to the court, maintaining his innocence and providing brief insights into his prior robbery convictions. The court imposed a sentence within the presumptive range of the Class D armed robbery felony, sentencing Defendant to 80 to 108 months' imprisonment. Defendant immediately entered his notice of appeal by oral motion, and requested appointed appellate counsel. The court appointed the Appellate Defender.

II. Standard of Review

On appeal, Defendant claims the trial court committed plain error in allowing Detective Russell's testimony, the evidence from the photographic lineup, Mr. Stimpson's in-court identification, and jury instructions that did not discuss the EIRA. Defendant did not preserve any of these claims by objection at trial. On appeal he asked that we review the admission of eyewitness testimony for plain error.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved

> by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error review is to be " 'applied cautiously and only in the exceptional case . . . ' [meaning] the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

"The North Carolina plain error standard of review . . . requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. "For an error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334. Next, "a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *Odom*, at 307 N.C. 660, 300 S.E.2d at 378).

III. Analysis

"[E]yewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime." *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 661, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting). North Carolina courts have long recognized this impact, and provided neutral lineup and confrontation procedures to protect suspects' Due Process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Art. I § 19 of the North Carolina Constitution. *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984); *see also State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983).

When "lineup and confrontation procedures [are] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification [they] violate due process and are constitutionally unacceptable." *State v. Smith*, 278 N.C. 476, 481, 180 S.E.2d 7, 11 (1971) (citation and quotation marks omitted). Under a Due Process analysis, the North Carolina Supreme Court has provided a two-part framework:

> First we must determine whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If this question is answered in the negative, we need proceed no further. If it is answered affirmatively, the second inquiry is whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification.

Hannah, 312 N.C. at 290, 322 S.E.2d at 151 (citations omitted).

The North Carolina Supreme Court has developed a totality of the circumstances test to determine if a pretrial procedure was impermissibly suggestive, defining impermissible suggestiveness as "so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Id.* (citations omitted). In making this determination courts consider several factors: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Harris*, at 308 N.C. 164, 301 S.E.2d at 95; *see also State v. Johnson*, 161 N.C. App. 68, 73, 587 S.E.2d 445, 448 (2003).

Following our Supreme Court's decisions, the North Carolina General Assembly recognized the need to protect Due Process rights during identification procedures and passed the North Carolina Eyewitness Identification Reform Act of 2007 ("EIRA"). N.C. Gen. Stat. § 15A-284.52. The EIRA was enacted "to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects." N.C. Gen. Stat. § 15A-284.51. Originally the EIRA only applied to photographic lineups, defining a photographic lineup as a "procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime." N.C. Gen. Stat. § 15-284.52(a)(7). The General Assembly recently expanded the EIRA's scope, now applying it to in-person show-ups in addition to photographic lineups. Act of August 11, 2015, ch. 15A, sec. 284.52, 2015 N.C. Sess. Laws 2015-212.

A. North Carolina Eyewitness Identification Reform Act of 2007

[1] The EIRA directs all "State, county, and other local law enforcement" to follow specific requirements in conducting a photographic

lineup. N.C. Gen. Stat. § 15-284.52(b). The EIRA requirements vary in detail based on whether the lineup administrator is independent or non-independent.

The EIRA provides greater detail for independent administrators under section 15-284.52(b). An independent administrator must give specific instructions to the eyewitness before the lineup: the perpetrator might or might not be present in the lineup; the administrator does not know the suspect's identity; the eyewitness should not feel compelled to make an identification; it is as important to exclude innocent persons as it is to identify the perpetrator; and the investigation will continue whether or not an identification is made. N.C. Gen. Stat. § 15-284.52(b)(3) The suspect's photo must "resemble the suspect's appearance at the time of the offense." N.C. Gen. Stat. § 15-284.52(b)(4). The independent administrator must also use photos of other persons, called "filler photos." N.C. Gen. Stat. § 15-284.52(a)(2). These fillers must "generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers." N.C. Gen. Stat. § 15-284.52(b)(5). The photographic lineup must include a minimum of five filler photos in addition to the photo of the suspect. *Id.* No "information concerning any previous arrest, indictment, or conviction of the suspect shall be visible or made known to the eyewitness." N.C. Gen. Stat. § 15-284.52(b)(7). Lastly, the independent administrator "shall seek and document a clear statement . . . as to the eyewitness's confidence level that the person identified in a given lineup is the perpetrator." N.C. Gen. Stat. § 15-284.52(b)(12). If the eyewitness successfully identifies the perpetrator, the administrator "shall not [provide] any information concerning the [perpetrator] before the lineup administrator obtains the eyewitness's confidence statement about the selection." N.C. Gen. Stat. § 15-284.52(b)(13).

Conversely, section 15A-284.52(c) of the EIRA provides greater breadth for non-independent administrators:

> Alternative Methods for Identification if Independent Administrator Is Not Used.—In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the North Carolina Criminal Justice Education and Training Standards Commission. Any alternative method shall be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification

> procedure. Alternative methods may include any of the following:
>
> (1) Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the administrator from seeing which photo the witness is viewing until after the procedure is completed.
>
> (2) A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.
>
> (3) Any other procedures that achieve neutral administration.

N.C. Gen. Stat. § 15A-284.52(c).

Lastly, the EIRA provides remedies for noncompliance in section 15A-284.52(d). Courts must consider noncompliance while hearing motions to suppress or claims of eyewitness misidentification. N.C. Gen. Stat. § 15A-284.52(d)(1)–(2). The EIRA maintains similar scrutiny in jury trials, stating "[w]hen evidence of compliance or noncompliance with the requirements . . . has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identification." N.C. Gen. Stat. § 15A-284.52(d)(3).

In this case, Detective Russell is a non-independent administrator subject to the broader requirements for alternative lineups under section 15A-284.52(c). Detective Russell testified in detail about his use of the approved folder method, randomizing manila folders so that he could not track any photo. N.C. Gen. Stat. § 15A-284.52(c)(2). He achieved neutral administration by using the statutory method. *Id.* Detective Russell met the additional requirements of the EIRA, instructing Mr. Stimpson with a signed instruction form mirroring the EIRA, using one photo of Defendant and five filler photos of similar looking men, and documenting Mr. Stimpson's confidence in the identification without providing information on any one suspect. N.C. Gen. Stat. § 15A-284.52(b). We have examined all of the seven filler photos used in this case and we agree with the trial court that they are similar to Defendant's photo. We hold Detective Russell's administration of the photographic lineup met the statutory requirements; thus there was no error in admitting this testimony, much less any plain error.

B. Defendant's Argument

Defendant contends the trial court plainly erred in allowing Detective Russell's testimony because Detective Russell could not identify the specific five filler photos he used, out of the seven filler photos he selected for the lineup. Defendant elaborates on this point as follows:

> Here, Detective Russell brought eight photographs [seven fillers and one photo of Defendant] but only used six of them. It is impossible to know which six photographs he used. Detective Russell testified that he didn't remember which of the [filler] photographs he used. As stated above, it is impossible for the photographs used to be admitted into evidence when the detective himself is unsure which ones were used. The eight photographs were admitted into evidence but no one, including Detective Russell, can know which of those were used in the photographic lineup.

We are not persuaded. Although the reliability of Detective Russell's testimony is initially a consideration for the trial judge, the weight to be given his testimony is a question for the jury. We do not hold Detective Russell's failure to recall which five filler photos were used to be of such significance as to render his testimony inadmissible. Rather, his failure to recall goes to the weight to be accorded to his testimony.

The witness's credibility is a matter for the court "when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the . . . State's own evidence." *State v. Wilson*, 293 N.C. 47, 51, 235 S.E.2d 219, 221 (1977) (citations omitted). No such conflict exists here. Any issue concerning Detective Russell's credibility, or the weight to be given to his testimony, was a matter for the jury. The trial court therefore did not err, much less commit plain error, in admitting this testimony.

Next, Defendant argues the reliability of Mr. Stimpson's in-court identification of Defendant was tainted by the procedures used by Detective Russell. "The credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." *State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 200–201 (1978) (citations omitted). Finding no EIRA violations in the photographic lineup, "there is no danger [the lineup identification] impermissibly tainted the in-court identification[s]." *State v. Lawson*, 159 N.C. App. 534, 539, 583 S.E.2d 354, 358 (2003) (citations omitted). During his direct testimony, Mr. Stimpson identified Defendant as his assailant three times. Given

Mr. Stimpson's repeated identifications, and the failure of defense counsel to elicit any evidence of improper suggestions made during the lineup, we can discern no plain error in this proceeding.

Lastly, we have reviewed all eight photos from the photographic lineup, marked State's exhibit numbers 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, and 1-H. None of the photos contain "information concerning any previous arrest, indictment, or conviction . . ." nor do they conspicuously depict a jail setting or jail clothing. N.C. Gen. Stat. § 15-284.52(b)(7). All seven filler photos, State's exhibit numbers 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, "generally resemble" Mr. Stimpson's description of the perpetrator, and ensure that Defendant's photo, State's exhibit 1-A, "does not unduly stand out from the fillers." N.C. Gen. Stat. § 15-284.52(b)(5). The photos did not taint any in-court identification at trial, and the trial court did not err in admitting the photos.

C. Ineffective Assistance of Counsel

[2] Defendant contends that he received ineffective assistance of counsel from his trial counsel. We dismiss this argument without prejudice to the right of Defendant to file a motion for appropriate relief in the trial court.

"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) (citations omitted). "Our Supreme Court has instructed that should the reviewing court determine the [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Id.* at 554, 557 S.E.2d at 547 (quotation marks and citation omitted).

The record does not disclose whether the actions of trial counsel, which Defendant contends deprived him of an effective defense, were part of a broader trial strategy. We cannot resolve this question without a fuller record on appeal in which all evidence can be presented. We therefore dismiss this claim without prejudice to the right of Defendant to file a motion for appropriate relief at a later date.

IV. Conclusion

For the foregoing reasons, we find

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
JERRY LANE HARWOOD, JR., DEFENDANT

No. COA14-971

Filed 6 October 2015

Probation and Parole—violation report filed after probation expired—subject matter jurisdiction

On appeal from the trial court's judgments revoking defendant's probation and activating five consecutive sentences, the Court of Appeals held that the trial court lacked subject matter jurisdiction. Even assuming the trial court that originally placed defendant on probation made a clerical error by failing to check the box to order that defendant's probation begin upon his release from incarceration, pursuant to Rule of Civil Procedure 60(a) the Court of Appeals did not have authority to correct a substantive error. Accordingly, the probation officer filed his violation reports after defendant's probation expired and the trial court lacked subject matter jurisdiction under N.C.G.S. § 15A-1344(f) to revoke defendant's probation.

Appeal by defendant from judgments entered on or about 14 March 2014 by Judge Mark E. Klass in Superior Court, Rowan County. Heard in the Court of Appeals on 19 March 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Christine Anne Goebel, for the State.

Peter Wood, for defendant-appellant.

STROUD, Judge.

Jerry Lane Harwood, Jr. ("defendant") appeals from judgments in which the trial court found defendant in willful violation of his probation, revoked his probation, and activated five consecutive sentences. Defendant contends that the trial court lacked subject matter jurisdiction. We vacate.

I. Background

On or about 28 April 2008, a grand jury indicted defendant for one count of felonious burning of a public building and forty-three counts of felonious cruelty to animals for offenses committed in March 2006,

arising from the burning of the Dan Nicholas Park petting zoo. *See* N.C. Gen. Stat. §§ 14-59, -360(b) (2005). On or about 23 June 2008, a grand jury indicted defendant for two counts of felonious breaking or entering, two counts of felonious larceny pursuant to a breaking or entering, two counts of felonious possession of stolen goods, thirteen counts of felonious breaking or entering a motor vehicle, two counts of financial transaction card theft, one count of possession of burglary tools, twelve counts of misdemeanor larceny, and one count of larceny of a firearm for offenses committed in April 2008.[1] *See id.* §§ 14-54(a), -55, -56, -71.1, -72(a), (b), -113.9(a)(1) (2007). At a 29 May 2009 hearing, defendant pled no contest to all seventy-nine charges.

On or about 29 May 2009, the trial court consolidated defendants' convictions into seven judgments. In the first judgment (No. 08CRS052862), the trial court consolidated one count of felony burning of a public building and seven counts of felonious cruelty to animals, and sentenced defendant to 16 to 20 months' imprisonment. The trial court also credited defendant for 405 days of imprisonment. In the second judgment (No. 08CRS052942), the trial court consolidated two counts of felonious breaking or entering, two counts of felonious larceny pursuant to a breaking or entering, two counts of felonious possession of stolen goods, one count of possession of burglary tools, and one count of larceny of a firearm, and sentenced defendant to 6 to 8 months' imprisonment. In the third judgment (No. 08CRS052871), the trial court consolidated nine charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the fourth judgment (No. 08CRS052880), the trial court consolidated eight charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the fifth judgment (No. 08CRS052888), the trial court consolidated eight charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the sixth judgment (No. 08CRS052896), the trial court consolidated eleven charges of felonious cruelty to animals and sentenced defendant to 6 to 8 months' imprisonment. In the seventh judgment (No. 08CRS052916), the trial court consolidated thirteen charges of breaking or entering a motor vehicle, twelve charges of misdemeanor larceny, and two charges of financial transaction card theft, and sentenced defendant to 6 to 8

1. We note that the indictment for possession of burglary tools lists the offense date as 19 April 2007, whereas the judgment lists this date as 19 April 2008. Given that every other June 2008 indictment lists an offense date in April 2008, we assume that the date listed in the judgment is correct and note that this discrepancy is immaterial to our analysis.

months' imprisonment. The trial court ordered that defendant serve all seven sentences consecutively.

The trial court suspended the last five sentences (Nos. 08CRS052871, 08CRS052880, 08CRS052888, 08CRS052896, 08CRS052916) and placed defendant on 48 months of supervised probation. The trial court also ordered that defendant pay $2,337 in restitution, a $1,000 fine and a $200 community service fee. The trial court ordered that during his probation, defendant complete 100 hours of community service, which could not involve any animals or any areas where they are kept, housed, or boarded. The trial court also included the following among the conditions of defendant's probation: (1) submit to warrantless searches for stolen goods, controlled substances, contraband, child pornography, weapons, pets, and incendiaries; (2) have no contact with Joshua Dunaway, a co-defendant; and (3) obtain a psychological evaluation and abide by all of its recommendations. In each of the five judgments, the trial court failed to either check the box to order that the probation would begin upon defendant's release from incarceration or the box to order that the probation would begin at the expiration of another sentence. In each of the last four judgments, the trial court checked a box to order that defendant comply with the probation conditions described in the third judgment (No. 08CRS052871).

On 11 June 2010, defendant was released from incarceration.[2] On 27 January 2014, a probation officer filed probation violation reports alleging that defendant had been convicted by a court in Tennessee for one count of aggravated burglary, four counts of fraudulent use of a credit card, two counts of theft, one count of attempted theft, one count of vandalism, and one count of possession of burglary tools. At a 14 March 2014 hearing, defendant admitted to willfully violating the terms of his probation without lawful justification. On or about 14 March 2014, the trial court revoked defendant's probation, activated all five suspended sentences, and ordered that defendant serve them consecutively. Defendant gave notice of appeal in open court.

II. Subject Matter Jurisdiction

A. Standard of Review

> The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal

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2. Under North Carolina Rule of Evidence 201, we take judicial notice of this fact from the Department of Public Safety website's offender search results. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2013); *State v. Surratt*, ___ N.C. App. ___, ___, 773 S.E.2d 327, 331 (2015).

> or by a court *sua sponte*. It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.
>
> An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.

State v. Gorman, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citations, quotation marks, brackets, and ellipsis omitted). "In a criminal case, . . . North Carolina requires the State to prove jurisdiction beyond a reasonable doubt. . . . . The burden of perfecting the trial court's jurisdiction for a probation revocation hearing after defendant's period of probation has expired lies squarely with the State." *State v. Moore*, 148 N.C. App. 568, 570-71, 559 S.E.2d 565, 566-67 (2002).

B. Analysis

In his sole argument on appeal, defendant contends that the 2014 trial court lacked subject matter jurisdiction to revoke his probation, because the probation officer filed the probation violation reports after defendant's probation had expired. Defendant argues that his four-year period of probation began on or about 29 May 2009 and thus expired on or about 29 May 2013, several months before the probation officer filed violation reports on 27 January 2014. N.C. Gen. Stat. § 15A-1344(f) (2013) provides that, in order for a trial court to revoke a defendant's probation after the expiration of the period of probation, the State must have filed a written violation report *before* the expiration of the period of probation, among other conditions.

The State responds that defendant's period of probation actually began upon his release from incarceration on 11 June 2010. According to the State, defendant's four-year period of probation expired 11 June 2014, after the 2014 trial court revoked defendant's probation, and thus the trial court did not violate N.C. Gen. Stat. § 15A-1344(f). The State acknowledges that the 2009 trial court failed to check the box to indicate that the period of probation would begin upon defendant's release from incarceration. But the State argues that this omission was due to a

clerical mistake and requests that we remand this case to the trial court for correction of that mistake.

N.C. Gen. Stat. § 15A-1346 (2013) provides that the default rule is that a defendant's period of probation runs concurrently with his period of imprisonment:

> (a) Commencement of Probation.—Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences.—If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

North Carolina Rule of Civil Procedure 60(a) provides the rule for clerical errors:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013). However,

> [t]he court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error.

Gerhauser v. Van Bourgondien, ___ N.C. App. ___, ___, 767 S.E.2d 378, 384 (2014) (citations omitted). In *Gerhauser*, the trial court

originally held that it had subject matter jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2). *Id.* at ___, 767 S.E.2d at 383. But after the plaintiff filed a Rule 60 motion, the trial court changed its basis for subject matter jurisdiction and held that it had jurisdiction instead under N.C. Gen. Stat. § 50A-201(a)(4). *Id.* at ___, 767 S.E.2d at 382-84. This Court held that this change was substantive, not clerical, because the "trial court did not merely cite an incorrect subsection of N.C. Gen. Stat. § 50A-201 in the [original order]; the trial court quoted large portions of the statute in detail and made findings of fact and conclusions of law based upon the provisions of N.C. Gen. Stat. § 50A-201(a)(2)[.]" *Id.* at ___, 767 S.E.2d at 383.

Here, in each of the five judgments in which the 2009 trial court placed defendant on supervised probation, the 2009 trial court failed to either check the box to order that the probation would begin upon defendant's release from incarceration or check the box to order that the period of probation would begin at the expiration of another sentence. We first note that the fact that the 2009 trial court made both omissions five times strongly suggests that the trial court did not make a mistake but rather intended for defendant's probation to run concurrently with his incarceration, as this is the default rule under N.C. Gen. Stat. § 15A-1346. We also note that in each of the last four judgments, the 2009 trial court checked a box to order that defendant comply with the probation conditions described in the third judgment (No. 08CRS052871), which also indicates that the trial court was being careful in ordering the details of defendant's probation. Additionally, even assuming the 2009 trial court made a mistake, we hold that this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend defendant's period of probation by more than one year and would grant the trial court subject matter jurisdiction to activate five consecutive sentences of 6 to 8 months' imprisonment. Because this provision is substantive, we lack authority to change it under Rule 60(a). *See id.* at ___, 767 S.E.2d at 384.

The State argues that the 2009 trial court's comments to defendant indicate that it intended for defendant's probation to begin upon his release from incarceration. At the 29 May 2009 hearing, the trial court addressed defendant: "I want you to know that I have imposed a very strenuous and very serious probation period for you. I do that out of a sincere desire to see you walk on a very straight and narrow path." But these comments are not inconsistent with a decision that defendant's probation run concurrently with defendant's active sentences. Defendant's total active sentence was 22 to 28 months' imprisonment. But the 2009 trial court credited defendant 405 days, approximately 13 months, so defendant's period of incarceration beginning from the

date of the 29 May 2009 hearing was between 9 to 15 months. Defendant was actually released on 11 June 2010, approximately 12 months after the hearing, which fits within this range. According to the judgments on their face, defendant was on probation until 29 May 2013, almost three years after his release from incarceration on 11 June 2010. During this period, defendant was required to complete 100 hours of community service, which could not involve any animals or any areas where they are kept, housed, or boarded. Defendant was also subject to the following conditions: (1) submit to warrantless searches for stolen goods, controlled substances, contraband, child pornography, weapons, pets, and incendiaries; (2) have no contact with Joshua Dunaway, a co-defendant; and (3) obtain a psychological evaluation and abide by all of its recommendations. Accordingly, we hold that the trial court's comments to defendant at the 29 May 2009 hearing were not inconsistent with the judgments on their face as they impose a lengthy period of probation with several conditions. Additionally, as discussed above, even if the 2009 trial court did make a mistake, we cannot change a substantive error. *See id.*, 767 S.E.2d at 384.

The State next argues that the 2009 trial court intended for defendant's probation to begin upon defendant's release from incarceration, because defendant would not be able to complete his 100 hours of community service otherwise. But as discussed above, according to the judgments on their face, defendant served nearly three years of his probation after being released from incarceration. Because completing 100 hours of community service in three years is certainly feasible, we disagree with the State. The State further argues that given the large number of charges involved in this case, "it is no surprise that such clerical errors were made." But the 2009 trial court properly included all seventy-nine charges in the seven judgments, and no mistake in the judgments is readily apparent from the record.

The State finally points out that in the third judgment (No. 08CRS052871), the 2009 trial court checked the box to order that the first suspended sentence run consecutively to the second active sentence. The State asks, "If the trial court intended for the 48-month probation period to run concurrently with Defendant's two active sentences starting on May 29, 2009, why would this box have been checked, indicating that the sentence was to run after the second of the two active sentences?" The trial court checked this box because it intended for the five suspended sentences of 6 to 8 months' imprisonment to serve as a penalty for a probation violation. At the 29 May 2009 hearing, the trial court emphasized this penalty to defendant: "[I]f you reappear before the Superior Court on probation violations for failure to comply with these

conditions, then you are looking at five back-to-back six-to-eight sentences. Do you understand that?" The fact that the trial court checked this box indicates that it intended for the first suspended sentence to run consecutively to the second active sentence, but it does not indicate that the trial court intended for the *probation period* to run consecutively to the second active sentence.

In summary, we hold that the State has failed to show from the record that the 2009 trial court intended for defendant's probation to begin upon his release from incarceration. Assuming *arguendo* that the State had made this showing, we would be without authority to make such a substantive change to the judgments. *See id.*, 767 S.E.2d at 384. Accordingly, we hold that defendant's probation expired on or about 29 May 2013, several months before the probation officer filed the probation violation reports. Therefore, under N.C. Gen. Stat. § 15A-1344(f), the 2014 trial court lacked subject matter jurisdiction to revoke defendant's probation and activate his five remaining sentences.[3]

III. Conclusion

Because we hold that the 2014 trial court lacked subject matter jurisdiction to revoke defendant's probation, we vacate the 2014 judgments.

VACATED.

Judges DILLON and DAVIS concur.

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3. We note that N.C. Gen. Stat. § 15A-1344(g) (2009) provides: "If there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved. The probationer shall remain subject to the conditions of probation, including supervision fees, during the tolled period. If the probationer is acquitted or if the new charge is dismissed, the time spent on probation during the tolled period shall be credited against the period of probation." But this subsection is inapplicable to defendant because it applies to offenses committed on or after 1 December 2009. 2009 N.C. Sess. Laws 667, 675, 679, ch. 372, §§ 11(b), 20. We also note that Session Law 2009-372 also deleted similar tolling language from N.C. Gen. Stat. § 1344(d) and that this amendment applies to *hearings* held on or after 1 December 2009. 2009 N.C. Sess. Laws 667, 674-75, 679, ch. 372, §§ 11(a), 20. Because defendant committed the underlying offenses before 1 December 2009 and his probation revocation hearing occurred after 1 December 2009, we hold that these tolling provisions are inapplicable here. *See State v. Sitosky*, ___ N.C. App. ___, ____, 767 S.E.2d 623, 627 (2014) ("[W]e conclude that Defendant, who committed her offenses . . . prior to 1 December 2009 but had her revocation hearing after 1 December 2009, was not covered by either statutory provision—§ 15A-1344(d) or § 15A-1344(g)—authorizing the tolling of probation periods for pending criminal charges."), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 847 (2015).

STATE v. HENRY

[243 N.C. App. 433 (2015)]

STATE OF NORTH CAROLINA
v.
ALBERT HENRY

No. COA15-124

Filed 6 October 2015

Evidence—victim's reputation for violence—introduced in defendant's case-in-chief

The trial court did not abuse its discretion in a prosecution for second-degree murder by waiting until the defendant's case-in-chief to allow testimony of the victim's reputation for violence rather than allowing that testimony during cross-examination. The trial court expressly permitted defendant to keep the witness under subpoena, and defendant was allowed to call numerous witnesses during his case-in-chief to provide the testimony. Defendant appeared to have chosen not to recall this witness and did not demonstrate that he was prejudiced by that decision in any way.

Appeal by Defendant from judgments entered 10 July 2014 by Judge Douglas B. Sasser in Superior Court, Columbus County. Heard in the Court of Appeals 24 August 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel S. Hirschman, for the State.

John R. Mills for Defendant.

McGEE, Chief Judge.

Albert Henry ("Defendant") appeals from his conviction for second-degree murder. Defendant contends the trial court erred by not allowing him to introduce evidence of the victim's reputation for violence. We disagree.

I. Background

The underlying facts in this case are not in dispute. Defendant had an argument with Chad Bellamy ("Mr. Bellamy") on the morning of 15 June 2011. Both men had guns. John Collins, Sr. ("Mr. Collins") lived nearby and saw the escalating altercation between Defendant and Mr. Bellamy. Mr. Collins yelled to Defendant and Mr. Bellamy that they should "put those guns down and fight each other like men." Defendant

and Mr. Bellamy did put their guns on the ground and "began to swing at each other[.]" A few seconds later, Defendant picked up both guns and fatally shot Mr. Bellamy in the back, as Mr. Bellamy ran away.

At trial, Mr. Collins testified during the State's case-in-chief. On cross-examination, counsel for Defendant sought to elicit testimony from Mr. Collins that Mr. Bellamy had a reputation for violence. The State objected, arguing that it would be more appropriate to allow that evidence during Defendant's case-in-chief – during which Defendant could present evidence to support a claim that he had acted in self-defense. The trial court agreed and noted that Defendant was simply "not there yet for self-defense as to the character of the victim[.]" Counsel for Defendant stated: "If I can't ask [Mr. Collins] that question now, I can recall him if it's relevant." The trial court responded: "Yes, sir, keep [Mr. Collins] under subpoena[,] and if you wish to call him back to testify . . . he [can] be available to testify."

During Defendant's case-in-chief, Defendant was allowed to introduce testimony from numerous witnesses that Mr. Bellamy had a reputation for violence. However, Defendant did not recall Mr. Collins to the stand. The jury found Defendant guilty of second-degree murder and possession of a firearm by a felon. Defendant appeals.

II. Analysis

Defendant contends that the trial court erred by "suppress[ing] testimony" from Mr. Collins that Mr. Bellamy had a reputation for violence. *See* N.C. Gen. Stat. § 8C-1, Rules 404, 405 (2013); *State v. Ray*, 125 N.C. App. 721, 725, 482 S.E.2d 755, 758 (1997) ("Where [a] defendant argues he acted in self-defense, evidence of the victim's character may be admissible . . . to show [the] defendant's fear or apprehension was reasonable or to show the victim was the aggressor." (citation and internal quotation marks omitted)). Defendant's argument is without merit.

Trial courts have discretion to "exercise reasonable control over the mode and order of interrogating witnesses" at trial. N.C. Gen. Stat. § 8C-1, Rule 611 (2013); *State v. Demos*, 148 N.C. App. 343, 351, 559 S.E.2d 17, 22 (2002). Although Defendant argues at length in his brief before this Court that evidence of Mr. Bellamy's reputation for violence was *admissible* at trial – a matter which is not in dispute – Defendant has provided this Court with no relevant authority suggesting that the trial court abused its discretion under Rule 611 by waiting until Defendant's case-in-chief to allow testimony on Mr. Bellamy's reputation for violence. Defendant also has not demonstrated that he was prejudiced by that decision in any way. *See State v. McAbee*, 120 N.C. App. 674, 683, 463

S.E.2d 281, 286 (1995) ("In order to obtain relief, a defendant must show that the error asserted is material and prejudicial.").

Indeed, the trial court did not prevent Mr. Collins from testifying about Mr. Bellamy's reputation for violence. It expressly permitted Defendant to keep Mr. Collins under subpoena so that Mr. Collins could provide this testimony at a later time. Moreover, Defendant was allowed to call numerous witnesses during his case-in-chief to provide testimony regarding Mr. Bellamy's reputation for violence. Defendant appears to have *chosen* not to recall Mr. Collins to testify. Accordingly, we find no error by the trial court. *See State v. Almogaded*, 223 N.C. App. 210 (2012) (unpublished) (finding no error on similar facts), *disc. review denied* 366 N.C. 576, 738 S.E.2d 388 (2013).

NO ERROR.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MATTHEW RAY HOOKS

No. COA15-212

Filed 6 October 2015

1. Appeal and Error—preservation of issues—issue not asserted at trial

Defendant waived his right to appellate review of an alleged fatal variance between the indictment and the evidence where he did not assert the issue at trial.

2. Drugs—methamphetamine—precursor chemical—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence charges of possession of pseudoephedrine, a precursor chemical to methamphetamine. Although defendant contended that no pseudoephedrine was found on his person or premises, that there was no evidence that he actually made particular purchases, and that no chemical analysis was performed, substantial evidence was introduced that defendant possessed pseudoephedrine, and that pseudoephedrine is a precursor

chemical, not a controlled substance, and the State was not required to present evidence that a chemical analysis was performed.

Appeal by defendant from judgment entered 26 August 2014 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Kimberly P. Hoppin for defendant-appellant.

TYSON, Judge.

Matthew Ray Hooks ("Defendant") appeals from judgment after a jury convicted him of (1) misdemeanor child abuse; (2) manufacturing methamphetamine; (3) trafficking in methamphetamine; and, (4) thirty-five counts of possession of an immediate methamphetamine precursor. We find no error in Defendant's conviction or the judgment entered thereon.

I. Factual Background

Defendant, his girlfriend, Brandi Moss ("Moss"), and their eight-year-old son rented a mobile home from Sue Drye ("Ms. Drye"), Moss's mother, located in Concord, Cabarrus County, North Carolina. They were evicted for non-payment of rent, and Ms. Drye wanted them to move out by 16 October 2011. Ms. Drye owned a storage shed located on the property with the mobile home. She asked Defendant to clean his belongings out of the shed, because she wanted to rent the property to someone else. Defendant became angry, and responded, "Nobody better not [sic] touch my storage building." Defendant had previously secured the shed with a lock.

On 17 October 2011, Ms. Drye contacted Cabarrus County Sheriff's Department Detective Jamie Barnhardt ("Detective Barnhardt"). Ms. Drye stated "she had received information from somebody else that [Defendant and Moss] were cooking meth," and she wanted law enforcement "to come take a look" before she rented the mobile home to anyone else. Ms. Drye expressed concern that "if something [was] left behind, it would put others in danger[.]" Detective Barnhardt agreed to meet with Ms. Drye at the mobile home.

Detective Barnhardt and Ms. Drye walked through the mobile home, room by room. As they were walking outside toward the storage shed and the playhouse, a neighbor alerted them that a trash can between

the two structures was smoking. Detective Barnhardt lifted the lid of the trash can and discovered a clear bottle filled with a bubbling, white "pasty, chalky substance." Detective Barnhardt testified he immediately knew this was "part of a meth[] cooking operation," based on his training and experience.

Detective Barnhardt notified his superiors, fire personnel, and the State Bureau of Investigation ("SBI"). The area was cordoned off as more personnel arrived and law enforcement awaited a search warrant, which provided for the immediate destruction of certain dangerous chemicals.

Law enforcement cut off the lock on the storage shed. Detective Barnhardt testified when they opened the doors, there was "an immediate chemical reaction," which caused "smoke and some type of gas leak" to emanate from within. More chemical releases occurred throughout the night as law enforcement recovered various items from the shed and the trash can.

Detective Barnhardt testified he saw agents remove several trash bags from the shed, which were filled with plastic bottles "that had tubing that was coming from the inside[.]" The bottles contained a "white, powderish-looking substance," consistent with what Detective Barnhardt had observed in the original bottle from the trash can. Law enforcement remained on the scene until all evidence was collected, tested by a chemist, and transported so it could be destroyed.

Two days later, Defendant was arrested and charged with one count of manufacturing methamphetamine and one count of misdemeanor child abuse. Detective Barnhardt observed Defendant had chemical burns and staining on his hands during the fingerprinting process of Defendant's arrest. Detective Barnhardt testified this staining was consistent with the staining he had observed on the walls of the storage shed.

On 31 October 2011, a grand jury indicted Defendant for manufacturing methamphetamine and misdemeanor child abuse. On 9 April 2012, a grand jury also indicted Defendant for: (1) forty counts of possession of an immediate methamphetamine precursor chemical with the intent to manufacture a controlled substance, methamphetamine; (2) maintaining a dwelling place for keeping and selling a controlled substance, methamphetamine; and (3) trafficking in methamphetamine by possession of more than 28 grams but less than 200 grams of methamphetamine.

On 30 April 2012, a grand jury indicted Defendant in fourteen separate superseding indictments for: (1) maintaining a dwelling place for keeping and selling a controlled substance, methamphetamine;

(2) trafficking in methamphetamine by possession of more than 28 grams but less than 200 grams of methamphetamine; and, (3) forty counts of possession of an immediate methamphetamine precursor chemical, pseudoephedrine, with the intent to manufacture a controlled substance, methamphetamine. Defendant's case proceeded to trial before a jury on 19 August 2014.

Agent Stephanie Raysich ("Agent Raysich"), the North Carolina State Crime Lab forensic scientist who responded to the scene on 17 October 2011, testified as an expert in the investigation of clandestine manufacture of methamphetamine. Agent Carroll Pate ("Agent Pate"), a forensic scientist with the North Carolina State Crime Lab, took over the case after Agent Raysich became ill, and testified as an expert in forensic drug chemistry and the investigation of clandestine manufacture of methamphetamine.

Agent Pate explained this particular case involved manufacturing methamphetamine using the "one-pot" method. Agents Pate and Raysich both testified about numerous items observed at the scene that were consistent with the clandestine manufacture of methamphetamine, including: (1) 79 HC1 (hydrochloric acid gas) generators; (2) two empty one-gallon cans of Coleman fuel; (3) two empty cans of Drano; (4) one empty thirty-two-ounce plastic bottle of charcoal lighter fluid; (5) one empty twelve-ounce plastic bottle of power steering fluid; (6) numerous pieces of plastic and rubber tubing in various sizes and colors; (7) numerous pieces of white paper strips, some of which contained metal material consistent with lithium; (8) empty lithium battery packaging; (9) numerous pieces of burned aluminum foil containing a brown-black powder residue; (10) empty box covers of instant cold packs and empty cold pack plastic bags; (11) four partial plastic straws containing a residue amount of white crystalline material; (12) one box of heavy duty aluminum foil; (13) two empty containers of salt; (14) an empty container of instant starting fluid; (15) a full container of muriatic acid; (16) two empty cans of drain cleaner; (17) a one-milliliter syringe; and, (18) several empty pseudoephedrine boxes and blister packs. Six items were seized for testing in the laboratory, including an old methamphetamine cooking vessel and items containing various residues. The remainder of the items seized at the scene were destroyed.

Agent Pate testified the total amount of pseudoephedrine present from the boxes and blister packs "would yield 18.9 grams methamphetamine at a one hundred percent theoretical yield." Agent Pate conducted a confirmatory test on a glass jar containing a blue sludge material. Agent Pate determined the material, which weighed fifty-one grams, contained

either pseudoephedrine or ephedrine and an unknown amount of methamphetamine. The other items tested contained traces of methamphetamine, but not in sufficient quantities to weigh.

Becca Clontz ("Ms. Clontz") bought the mobile home from Ms. Drye, and moved in approximately six weeks after Defendant and Moss moved out. She testified one day she was cleaning the water heater closet and discovered a piece of paper containing what appeared to be a recipe for methamphetamine written on it. Ms. Clontz gave the piece of paper to Ms. Drye, and Ms. Drye subsequently turned it over to law enforcement. Ms. Drye and Moss were familiar with Defendant's handwriting, and both testified the handwriting on the piece of paper was that of Defendant's.

William Lanuto ("Lanuto") was a friend of Defendant and Moss. He testified he had seen Defendant "cook[ing] meth" in the storage shed. He stated he once saw a fire on Defendant's porch, which appeared to grow larger as rain fell on it. Lanuto testified he purchased pseudoephedrine for Defendant approximately twenty times, beginning in April 2011, with the understanding that Defendant was going to use the pseudoephedrine to "cook meth."

Lanuto admitted to using methamphetamine with Defendant in exchange for purchasing pseudoephedrine. Lanuto stated he helped Defendant pack and move out of the mobile home during October 2011. Lanuto testified Defendant was "[m]aking meth" throughout that weekend. Lanuto was charged with eleven counts of felony possession of a precursor chemical with the intent to manufacture methamphetamine in relation to this case.

Moss and Defendant no longer maintained a relationship at the time of trial. Moss stated she and Defendant engaged in a relationship for ten years, and parented a child together. Moss testified she had witnessed Defendant "cook methamphetamine" more times than she could count.

Moss admitted she bought pseudoephedrine in order to make methamphetamine and assisted Defendant in the process of manufacturing methamphetamine. At the time of trial, Moss had been charged with and pled guilty to the following charges: (1) manufacturing methamphetamine; (2) trafficking in methamphetamine; (3) eleven counts of possession of a precursor chemical with intent to manufacture methamphetamine; and, (4) misdemeanor child abuse. Moss was currently serving a ten- to thirteen-year term of imprisonment.

Michael Rimiller ("Mr. Rimiller"), a district loss prevention manager for Walgreens, testified about the regulations Walgreens followed with

regard to the sales of pseudoephedrine. Mr. Rimiller stated individuals were required to produce a valid driver's license in order to purchase pseudoephedrine. Mr. Rimiller explained that during the relevant time period in 2011, Walgreens recorded and tracked pseudoephedrine purchases by reporting the purchases to the National Precursor Log Exchange ("NPLEx").

The NPLEx system collects data of over-the-counter pseudoephedrine and ephedrine sales "in real time at the point of sale and also measures all those purchases against the laws that are in effect[.]" The NPLEx system is used to inform the sales clerk whether to proceed with the sale. The information from the NPLEx system is subsequently made available to law enforcement in a separate report.

James Reilly ("Mr. Reilly"), director of health and wellness at Walmart, testified he was responsible for maintaining pharmacy compliance. Mr. Reilly explained Walmart maintained compliance logs of pseudoephedrine purchases in order to keep track of the daily, monthly, and annual limits of pseudoephedrine purchases. He testified Walmart also required the purchaser of pseudoephedrine to present a valid form of photo identification.

SBI Special Agent William Galloway ("Agent Galloway") responded to reports of a possible "meth lab" at Defendant's former residence on 17 October 2011. Agent Galloway obtained the search warrant and was in charge of crime scene documentation. He conducted witness interviews and obtained Defendant's phone records. Agent Calloway requested the pseudoephedrine purchase records for the eight months prior to the discovery of Defendant's "meth lab" for certain individuals based on frequently dialed phone numbers in Defendant's call log.

Agent Galloway summarized NPLEx records of pseudoephedrine purchases from Walgreens and Walmart made by Defendant, Moss, Lanuto, Aaron Tallent ("Tallent"), and Fred Cook ("Cook"). He testified: Tallent purchased pseudoephedrine six times between 9 July 2011 and 1 September 2011; Lanuto purchased pseudoephedrine seventeen times and was blocked from purchasing pseudoephedrine once between 25 June 2011 and 14 October 2011; Moss purchased pseudoephedrine twelve times between 22 March 2011 and 24 July 2011; and Defendant purchased pseudoephedrine thirty-five times and was blocked from purchasing pseudoephedrine five times between 4 May 2011 and 11 October 2011.

Defendant did not exercise his right to testify at trial, nor did he offer any additional evidence. Defendant moved to dismiss the charges at the close of all of the evidence. The trial court denied Defendant's

motion. The State dismissed the charges of maintaining a dwelling and five counts of possession of an immediate precursor chemical.

The jury returned a verdict of guilty on all remaining charges. The trial court sentenced Defendant to 83 to 109 months imprisonment for his manufacturing methamphetamine conviction. The trial court also sentenced Defendant to a consecutive mandatory term of 70 to 84 months imprisonment for trafficking in methamphetamine, four consecutive terms of 19 to 23 months imprisonment for the thirty-five counts of possession of a precursor chemical, and a consecutive term of 150 days imprisonment for his misdemeanor child abuse conviction.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by (1) denying his motion to dismiss the charge of trafficking in methamphetamine due to a fatal variance between the indictment and the State's evidence at trial; and (2) denying his motion to dismiss the thirty-five counts of possession of the precursor chemical pseudoephedrine due to insufficient evidence.

III. Analysis

A. Fatal Variance

[1] Defendant argues the trial court erred by denying his motion to dismiss the charge of trafficking in methamphetamine and asserts a fatal variance between the indictment and the State's evidence. Defendant contends the superseding indictment alleged he "unlawfully, willfully and feloniously did possess more than 28 grams but less than 200 grams of methamphetamine[,]" but the trial court instructed the jury it could convict Defendant of trafficking in methamphetamine, if it found Defendant knowingly possessed "any mixture containing methamphetamine."

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

> A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.

State v. Cody, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted).

This Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "An indictment must set forth each of the essential elements of the offense. . . . To require dismissal any variance must be material and substantial and involve an essential element." *State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (citations omitted), *appeal dismissed and disc. review denied*, 359 N.C. 195, 608 S.E.2d 63 (2004).

2. Analysis

[2] "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1); *see also State v. Maness*, 363 N.C. 261, 273, 677 S.E.2d 796, 804 (2009), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010). A defendant must state at trial a fatal variance is the basis for his motion to dismiss in order to preserve a fatal variance argument for appellate review. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010).

Defendant based his motion to dismiss solely on insufficiency of the evidence. Defendant did not allege the existence of a fatal variance between the indictment and the jury instructions. When the trial judge asked the parties if they had any questions regarding the proposed jury instructions, counsel for Defendant replied, "None from the defense, Your Honor."

Defendant seeks for the first time on appeal to argue the trial court erred by denying his motion to dismiss due to a fatal variance between the indictment and the State's proof at trial. Defendant failed to raise or make this argument in support of his motion to dismiss at trial. Because Defendant failed to properly preserve this issue, he has waived his right to appellate review on this issue. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal). We decline to address the issue and dismiss this issue.

B. Insufficient Evidence

Defendant argues the trial court erred by denying his motion to dismiss the thirty-five counts of possession of the precursor chemical pseudoephedrine. Defendant contends the State presented insufficient

evidence to prove (1) he possessed pseudoephedrine; and (2) the chemical composition of the alleged controlled substance.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "When reviewing a defendant's motion to dismiss, this Court determines only whether there is substantial evidence of (1) each essential element of the offense charged and of (2) the defendant's identity as the perpetrator of the offense." *State v. Fisher*, __ N.C. App. __, __, 745 S.E.2d 894, 900-01 (citations and internal quotation marks omitted), *disc. review denied*, 367 N.C. 274, 752 S.E.2d 470 (2013).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. 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. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (citations and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"If there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990) (citation omitted).

2. Analysis

(a) Insufficient Evidence of Possession of a Precursor Chemical

Defendant argues the State presented insufficient evidence to prove he had actual or constructive possession of products containing pseudoephedrine, a precursor chemical to methamphetamine. We disagree.

N.C. Gen. Stat. § 90-95(d1)(2) makes it unlawful for any person to "[p]ossess an immediate precursor chemical with intent to manufacture methamphetamine[.]" N.C. Gen. Stat. § 90-95(d1)(2)(a) (2013). "To prove

that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials." *State v. Loftis*, 185 N.C. App. 190, 197, 649 S.E.2d 1, 6 (2007) (citation omitted).

> A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. Constructive possession, on the other hand, exists when the defendant, while not having actual possession, has the intent and capability to maintain control and dominion over the [substance]. When the defendant does not have exclusive possession of the location where the drugs were found, the State must make a showing of other incriminating circumstances in order to establish constructive possession.

State v. Boyd, 177 N.C. App. 165, 175, 628 S.E.2d 796, 805 (2006) (citations and internal quotation marks omitted). "Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. Sinclair*, 191 N.C. App. 485, 492, 663 S.E.2d 866, 872 (2008) (citation and internal quotation marks omitted).

Defendant argues the State's evidence was insufficient to prove he had constructive possession of pseudoephedrine. He asserts no pseudoephedrine was actually located on his person, on his premises, or seized and taken into evidence from any location. Defendant also contends the evidence was insufficient to support his convictions of a precursor chemical because the State did not present any testimony from any pharmacist or store clerk identifying him as the individual who actually made particular purchases of pseudoephedrine on particular dates. We disagree.

The State charged Defendant with thirty-five counts of possession of a precursor chemical based upon his alleged purchases and possession of pseudoephedrine. The trial court admitted into evidence a summary, created by Detective Galloway, of the records of pseudoephedrine purchases for Moss, Lanuto, Tallent, Cook, and Defendant. Detective Galloway testified this summary showed Defendant's ID was used to purchase pseudoephedrine from Walgreens and Walmart on thirty-five separate occasions. Five additional purchases were blocked when Defendant's ID was used in attempt to purchase pseudoephedrine.

Moss testified she and Defendant purchased pseudoephedrine. She admitted she had seen Defendant "cooking meth" numerous times, and assisted him in the process. Lanuto, Tallent, and Cook all testified they had purchased pseudoephedrine for Defendant on several occasions. Lanuto also witnessed Defendant cooking methamphetamine. Agents on the scene documented a number of empty Sudafed and Sufedrin blister packs, and at least two empty Sudafed boxes — both of which are products containing pseudoephedrine.

Substantial evidence was admitted from which a jury could reasonably find and conclude Defendant possessed pseudoephedrine to support his conviction of thirty-five counts of a precursor chemical to methamphetamine. This argument is overruled.

(b) Insufficient Evidence of a Controlled Substance

Defendant argues the State presented insufficient evidence to prove the items he allegedly possessed were actually controlled substances. He asserts no chemical analysis or testimony about the chemical makeup of the particular items purchased was presented. We disagree.

Our Supreme Court has held chemical analysis is required to accurately identify *controlled substances*:

> [T]hroughout the lists of Schedule I through VI controlled substances found in sections 90-89 through 90-94, care is taken to provide very technical and "specific chemical designations" for the materials referenced therein. . . . These scientific definitions imply the necessity of performing a chemical analysis to accurately identify *controlled substances* before the criminal penalties of N.C.G.S. § 90-95 are imposed.

State v. Ward, 364 N.C. 133, 143, 694 S.E.2d 738, 744 (2010) (emphasis supplied).

Defendant was charged with, and a jury convicted him of, thirty-five counts of possession of pseudoephedrine, a precursor chemical to methamphetamine, under N.C. Gen. Stat. § 90-95. N.C. Gen. Stat. § 90-95(d1)(2)(a) (2013). The necessity of performing chemical analysis is limited to *controlled substances*. N.C. Gen. Stat. § 90-87 defines "controlled substance" as "a drug, substance, or immediate precursor included in Schedules I through VI of [the North Carolina Controlled Substances Act]." N.C. Gen. Stat. § 90-87(5) (2013). Pseudoephedrine is *not* listed as a controlled substance under Schedules I through VI in N.C. Gen. Stat.

§§ 90-89 through 90-94. Pseudoephedrine is a precursor chemical, not a controlled substance, and a chemical analysis was not required to support Defendant's convictions of possession of pseudoephedrine. This argument is without merit and is overruled.

IV. Conclusion

Defendant failed to assert and preserve his argument that a fatal variance existed between the indictment and the proof at trial.

The State presented substantial evidence Defendant possessed pseudoephedrine, a precursor chemical to methamphetamine. The State was not required to present evidence that a chemical analysis was performed to establish the identity of pseudoephedrine. The trial court did not err by denying Defendant's motion to dismiss for insufficient evidence.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA
v.
DERRICK AUNDRA HUEY, DEFENDANT

No. COA15-100

Filed 6 October 2015

1. Homicide—closing arguments—suggestion that defendant and witness lied—ex mero motu intervention

On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court erred by failing to intervene ex mero motu when the State made improper arguments during closing arguments. The State argued that defendant lied on the stand in cooperation with defense counsel and that his expert witness lied because he was being paid to do so. Because defendant's defense was predicated upon his credibility and the credibility of his witnesses, the error was not harmless, and the Court of Appeals vacated defendant's conviction and remanded the case for a new trial.

2. Homicide—jury instructions—flight

On appeal from defendant's conviction for voluntary manslaughter, the Court of Appeals held that the trial court did not err by instructing the jury on flight. The evidence showed that defendant shot the victim, drove away for a short period of time, and then returned.

Appeal by Defendant from judgment entered 18 July 2014 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Sarah Holladay for Defendant.

McGEE, Chief Judge.

Derrick Aundra Huey ("Defendant") shot and killed James Love ("Love") on 13 October 2011, at approximately 11:00 p.m. According to Defendant's evidence, Defendant has an IQ of 61, and his mental faculties were additionally impaired as a result of an attempted suicide by automobile crash, resulting in head trauma. Defendant has reported hallucinations and has been treated with antipsychotic and antidepressant medications.

Further, according to Defendant's evidence, on 13 October 2011, he was attempting to purchase drugs from an unidentified man when Love, with whom Defendant had had altercations in the past, approached and threatened Defendant and the unidentified man. Earlier that same evening, Love had also threatened Defendant in the apartment of Defendant's girlfriend. According to Defendant, Love hit Defendant in the head, and threatened Defendant with what Defendant believed was a knife. The unidentified man drew a handgun while Love continued to threaten Defendant. Defendant grabbed the weapon from the unidentified man and fired a warning shot. When the warning shot did not stop Love, Defendant fired another shot that struck Love, killing him. Love was known to carry a box cutter for protection, and a box cutter was found near Love's body. According to Defendant, the unidentified man took the gun and ran away. At trial, Defendant's psychological expert witness, Dr. George Patrick Corvin ("Dr. Corvin"), testified, *inter alia*, concerning Defendant's low I.Q. and brain trauma, and how these conditions affected Defendant's decision-making process.

The State presented evidence that Defendant called 911 and reported the shooting, stating: "I shot a motherf*****. I . . . I hope I killed that son of a bitch[,]" but Defendant did not identify himself. A neighbor reported seeing Defendant drive away from the scene shortly after the shooting, but Defendant returned very shortly thereafter. When initially interviewed by the police, Defendant denied having shot Love, claiming that the unidentified man shot Love. Defendant gave multiple accounts of the events of that night. After Defendant listened to the 911 call, he admitted that he shot Love. At trial, the State argued that Defendant again changed his position before trial, and that Defendant intended to claim he did not shoot Love. According to the State, Defendant maintained this position until approximately four months before the trial. The State argued that only after Defendant sat down with his attorney and Dr. Corvin, did Defendant decide to again admit to shooting Love, and to argue that Love was shot in self-defense.

Defendant's trial on first-degree murder commenced on 7 July 2014. The jury found Defendant guilty of voluntary manslaughter on 18 July 2014. Defendant was sentenced to seventy-three months' to ninety-seven months' imprisonment. Defendant appeals.

I.

[1] In Defendant's first argument, he contends "the trial court erred by failing to intervene *ex mero motu* when the State made improper statements during closing arguments[.]" We agree.

Our Supreme Court has recently reminded us that:

> During closing arguments, prosecutors are barred by statute from "becom[ing] abusive, inject[ing their] personal experiences, [and] express[ing their] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant." N.C.G.S. § 15A-1230 (2014). Within those confines, however, we have long recognized that " 'generally, prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " This latitude is reflected in our deferential standards of review. When opposing counsel objects during a closing argument, we review for abuse of discretion. When there is no objection, we review for gross impropriety. In all cases, we view the remarks "in context and in light of the overall factual circumstances to which they refer."

> Judicial deference, however, is not unlimited. In particular, "we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation." [*See*] *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." (citations and internal quotation marks omitted)).

State v. Hembree, __ N.C. __, __, 770 S.E.2d 77, 88-89 (2015) (citations omitted).

In *Hembree*, the State argued the following in its closing argument:

> He [defendant] has manipulated his attorneys. Don't let him manipulate you. Don't let him work the system again. . . . [Y]ou heard video confessions of how he killed Heather Catterton and Randi Saldana. And then the defense started, they started putting up these smoke screens, started to try to confuse you.
>
> . . . .
>
> [A]t no point, no point in the last 18 months since this has been pending trial, has he ever recanted killing Heather or Randi. Never. Not until two years later when he could look at everything, when he can study the evidence, when he can get legal advi[c]e from his attorneys, does he come up with this elaborate tale as to what took place.
>
> . . . .
>
> Two years later, after he gives all these confessions to the police and says exactly how he killed Heather and Randi Saldana . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story.
>
> . . . .
>
> Think back to December 5th of 2009 when he knew nothing, when he had no legal advice; consistently, voluntarily told the police everything, and it was consistent with what the evidence showed. . . . For hours you watched this man confess to killing Heather and Randi Saldana, and now, after 18 months to two years, the defense begins and they

> put up smoke screens and they tried to confuse you? . . . We've got two women dead, and he killed them.

Id. at __, 770 S.E.2d at 89. Our Supreme Court then held:

> In context, the import of these arguments is clear: The State argued to the jury, not only that defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel. Whether or not defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys. Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*.

Id.

In the case now before this Court, the State argued the following in closing:

> Innocent men don't lie. Innocent men don't lie because they don't have to. The truth is not something you practice. Telling the truth is not something you have to rehearse. The truth just is, and the truth in this case is James Love was shot because of an insult.
>
> . . . .
>
> [N]ow, up until about four months ago [D]efendant had planned to come in here and tell you all he didn't do it; he changed his mind, and he's now testified under oath that he is, in fact, the man who fatally shot James Love[.]
>
> . . . .
>
> I'm going to say this again, innocent men don't lie, they simply don't have to. The truth shall set you free unless, of course, you're on trial for a murder that you committed.
>
> . . . .
>
> When you look back at 2011 you'll be able to find the truth.
>
> You're not going to find it over there, not anymore. [D]efendant is not going to give you the truth. He's spent years planning to come in here to tell you he didn't do it, and then in the past four months he's come up with another story, and he's decided to go with that instead. But

he's going to stick to that story, *that story that he developed after he sat down with his attorney and his defense experts and decided on what he wanted to tell you. You're not going to find the truth there.*

But even when [D]efendant tries to hide the truth from you all, it slips out here and there. For example, it slips out when [D]efendant says things to his defense expert *like my attorneys want me to go with self-defense at trial.*

. . . .

Now, all of a sudden you heard Dr. Corvin. *He sat down with [Defendant's attorney] and [D]efendant and made sure the defendant understood the law, understood what he was charged with, what the elements were, and understood the defenses and what they meant and the law about the defenses.* As he sits there on the stand, as he sits there right now, it has been explained to [D]efendant you're supposed to consider the fierceness of the assault that he was victim to. *So isn't it interesting that four months ago it went from a grab to it went [to] a punch, a slash, a hack, not just at me but at everybody.* All of a sudden a grab went to a wild-armed (phonetic) handle. *Now that the law has been explained to him, now that he's been talked out of claiming I didn't do it.*

. . . .

[Defendant's attorney] tells you all we're trying to hide from this. All the evidence shows the box cutter was involved, the box cutter was involved, all the evidence. Do you know who's not a witness in this case? [Defendant's attorney]. He wasn't there. *He's paid to defend [D]efendant.*

. . . .

There's no real threat. There's no real threat except for the one *that was created sometime four months ago to try and sell you on something.*

. . . .

Now, I want to talk a little bit about Dr. Corvin, some of his opinions. But before we do that, we've got to make something clear. Make no mistake. *Dr. Corvin has a client here. He works for [D]efendant. He is not an impartial*

> *mental-health expert.* There are several who know [D]efendant: Drs. Fuller, Castro, Abramowitz. He didn't call any of those, he called Dr. Corvin. *Dr. Corvin is part of the defense team, he has a specific purpose, and he's paid for it. You heard Dr. Corvin earns over $300,000 a year just working for criminal defendants. He is not impartial. In fact, I'd suggest to you he's just a $6,000 excuse man. That's what he is.*
>
> . . . .
>
> So according to Dr. Corvin, [D]efendant []formed the intent to kill himself, but for some reason that he never explained to you, he's taken the stand to say, well, he can certainly intend to kill himself, but in his opinion he can't intend to kill James Love. *Does that make a lick of sense or does that just show you that Dr. Corvin came in here and did exactly what he was paid to do?* And, again, what else might show you this?
>
> Again, many doctors have met [D]efendant. Many who were not hired to help him in the defense, you didn't hear from a single one.

During cross-examination, the State questioned Dr. Corvin about his initial meeting with Defendant, which only included Defendant and Dr. Corvin, and from which Dr. Corvin produced notes. In that meeting, Defendant told Dr. Corvin he did not shoot Love, but that his attorney was trying to get him a plea deal, or to go to trial arguing self-defense. The State asked Dr. Corvin: "So, when you end your meeting in January, though, [D]efendant is dead set, I didn't do it, that's some drug dealer shot James, I had nothing to do with it, right?" Dr. Corvin responded that that was correct. The State then asked Dr. Corvin about a subsequent meeting with Defendant that Defendant's attorney also attended, and compared it with the first meeting:

> Q. And in that two hours [during the first meeting], safe to say you took about 11 pages of notes?
>
> A. That sounds about right. I can count them, but something like that.
>
> Q. Now, that was in January.
>
> A. Yes.

Q. In March you went back to talk to [D]efendant, right?

A. Yes.

Q. The first meeting was in January. That was by yourself.

A. Yes.

Q. Second meeting in March, you go with [Defendant's attorney].

A. Yes.

Q. Anybody else go with you?

A. I don't think so. No, not by my memory.

Q. But you did meet [D]efendant in person.

A. Yes. This was a contact visit, yes.

Q. And you spent probably another two hours talking to him.

A. A little south of that, but close, yes.

Q. Now, when you went in January, you took 11 pages of notes in two hours.

A. Yes.

Q. How many pages of notes did you take the two hours you spent in March?

A. None. Well, none, but I authored a report shortly thereafter, which is sometimes done for clinical reasons, yes.

Q. Now, at the end of the March meeting [D]efendant had agreed to go with self-defense.

A. Well, I don't know what he had agreed to. I don't discuss that strategy with him. What I can tell you is that he described a sequence of events that in my mind was self-defense.

The State focused on the fact that, when Dr. Corvin met with Defendant alone the first time, Defendant maintained he did not shoot Love, and that Dr. Corvin had taken copious notes. The implication from the State was that, in the second meeting attended by Defendant's attorney, Dr. Corvin decided not to record what was discussed because the discussion was about coming up with an "excuse." The further implication

was, as a result of that meeting, Defendant decided to change his story. This was also the State's argument in closing.

As our Supreme Court stated in *Hembree*: "In context, the import of these arguments is clear[.]" *Hembree*, __ N.C. at __, 770 S.E.2d at 89. The State, in this case, argued to the jury not only that Defendant was a liar, "but that he had lied on the stand in cooperation with defense counsel" and Dr. Corvin. *Id.* "Whether or not [D]efendant committed perjury, there was no evidence showing that he had done so at the behest of his attorney" or Dr. Corvin. *Id.* In addition, taken in context, it is clear the State was arguing that Dr. Corvin would say whatever the defense wanted him to say, because he was being paid to do so.

Further, the State implied that Dr. Corvin was committing perjury because "he [was] just a $6,000 excuse man[,]" and would do "exactly what he was paid to do." The State also indicated that the jury should not trust Defendant's counsel because he was "paid to defend the defendant." This was improper. *State v. Rogers*, 355 N.C. 420, 460-63, 562 S.E.2d 859, 883-86 (2002). "In light of the cumulative effect of the improprieties in the prosecutor's cross-examination of defendant's expert and the prosecutor's closing argument, we are unable to conclude that defendant was not unfairly prejudiced." *Id.* at 465, 562 S.E.2d at 886 (citation omitted). "Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*." *Hembree*, __ N.C. at __, 770 S.E.2d at 89. Because Defendant's entire defense was predicated on his credibility and the credibility of his witnesses, we cannot deem this error to have been harmless. We vacate Defendant's conviction and sentence and remand for a new trial.

II.

[2] Because this issue will likely reoccur upon retrial, we address Defendant's second argument. In Defendant's second argument, he contends "the trial court erred by instructing the jury on flight when this instruction was not supported by the evidence." We disagree.

Evidence introduced at trial tends to show that Defendant shot Love, then got into his vehicle, drove off for a short period of time, and returned. The firearm Defendant used to shoot Love was never recovered.

"So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be

other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977) (citation omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citation omitted). There is some evidence in the record supporting the theory that Defendant drove away briefly in order to dispose of the firearm he used to shoot Love. This argument is without merit.

NEW TRIAL.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS STANRICK JEFFERIES, DEFENDANT

No. COA15-137

Filed 6 October 2015

1. Witnesses—expert—fire marshal—whether fire intentionally set

There was no error, much less plain error, in a prosecution for burning personal property where a fire marshal was allowed to testify. It has been held that a fire marshal may, with a proper foundation, offer an expert opinion as to whether a fire was intentionally set.

2. Arson—burning private property—instruction—defendant's presence at scene

The trial court did not err in a prosecution for burning personal property by failing to instruct the jury regarding defendant's presence at the scene of the crime. Defendant's presence was not required to prove a fact necessary to establish any element of the crime or a lesser-included offense.

3. Criminal Law—prosecutor's argument—no intervention ex mero motu

The trial court did not err when it did not intervene on its own motion during the prosecutor's closing argument in a prosecution for burning personal property where the prosecutor a made

a flat statement that the victim's testimony was extraordinarily credible. Although the statement was improper, it did not undermine the integrity of the entire trial and did not rise to the level of gross impropriety.

4. Appeal and Error—preservation of issues—fatal variance—review by discretionary authority

While defendant did not preserve his fatal variance argument for appeal, the Court of Appeals exercised its discretionary authority to review the argument to prevent manifest injustice.

5. Indictment and Information—variance—indictment and instruction—not fatal

There was no fatal variance and no plain error in a prosecution for burning personal property where the trial court instructed the jury to find defendant guilty if it found that he set fire to the bedding of the victim while the indictment charged defendant with setting fire to the victim's bed, jewelry, and personal clothing. The jewelry and the clothing were surplusage and not necessary to establish defendant's guilt. The variance between bed and bedding was not material because there was no evidence to suggest that the bedding was located anywhere other than the bed.

6. Sentencing—habitual felon—predicate felonies—ambiguous verdict

A conviction for burning personal property and being a habitual felon was remanded for a new trial on the habitual felon charge or for entry of a new judgment based solely on burning personal property where the indictment charging habitual felon status identified three predicate felonies but the trial court instructed on four felonies. The verdict sheet did not identify the felonies, so that it was impossible to tell whether any of the jurors relied on the fourth felony.

Appeal by Defendant from judgment entered 22 August 2014 by Judge Richard D. Boner in Cleveland County Superior Court. Heard in the Court of Appeals 27 August 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Matthew L. Liles, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

DILLON, Judge.

Nicholas Stanrick Jefferies ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of burning personal property and attaining the status of an habitual felon. We find no error in part, reverse in part, vacate the judgment, and remand the case for further proceedings consistent with this opinion.

I. Background

The evidence at trial tended to show the following: On 5 April 2011, Defendant attended a cookout with the victim and two of her children. After consuming a considerable amount of alcohol, Defendant disciplined the victim's son in a manner the victim considered inappropriate. She confronted him about it, whereupon a heated argument broke out between them. As the victim took her children to leave the cookout, Defendant beat on the windows of the vehicle she was driving and yelled threats at her. The victim and her children spent the evening at her sister's home.

Later that evening, police responded to a call reporting a break-in at the victim's home. Upon arriving, the officers approached the house and knocked on the front door. Eventually, Defendant emerged from the house and shut the door behind himself.

As soon as Defendant exited the house, an officer noticed a strong smell of smoke coming from inside. The officer immediately dispatched the fire department. The officer then investigated to determine the origin of the smoke and whether there were other occupants. He found thick black smoke emanating from a back room, but no other occupants.

Firefighters arrived, discovering and extinguishing a fire in the rear bedroom. The fire had consumed the top of the bed and some other items of personal property.

Defendant was indicted for burning personal property and for attaining the status of an habitual felon. The matter came on for trial and the jury found Defendant guilty of both charges. The trial judge entered a judgment, sentencing Defendant to prison for 96 to 125 months. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes five arguments on appeal, which we address in turn.

A. Fire Marshal Testimony

[1] Defendant first argues that the trial court committed plain error in allowing the State's expert in fire investigation, Fire Marshal Raymond Beck, to testify that the fire had been intentionally set. Specifically, Defendant contends that Fire Marshal Beck's expert opinion was inadmissible because he merely deduced that the fire had been intentionally set rather than reaching this conclusion based on his expertise in the field of fire investigation. We disagree.

"Unpreserved error . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred . . . [that] had a *probable* impact on the jury's finding[.]" *Id.* at 518, 723 S.E.2d at 334 (internal marks and citation omitted) (emphasis added).

In the present case, after being accepted as an expert in the field of fire investigation, Fire Marshal Beck testified that he had concluded that the fire was caused by "the application of an open flame to . . . combustible material," and that the fire had been "ruled as incendiary." When asked to clarify what he meant by "incendiary," Fire Marshal Beck explained that he meant that the fire was not accidental in nature but rather had been intentionally set.

Generally, the admission of expert opinion testimony is only allowed where "the opinion expressed is . . . based on the special expertise of the expert[.]" *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). However, our Supreme Court has held that, with a proper foundation laid as to his expertise, a fire marshal may offer his expert opinion as to whether a fire was intentionally set. *State v. Hales*, 344 N.C. 419, 424-25, 474 S.E.2d 328, 330-31 (1996). Therefore, we hold that the trial court in the present case did not err, much less plainly err, in allowing this testimony. Accordingly, this argument is overruled.

B. Jury Instructions

[2] Defendant next argues that the trial court erred in failing to instruct the jury regarding his presence at the scene of the crime. Specifically, Defendant contends that his presence was a material feature of the crime with which he was charged; that there was evidence that he was present at the scene of the crime; and that the trial court was required to instruct the jury regarding his presence at the scene of the crime. Notwithstanding Defendant's casting of this issue as an instructional error, we do not agree that the trial court erred in this regard.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). Where there is evidence of a lesser-included offense of a crime with which a defendant stands accused, the trial court must instruct the jury on the lesser-included offense. *See, e.g.*, *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000). However, where no such lesser-included offense exists, neither does the requirement that the jury be given a corresponding instruction. *Id.* Furthermore, the mere denial of guilt by a defendant does not, by itself, controvert any material fact required for proof of that defendant's guilt, nor does it require the trial court to instruct the jury on any lesser-included offense. *See, e.g.*, *State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (2000).

The crime of burning personal property is codified at N.C. Gen. Stat. § 14-66, which defines the offense in relevant part as follows:

> If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of . . . personal property of any kind, . . . with intent to injure or prejudice . . . any [] person, . . . he shall be punished as a Class H felon.

N.C. Gen. Stat. § 14-66 (2011). Thus, the elements of burning personal property are (1) an intentional burning (2) of personal property of another (3) with the intent thereby to injure or to prejudice another's rights with respect to that property. *See id.*; *State v. Jordan*, 59 N.C. App. 527, 529, 296 S.E.2d 823, 825 (1982).

In the present case, the evidence of Defendant's presence at the scene of the crime was not required to prove a fact necessary to establish any element of the crime of burning personal property, nor was it evidence of any lesser-included offense thereof. Indeed, proof of the commission of this offense is possible where the defendant is *never* present at the scene of the intentional burning, but instead "cause[s]" "aid[s]," "counsel[s]," or "procure[s]" the burning from afar. *See* N.C. Gen. Stat. § 14-66 (2011). Furthermore, rather than present any evidence of a lesser-included offense of burning personal property at trial, which, if believed by the jury, "would permit [] [it] rationally to find him guilty of [a] lesser offense and acquit him of the greater," *see Leazer*, 353 N.C. at 237, 539 S.E.2d at 924, Defendant simply denied all wrongdoing. Therefore, we hold that the trial court did not err in failing to instruct the jury regarding Defendant's presence at the scene of the crime.

We rejected a similar argument in *State v. Chapman*, 154 N.C. App. 441, 572 S.E.2d 243 (2002). In *Chapman*, we held that where there was no evidence of aiding and abetting or acting in concert – modes of criminal liability where the defendant's presence at the scene of the crime *does* bear on the defendant's participation in the commission of the offense – the trial court did not err in refusing to instruct the jury on mere presence, even though such an instruction was requested. *Id.* at 446, 572 S.E.2d at 247. In that case, there was no *material* evidence – i.e., evidence probative of any fact necessary to prove an element of a crime with which the defendant was charged, or any lesser-included offense thereof – to support the requested instruction. *Id.* Therefore, as in *Chapman*, it would not have been error for the trial judge to refuse to give the instruction, had it been requested, because there was no *material* evidence to support it. *See id.* Furthermore, even assuming, *arguendo*, it would have been error, it would not have been plain error, as it is not *probable* that the jury's ultimate finding of guilt would have differed if the trial court had given an unrequested instruction unsupported by the evidence. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, this argument is overruled.

C. State's Closing Argument

[3] Defendant next argues that the trial court erred in failing to intervene and strike certain portions of the State's closing argument. Specifically, Defendant contends that the court erred in failing to strike comments by the prosecutor relating to the credibility of certain witness testimony. Although some of these statements may have been objectionable, we do not believe they so contaminated the proceedings as to require a new trial.

Generally, "[t]he control of the argument of the district attorney and counsel must be left largely to the discretion of the trial judge and his rulings thereon will not be disturbed in the absence of gross abuse of discretion." *State v. Hunter*, 297 N.C. 272, 278, 254 S.E.2d 521, 524 (1979). N.C. Gen. Stat. § 15A-1230(a) states that a prosecutor may not express his "*personal* belief as to the truth or falsity of the evidence[.]" N.C. Gen. Stat. § 15A-1230(a) (2014). He may, however, comment on the *strength* of the evidence. *State v. Best*, 342 N.C. 502, 518, 467 S.E.2d 45, 55 (1996). Furthermore, the prosecutor may – and indeed, should – argue, on the basis of such evidence, whether certain witness testimony should be believed. *See, e.g.*, *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967) ("It is improper for a lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that [it] should not believe a witness, but he should not call him a liar.").

We review a trial court's failure to intervene on its own motion and strike unobjected-to remarks made in closing argument for gross impropriety, "view[ing] the remarks in context and in light of the overall factual circumstances to which they refer." *State v. Hembree*, ___ N.C. ___, ___, 770 S.E.2d 77, 88 (2015) (internal marks omitted). Our Supreme Court has held that "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 136, 711 S.E.2d 122, 146 (2011) (internal marks omitted).

In *Phillips*, our Supreme Court identified two categories of objectionable prosecutorial comment under N.C. Gen. Stat. § 15A-1230(a). *Id.* at 138-39, 711 S.E.2d at 147-48. First, the court observed that a "prosecutor's flat statement that [a witness's] testimony was 'wholly unbelievable' was [] improper." *Id.* at 139, 711 S.E.2d at 148. The court also identified a second category of prosecutorial comment of more dubious propriety, reasoning that a prosecutor's remark to the effect that he "would say [the witness] was not very credible" was susceptible of interpretation as either a contention to the jury or an inappropriate statement of personal belief, and being susceptible of both interpretations, "skirt[ed] the strictures of the statute." *Id.* (emphasis added). Nevertheless, despite one wholly improper remark and another of dubious propriety, the court concluded that, based on the evidence in that case, the objectionable remarks did not "pervert or contaminate the trial to such an extent as to render the proceedings fundamentally unfair." *Id.*

In the present case, the prosecutor made the following remarks during closing argument:

> Folks, we gave you everything that you need. You have a motive with this argument with [the victim]. And while I bring up [the victim], my goodness, *credibility*, *credibility*, *credibility*. That testimony was *extraordinarily credible*. . . . You saw [the defendant] trying to control her even in a court of law, a court of law, trying to control her from over there, pointing at her, telling her to quit talking.[1] . . . She did phenomenal. *I will contend to you she was extraordinarily credible.*

(Emphasis added.) Thus, while the prosecutor's *contention* regarding the victim's testimony was within the bounds of appropriate argument

1. Defendant waived his right to counsel, representing himself at trial. The victim was subject to a lengthy cross-examination.

under N.C. Gen. Stat. § 15A-1230(a), the prosecutor's 'flat statement' that the victim's "testimony was extraordinarily credible," like the other references to her credibility, was either the entirely improper expression of opinion identified by our Supreme Court in *Phillips*, or at least, was susceptible of interpretation as such.

However, even assuming, *arguendo*, that all these remarks were objectionable, we do not believe their presence in the prosecutor's closing argument undermined the integrity of the entire trial. *See Phillips*, 365 N.C. at 139, 711 S.E.2d at 148. That is, based on the evidence before the jury, we hold that these remarks did not rise to the level of gross impropriety. Accordingly, this argument is overruled.

D. Fatal Variance

[5] Defendant next argues that the trial court committed plain error in instructing the jury on the offense of burning personal property where the instructions varied materially from the indictment.[2] Specifically, Defendant contends that the court plainly erred in instructing the jury to find him guilty if it found that he had "intentionally set fire to the bedding of [the victim]" where the indictment charged him with setting fire to the victim's "bed, jewelry and personal clothing." We disagree.

Generally speaking, "[a] variance between the criminal offense charged and the offense established by the evidence is . . . a failure of the State to establish the offense charged." *State v. Glenn*, 221 N.C. App. 143, 147, 726 S.E.2d 185, 188 (2012). The purpose of prohibiting a variance "is to enable the defendant to prepare a defense against the crime with which the defendant is charged and to protect the defendant from another prosecution for the same incident." *State v. Taylor*, 203 N.C. App. 448, 455-56, 691 S.E.2d 755, 762 (2010). However, "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972).

In the present case, one of the items of personal property was identified both in the indictment and in the jury instructions – namely, the bed.

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2. **[4]** "Defendant must preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012). In the present case, Defendant moved to dismiss the charge against him based on an alleged insufficiency of the evidence. However, fatal variance was not a basis of his motion. Therefore, Defendant has failed to preserve this argument for appellate review. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997). Nevertheless, we retain discretionary authority to review this argument "[t]o prevent manifest injustice to a party," *see* N.C. R. App. P. 2, and we elect to do so now.

The other two items identified in the indictment – to wit, the victim's jewelry and personal clothing – were omitted from the jury instructions. However, the jewelry and personal clothing identified in the indictment were mere surplusage. No proof of an intentional burning of either item was necessary to establish Defendant's guilt, as there was evidence of the requisite intentional burning of the bed.

Defendant makes a great deal, however, of the difference between "the bed" identified in the indictment and "the bed*ding*" to which the trial court referred in its instructions to the jury, arguing that this difference amounts to a fatal variance between the indictment and the evidence presented at trial. Specifically, Defendant contends that while a "bed" is a piece of furniture on which one sleeps, "bedding" is the material *in* which one sleeps.

We hold that this 'variance' is not fatal. *See*, *e.g.*, *State v. Lilly*, 195 N.C. App. 697, 700, 673 S.E.2d 718, 720 (2009) ("In order for a variance between the indictment and the evidence presented at trial to warrant reversal of a conviction, that variance must be material."). That is, assuming, *arguendo*, that there is a variance between the words "bedding" and "bed," this variance is not *material* because there is no evidence in the record to suggest that what Defendant refers to as the "bedding" was located anywhere other than the bed. For example, there is no evidence in the record that Defendant set fire to bedding *in the closet* of a different room *where there was no bed*. Rather, the evidence presented at trial was of an intentional burning of material composing the bedding lying on top of a bed or the top of that bed itself, including such material. Therefore, we hold that any variance between the indictment and the evidence presented at trial was not material. That is, we are unable to discern how Defendant was unfairly surprised, misled, or otherwise prejudiced in the preparation of his defense by the indictment's failure to identify the "bed*ding*" rather than the "bed." *See State v. Spivey*, ___ N.C. App. ___, ___, 769 S.E.2d 841, 844 (2015) ("whether the variance is material depends upon whether the defendant was surprised, misled, or otherwise prejudiced *because of* the variance") (emphasis in original). Likewise, this discrepancy does not imperil Defendant's right to be free from double jeopardy. *See State v. Greene*, 289 N.C. 578, 586, 223 S.E.2d 365, 370 (1976). *A fortiori*, the court's instructions did not constitute plain error because it is not reasonably *possible* – much less reasonably *probable* – that the jury's ultimate finding of guilt would have differed had the court's instructions on the charge differed. Accordingly, this argument is overruled.

E. Prior Conviction

[6] Finally, Defendant argues that the trial court erred in instructing the jury regarding his prior conviction for selling cocaine. Specifically, Defendant contends that the court erred in instructing the jury that it could find that he had attained the status of an habitual felon based on his prior conviction for selling cocaine where the indictment did not allege this conviction as a predicate to his attaining the status. We agree.

This argument presents a question of first impression. Under North Carolina's Habitual Felon Act, "[a]ny person who has been convicted of or pled guilty to three felony offenses . . . is declared to be an habitual felon[.]" *See* 1967 N.C. Sess. Laws 1241 (codified at N.C. Gen. Stat. § 14-7.1 (2011)). Our Supreme Court has held that "[b]eing an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977). However, the Habitual Felon Act also requires that the indictment charging a defendant as an habitual felon allege *when* the prior felonies were committed, the jurisdiction *where* such felonies were committed, *the dates* when pleas of guilty or convictions of those felonies were *entered* or *returned*, and *the court* where those pleas or convictions occurred. N.C. Gen. Stat. § 14-7.3 (2011). The purpose of these requirements is to "provide[] notice to a defendant that he is being tried as a recidivist." *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990).

Moreover, by both statutory mandate and constitutional guarantee, defendants in jury trials have a right to a unanimous verdict under North Carolina law. *See* N.C. Const. art. 1, § 24 (2011) ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."); N.C. Gen. Stat. § 15A-1237(b) (2011) ("[V]erdict[s] must be unanimous, and must be returned by the jury in open court."). Therefore, our Supreme Court has held that "[w]here the trial court erroneously submits the case to the jury on alternative theories, . . . and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990).

In the present case, the indictment charging Defendant with attaining the status of an habitual felon identified three predicate felonies to establish his status. However, the trial court instructed the jury on *four* felonies – the three identified in the indictment, and another – sale of cocaine. Moreover, the verdict sheet did not recite the felonies that the jury considered, but simply stated that the jury found Defendant guilty.

Therefore, it is impossible for us to discern whether any of the jurors relied on the fourth felony, which was not listed in the indictment, in finding Defendant guilty of attaining the status. Accordingly, "we must assume the jury based its verdict on the theory for which it received an improper instruction." *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993).

Our Supreme Court encountered a similar situation in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), and we find the Supreme Court's analysis in *Pakulski* controlling. In *Pakulski*, the jury found two defendants guilty of two felonies – armed robbery and felonious breaking and entering. *Id.* at 564, 356 S.E.2d at 321. Based on these convictions, the jury also found the defendants guilty of felony murder, though "the [jury's] verdict form [did] not reflect the [felony] upon which the jury based its finding of guilty[.]" *Id.* at 574, 356 S.E.2d at 326. On appeal, our Supreme Court held that the evidence was sufficient to support the armed robbery charge but was not sufficient to support the felonious breaking and entering charge; and, there being no specification on the verdict form to resolve the ambiguity created by the instructional error, the court reasoned it was impossible to determine whether the jury relied on the predicate felony unsupported by the evidence. *Id.* Accordingly, the court concluded that it was required to resolve the ambiguity created by the errant instruction in favor of the defendants, *see id.*, granting them a new trial on the felony murder conviction, *see id.* at 576, 356 S.E.2d at 327.

As in *Pakulski*, we cannot discern from the record on appeal in the present case whether the jury disregarded the errant instruction. As in *Pakulski*, "the verdict form does not reflect the theory upon which the jury based its finding of guilty," *see id.*, as would allow us to resolve the ambiguity created by the erroneous instruction. Therefore, we must resolve the ambiguity created by the erroneous instruction in favor of Defendant. *See Petersilie*, 334 N.C. at 193, 432 S.E.2d at 846. Defendant is entitled to a new trial on this charge. Accordingly, we vacate the judgment entered upon Defendant's conviction for attaining the status of an habitual felon and remand the case for a new trial on this charge or for entry of a new judgment based solely on Defendant's conviction for burning personal property.

III. Conclusion

We find no error in Defendant's conviction for burning personal property. However, we reverse Defendant's conviction on the charge of attaining the status of an habitual felon and we vacate the judgment

entered upon these convictions. On remand, the court must conduct further proceedings consistent with this opinion.

NO ERROR IN PART; REVERSED AND REMANDED IN PART; VACATED IN PART.

Judges HUNTER, JR. and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JORGE JUAREZ, DEFENDANT

No. COA15-152

Filed 6 October 2015

1. Homicide—felony murder—discharge of weapon into occupied vehicle—merger doctrine not applied

The trial court did not err by refusing to dismiss a charge of felony murder where the underlying felony was discharging a firearm into an occupied vehicle in operation. Although defendant argued that the doctrine of merger applied, a person may be found guilty of this underlying offense even if there was no bodily harm to anyone.

2. Homicide—felony murder—self-defense—lesser offenses

The trial court erred in a first-degree felony murder prosecution by denying defendant's request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. A finding that defendant acted in reasonable self-defense would have rendered him not guilty of a charge of discharging a firearm into an occupied vehicle; however, the evidence would have been sufficient to support a lesser-included offense.

3. Homicide—felony murder—instructions—self-defense

The trial court committed plain error in a prosecution for first-degree felony murder by instructing the jury that defendant could not receive the benefit of self-defense if he was found to be the aggressor. Even assuming that defendant was the aggressor in the initial encounter, his withdrawal removed him from that role.

STATE v. JUAREZ

[243 N.C. App. 466 (2015)]

Appeal by defendant from judgment entered 6 June 2014 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 26 August 2015.

Roy Cooper, Attorney General, by I. Faison Hicks, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Emily H. Davis, Assistant Appellate Defender, for defendant-appellant.

ZACHARY, Judge.

Where the felony of discharging a firearm into an occupied vehicle while it is in operation does not merge into felony murder, the trial court did not err in denying defendant's motion to dismiss the charge of first-degree murder based upon the felony murder rule. Where perfect self-defense was a defense to the underlying felony, the trial court erred in refusing to instruct the jury on lesser included offenses to felony murder. Where evidence showed that defendant withdrew, the trial court committed plain error in instructing the jury on the aggressor doctrine of self-defense.

I. Factual and Procedural Background

On the evening of 29 October 2012, Jorge Juarez (defendant) was drinking beer and smoking marijuana with Marcos Chaparro, Karen Gonzales, Erick Martinez, and Karina Rodriguez at Chaparro's residence in Durham. Around 11:30 p.m., the group traveled in Chaparro's four-door Acura to take Rodriguez to her home at the Foxhall Village development in Raleigh. At approximately 12:00 a.m. on 30 October 2012, the vehicle arrived at Rodriguez' house in Foxhall Village. After dropping Rodriguez off, Chaparro and Martinez proceeded to break into vehicles nearby to steal car stereos. Martinez took Chaparro's baseball bat along for protection. Chaparro asked to carry defendant's gun, but defendant refused.

Awakened by the noise, Foxhall Village resident Alfonso Canjay and his wife Silvia looked out of their window and saw Chaparro and Martinez "trying to steal something." Canjay chased Chaparro and Martinez, who fled back to the Acura; Canjay pursued them with a machete in his white Ford Focus. After eluding Canjay, Chaparro and Martinez returned to his residence and stole a stereo. Minutes later, Canjay, in his Ford Focus, spotted Chaparro and Martinez in the Acura and sped towards them, colliding twice with their vehicle. After the second impact, defendant fired one gunshot at Canjay's vehicle, shattering the driver's window.

Immediately after the shooting, Gonzalez drove Chaparro, Martinez, and defendant back to Durham.

Defendant was indicted for the first-degree murder of Canjay. On 6 June 2014, a jury found defendant guilty of first-degree murder pursuant to the felony murder rule, with the underlying felony being discharging a firearm into an occupied vehicle that is in operation. The trial court sentenced defendant to life imprisonment without parole.

Defendant appeals.

II. Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

A. Standard of Review

The standard of review is not disputed. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

At the close of the State's evidence, defendant moved to dismiss the charge of first-degree murder. This motion was denied, renewed at the close of all the evidence, and denied again. Defendant contends that the trial court erred in denying this motion because the underlying felony of discharging a firearm into an occupied vehicle could not support a felony murder conviction.

Felony murder is "[a] murder . . . committed in the perpetration or attempted perpetration of any arson, rape, or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon*," and constitutes first-degree murder, punishable

by life imprisonment. *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 70 (1982) (emphasis in original) (citations omitted); *see also* N.C. Gen. Stat. § 14-17 (2013). The existence of some underlying felony is an essential element of felony murder.

Defendant contends that, pursuant to the doctrine of merger, the underlying felony of discharging a firearm into an occupied vehicle merges into the charge of first-degree murder and thus cannot support the charge. This analysis, however, is inaccurate.

The doctrine of merger provides that:

> [A] defendant may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution. The underlying felony supporting a conviction for felony murder merges into the murder conviction. The underlying felony provides no basis for an additional sentence, and any judgment imposed thereon must be arrested.

State v. Barlowe, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994) (citations and quotations omitted). The merger doctrine does not preclude indictments for both the murder and the underlying felony, nor a guilty verdict for both; rather, it requires that, *if a defendant is found guilty of both felony murder and the underlying felony*, the judgment on the underlying felony is arrested, and "merges" into the felony murder conviction. We have held that:

> The felony murder merger doctrine provides that "[w]hen a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002). "[W]hen the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder[.]" *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (quoting *State v. Small*, 293 N.C. 646, 660, 239 S.E.2d 429, 438–39 (1977)); compare *State v. Lewis*, 321 N.C. 42, 50, 361 S.E.2d 728, 733 (1987) (stating that if a defendant's conviction of first-degree murder is based on both the felony murder rule and premeditation and deliberation, a defendant may be sentenced for both first-degree murder and the underlying felony).

State v. Rush, 196 N.C. App. 307, 313-14, 674 S.E.2d 764, 770 (2009).

In support of his position, defendant cites *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000). In *Jones*, the defendant was charged with two counts of first-degree murder and several counts of assault after striking a vehicle from behind, causing a collision which injured multiple passengers and resulted in the death of two. The defendant was found guilty of first-degree murder under the felony murder rule and of multiple charges of assault against the surviving passengers. In dictum, the Supreme Court observed that the definition of felony murder includes a blanket category of "'other felon[ies] committed or attempted with the use of a deadly weapon,' which includes such crimes as [assault with a deadly weapon inflicting serious injury] and shooting into an occupied dwelling or vehicle." *Id.* at 167, 538 S.E.2d at 924. In a footnote, the Court in *Jones* further noted:

> Although this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim . . . cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule. Otherwise, virtually all felonious assaults on a single victim that result in his or her death would be first-degree murders via felony murder, thereby negating lesser homicide charges such as second-degree murder and manslaughter.

Id., at 170 n. 3, 538 S.E.2d at 926 n. 3.

The offense of discharging a firearm into an occupied vehicle while the vehicle is in operation differs, however, from ordinary assault. In the instant case, the underlying offense of discharging a firearm into an occupied vehicle is defined thus:

> (a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.
>
> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft,

> watercraft, or other conveyance that is in operation is guilty of a Class D felony.
>
> (c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

N.C. Gen. Stat. § 14-34.1 (2013). Of particular significance is the fact that a person may be found guilty of discharging a firearm into an occupied vehicle that is in operation even if defendant's conduct does not cause bodily injury to any person. Moreover, "[t]his Court . . . has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Wall*, 304 N.C. at 612-13, 286 S.E.2d at 71 (citing *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973); *State v. Capps*, 134 N.C. 622, 46 S.E. 730 (1904)).

In *Wall*, the defendant, a store clerk, attempted to stop a shoplifter by firing a gun into her departing vehicle, resulting in the death of the driver. The defendant was charged with first-degree murder under the felony murder statute. On appeal, defendant urged our Supreme Court to apply the merger doctrine. The Court noted that the rule is attributed to the California case of *People v. Ireland*, 70 Cal.2d 522, 450 P.2d 580, 75 Cal.Rptr. 188 (1969). In *Ireland*, the California court held that "a ... felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." *Wall*, 304 N.C. at 612, 286 S.E.2d at 71 (emphasis in original) (quoting *Ireland*, 70 Cal.2d at 539, 450 P.2d at 590, 75 Cal.Rptr. at 198). Our Supreme Court noted that "[t]he felony of discharging a firearm into occupied property, G.S. 14-34.1, appears to be such an integral part of the homicide in the instant case as to bar a felony-murder conviction under the California merger doctrine." *Id.* The Court went on to observe that "[t]his Court, however, has expressly upheld convictions for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property." *Id.* Based upon North Carolina precedent, the Court held that discharging a firearm into occupied property, specifically into a vehicle while it was in operation, did not merge into felony murder in such a manner as to preclude the homicide charge. Relying on *Wall*, our courts have repeatedly declined to extend the merger doctrine into this area. *See e.g. State v. Mash*, 305 N.C. 285, 288, 287 S.E.2d 824, 826 (1982); *State v. King*, 316 N.C. 78, 81-82, 340 S.E.2d 71, 73-74 (1986); *State v. Jackso*n, 189 N.C. App. 747, 752, 659 S.E.2d 73, 77 (2008); *State v. Hicks*, ___ N.C. App. ___,

___, 772 S.E.2d 486, 489 (2015). Our precedent clearly states that discharging a firearm into occupied property is a felony involving a deadly weapon, and as such supports a charge of first-degree murder based upon the felony murder theory.

In the case at bar, the offense underlying felony murder was the willful or wanton discharge of a firearm into a vehicle, which is a felony irrespective of the outcome. Defendant's arguments that it should merge into felony murder, and that as a result the charge of felony murder should have been dismissed, are specious.

This argument is without merit.

III. Lesser Offenses

[2] In his second argument, defendant contends that the trial court erred in denying his request to instruct the jury on the lesser offenses of second-degree murder and voluntary manslaughter. We agree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

B. Analysis

At trial, defendant requested that the jury be instructed on the lesser included offenses of second-degree murder and voluntary manslaughter. The trial court denied this request, and the jury was instructed only on the charge of first-degree murder pursuant to the felony murder theory. Defendant contends that this constituted reversible error.

Defendant first maintains that there was conflict concerning the underlying felony, which defendant argues merges into felony murder. We have discussed and dismissed this argument in section II B of this opinion, above.

Defendant next asserts that there was conflict regarding whether defendant acted in self-defense. Self-defense is not a defense to first-degree murder under the felony murder rule; it may be a defense solely to the underlying felony, and then only if it is perfect self-defense. *State v. Richardson*, 341 N.C. 658, 668-69, 462 S.E.2d 492, 499 (1995). We

further note that, in the instant case, the jury was instructed on perfect self-defense. Our Supreme Court in *Millsaps* established when instructions on lesser included offenses were to be given with respect to felony murder:

> (i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555.
>
> . . .
>
> (iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and deliberate murder if the case is submitted on felony murder only. *See State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

Millsaps, 356 N.C. at 565, 572 S.E.2d at 773-74.

The evidence supporting the underlying felony is in conflict. As previously discussed, the underlying felony of discharging a firearm into an occupied vehicle while it is in operation requires simply that a defendant (1) willfully or wantonly discharges (2) a weapon (3) into an occupied vehicle (4) that is in operation. N.C. Gen. Stat. § 14-34.1(b). There is no question that this transpired. Defendant fired a gun into Canjay's vehicle while Canjay was driving it. The evidence also showed, however, that defendant and his associates were leaving from in front of Canjay's home when Canjay pursued them in his vehicle, ramming into their vehicle twice. This evidence is sufficient to support a finding that defendant had a reasonable fear for his safety and was within his rights to fire his gun in self-defense.

A finding that defendant acted in reasonable self-defense would have rendered him not guilty of a charge of discharging a firearm into an occupied vehicle and would have necessarily precluded a finding of guilt for first-degree murder based upon felony murder. The evidence, however, would have been sufficient to support a lesser included offense. As such, we hold that defendant has adequately demonstrated that it was

error to deny defendant's request that the jury be instructed on the lesser included offenses of second degree murder and voluntary manslaughter.

IV. Self-Defense

[3] In his third argument, defendant contends that the trial court committed plain error by instructing the jury that defendant could not receive the benefit of self-defense if he was found to be the aggressor. We agree.

A. Standard of Review

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [T]he plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Analysis

At trial, the trial court instructed the jury that defendant was not entitled to the benefit of self-defense on the felony of discharging a firearm into an occupied vehicle if defendant was the aggressor in that situation. As defendant failed to object to this instruction at trial, we review it for plain error.

Our courts have consistently held that it is reversible error to instruct the jury on the aggressor doctrine of self-defense where there is no evidence that the defendant was the initial aggressor. *See e.g. State v. Washington*, 234 N.C. 531, 535, 67 S.E.2d 498, 501 (1951); *State*

v. Jenkins, 202 N.C. App. 291, 299, 688 S.E.2d 101, 106-07 (2010); *State v. Tann*, 57 N.C. App. 527, 530-31, 291 S.E.2d 824, 827 (1982). The initial aggressor doctrine provides that "the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). Although our courts have not explicitly defined an "initial aggressor," we have held that withdrawing from conflict is a means by which a person can avoid that status.

In the instant case, the evidence at trial tended to show that: (1) defendant waited in the Acura while his associates broke into vehicles to steal car stereos; (2) Canjay discovered the break-ins, grabbed a machete, and chased defendant's associates back to the Acura; (3) after eluding Canjay, defendant and his associates returned to Canjay's residence and stole a stereo from a vehicle nearby; (4) Canjay spotted defendant's associates and pursued the Acura in his own car; (5) Canjay used his car to ram the Acura twice; and (6) defendant fired into Canjay's vehicle. Even if we were to assume that defendant's conduct rose to the level of aggression, his withdrawal in the Acura removes him from the realm of the initial aggressor. Canjay's pursuit of defendant and his associates reframes the conflict, placing Canjay in the role of aggressor when he used force against defendant and his companions. As there was no evidence to support a determination that defendant was the initial aggressor, the trial court erred in issuing an instruction on the initial aggressor exception to self-defense.

NO ERROR IN PART, REVERSED AND REMANDED IN PART.

Judges STEPHENS and McCULLOUGH concur.

STATE v. MASTOR

[243 N.C. App. 476 (2015)]

STATE OF NORTH CAROLINA
v.
ALLYSON S. MASTOR

No. COA15-365

Filed 6 October 2015

1. Sexual Offenses—convicted sexual offender—not synonymous with registered sexual offender

The superior court's findings of fact supported its determination that a mother was in indirect criminal contempt where she entered into a child custody agreement that included a provision forbidding contact between the children and "any convicted sex offender"; the mother entered into a relationship with a man convicted of felony secret peeping (Kistel); and Kistel was in the presence of the children on New Year's Eve. Although the mother contended that Kistel was not a "convicted sex offender" because he was not required to register as a sex offender, the inherent sexual nature of Kistel's conduct was apparent, the trial court could have exercised its discretion to require Kistel to register as a sex offender, and the fact that the term "convicted sex offender" is not specifically defined in the North Carolina criminal statutes does not foreclose the Court of Appeals' ability to determine the intended meaning of the words. Kistel was a convicted sex offender.

2. Sex Offenders—convicted sex offender—meaning within terms of consent agreement

In an action in which a mother was held in criminal contempt for violating a child custody consent order by allowing the children to be around a convicted sex offender (Kistrel), Kistrel was a "convicted sex offender" within the meaning of the consent order where the parties stipulated to the district court finding that Kistrel was a convicted sex offender as that term was agreed to by the parties and included in the consent order.

3. Appeal and Error—preservation of issues—constitutional issue—not raised at trial

Defendant did not preserve for appeal the issue of whether "sex offender" is unconstitutionally vague where the issue was not raised below.

4. Contempt—criminal—willful violation of consent order—not raised below

The finding in a criminal contempt proceeding that defendant willfully failed to comply with a consent order was supported by the unchallenged findings from the district court, to which the parties stipulated, and competent evidence in record and from the contempt hearing. Defendant argued that she did not willfully violate the consent order by allowing her children to be in the presence of a convicted sex offender because of the ambiguity of the term. The term "convicted sex offender" was not ambiguous.

Appeal by defendant Allyson S. Mastor from order entered 24 October 2014 by Judge Julia Lynn Gullet in Iredell County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Rebecca E. Lem, for the State.

Arnold & Smith, PLLC, by Kyle A. Frost and J. Bradley Smith, for defendant-appellant Allyson S. Mastor.

Homesley & Wingo Law Group, PLLC, by Andrew J. Wingo and Clark D. Tew for amicus curiae Jason E. Mastor.

TYSON, Judge.

Allyson S. Mastor ("Defendant") appeals from order entered holding her in criminal contempt. We affirm.

I. Factual Background

Defendant and Jason E. Mastor ("Jason") married on 7 February 1998. The parties separated on 8 January 2012. Three children were born of the marriage: twin girls J.M.M. and M.B.M., born 20 September 2000, and J.E.M., born 24 May 2006. On 21 September 2012, Defendant filed a complaint, in which she sought: (1) custody and child support; (2) alimony/post-separation support; (3) equitable distribution; and, (4) attorney's fees. Jason filed an answer and counterclaim, in which he alleged Defendant had been having an affair with Carl Kistel ("Kistel") since 2010, and Kistel was indicted on pending felony charges as an alleged sex offender.

The parties entered into a consent order ("the Consent Order") on 18 December 2012, in which they agreed to share joint legal custody of

the minor children. The Consent Order specified "[n]either party shall have any convicted sex offender in the presence of the minor children."

Kistel was involved in his own civil domestic divorce matter during October 2012. At a temporary child custody hearing, Kistel admitted to placing a camera in his shoe and "photograph[ing] up to fifteen clips of improper graphics of adult females." The district court entered an order finding Kistel engaged in conduct that resulted in indictment for felony secret peeping, pursuant to N.C. Gen. Stat. § 14-202 (2013). The district court ordered Kistel to "enroll in an intensive behavioral oriented psychotherapy program" and that he "continue to not expose the children to any pornography, nude photographs, or sexually explicit material in the nature of television, telephone, audio, video, etc." The criminal charges against Kistel were still pending in Lincoln County Superior Court at the time the district court entered the Consent Order at bar.

On 24 January 2014, Jason filed a motion for contempt against Defendant for violating the Consent Order. Jason alleged Kistel had pled guilty to felony secret peeping, and was a convicted sex offender. Jason also averred Kistel and Defendant were involved in a romantic relationship, and Defendant had allowed Kistel to be in the presence of their children.

Jason attached to his motion for contempt a copy of Kistel's 7 May 2013 guilty plea, judgment, and sentencing. The Lincoln County Superior Court sentenced Kistel to a suspended sentence of 5-6 months incarceration. Kistel was placed on 24 months supervised probation and ordered to "not possess any video recording devices with exception of a smart phone which is subject to inspection by [probation officer] at any time; not possess any sex oriented, pornographic or video materials" and required his "computer [to be] subject to inspection by [probation officer] at any time[.]"

A hearing was held on Jason's motion for contempt on 28 May 2014. The district court made the following findings of fact and entered an order on 4 June 2014:

> 3. That an Order was entered into by the parties on December 18, 2012, in which the Order provided, among other things:
>
> > B9. "Neither party shall have any convicted sex offender in the presence of the minor children."
>
> 4. That Carl J. Kistel, III was convicted of felony secret peeping on May 7, 2013 in the Superior Court of Lincoln County.

> 5. That [Defendant] willfully and voluntarily allowed Mr. Kistel to be in the presence of the minor children on New Year's Eve 2013, where Mr. Kistel was at the house of [Defendant], ate food with the minor children and stayed with [Defendant] and the minor children until after the ball dropped.
>
> 6. That [Jason] has proved beyond a reasonable doubt that [Defendant] has willfully and voluntarily brought the minor children into the presence of a convicted sex offender in violation of the December 18, 2012 consent order.

The district court held Defendant in indirect criminal contempt of the Consent Order based on its findings of fact. The district court ordered Defendant to pay a $500.00 fine. Defendant appealed the order to superior court.

Defendant's appeal came on for hearing in Iredell County Superior Court on 5 September 2014. The parties stipulated to all of the findings of fact set forth in the district court's order prior to the hearing. The only matter at issue before the superior court was the legal sufficiency of the district court's order, as it pertained to the term "convicted sex offender." The superior court entered an order holding Defendant in criminal contempt on 24 October 2014. The superior court concluded as follows:

> 4. N.C.G.S. § 14-202(d) [the felony secret peeping statute] provides that any person who secretly uses any device to create a photographic image of another person in that room for the purpose of arousing or gratifying the sexual desire of any person shall be guilty of a Class I felony.
>
> 5. Although the term "sex offender" is not specifically defined in the North Carolina General Statutes, N.C.G.S. § 14-208.5 provides that protection of the public from sex offenders is a paramount governmental interest. The Class I felony of secret peeping is included in the list of criminal offenses for which a person may be required to register as a sex offender if the sentencing judge deems it necessary. The Court recognizes that the sentencing in the underlying offense of Mr. Kistel did not require Mr. Kistel to register as a sex offender, *but the Court finds that the judge's decision to not require the defendant to register does not change the nature of the crime. Therefore, the Court concludes that a violation of N.C.G.S. § 14-202(d) is indeed*

> *a sex offense within the meaning of the December 18, 2012 Consent Order.*
>
> 6. It is the responsibility of the parties to a contract or proposed consent order to make sure they understand the terms of the contract before each party signs a consent order.
>
> 7. That the December 18, 2012 Consent Order . . . is a valid, enforceable order of the Court, and it was entered into freely and voluntarily by the Defendant and Jason Mastor.
>
> 8. That the Court concludes as a matter of law that the Defendant has, and without just cause, failed to comply with the previous Order of the Court and as such is in indirect criminal contempt pursuant to N.C.G.S. § 5A-11(a)(3).

(emphasis supplied). The superior court also imposed a $500.00 criminal fine against Defendant.

Defendant gave timely notice of appeal to this Court.

II. Issue

Defendant argues the trial court erred by holding her in criminal contempt for willfully violating the Consent Order provision which forbade her from allowing the children to be in the presence of a convicted sex offender.

Defendant contends (1) Kistel is not a "convicted sex offender" under North Carolina law; (2) the term "convicted sex offender" is unconstitutionally vague because it is undefined in the North Carolina criminal statutes; and (3) Defendant's noncompliance with the Consent Order was not "willful."

III. Standard of Review

Defendant appeals an order holding her in criminal contempt under N.C. Gen. Stat. § 5A-11(a)(3) (2013). A contempt hearing is a non-jury proceeding.

> The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

Sessler v. Marsh, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citations omitted).

"The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted).

IV. Analysis

A. "Sex Offender": North Carolina Law and the Consent Order

1. North Carolina Law

[1] Defendant argues she did not violate the Consent Order because Kistel is not a "convicted sex offender" under North Carolina law. Defendant attempts to argue the term "convicted sex offender," as used in the Consent Order, carries the same legal meaning as the term "registered sex offender." Defendant contends Kistel is not a "convicted sex offender" because Kistel was not required to register as a sex offender. We disagree.

The fact that the term "convicted sex offender" is not specifically defined in the North Carolina criminal statutes does not foreclose this Court's ability to determine the intended meaning of the words.

"Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent." *First Bank v. S & R Grandview, L.L.C.*, __ N.C. App. __, __, 755 S.E.2d 393, 394 (2014) (internal citations omitted).

"If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning. When, however, a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citations and internal quotation marks omitted). "Statutory language is ambiguous if it is fairly susceptible of two or more meanings." *Purcell v. Friday Staffing*, __ N.C. App. __, __, 761 S.E.2d 694, 698 (2014) (citations and internal quotation marks omitted).

Black's Law Dictionary defines "sexual offense" as "[a]n offense involving unlawful sexual conduct, such as prostitution, indecent exposure, incest, pederasty, and bestiality." *Black's Law Dictionary*, 712 (10th ed. 2014).

Kistel pled guilty to the criminal offense of felony secret peeping under N.C. Gen. Stat. § 14-202. It is unclear from the record under which subsection — (d), (e), or (f) — Kistel pled guilty. Both N.C. Gen. Stat. §§ 14-202(d) and (f) explicitly prohibit secret peeping "*for the purpose of arousing or gratifying the sexual desire of any person*." N.C. Gen. Stat. §§ 14-202(d), (f) (2013) (emphasis supplied).

An individual convicted of felony secret peeping under N.C. Gen. Stat. §§ 14-202(d)-(f) may be required to register as a sex offender "[i]f the sentencing court rules that the person is a danger to the community" and registration would "further the purposes" of the Sex Offender Registration Program. N.C. Gen. Stat. § 14-202(l) (2013). N.C. Gen. Stat. § 14-202(e) does not explicitly use the language: "for the purpose of arousing or gratifying the sexual desire of any person." N.C. Gen. Stat. §§ 14-202(d), (f). Its inclusion as a reportable offense, subject to enrollment under the North Carolina Sex Offender Registration Program clearly indicates the offense is one of a sexual nature.

The conduct proscribed by the felony secret peeping statute constitutes a "sexual offense," based on the Black's Law Dictionary definition, and subject to the statute's express limitation in subsections (d) and (f) that a defendant's actions are "*for the purpose of arousing or gratifying the sexual desire of any person*." *Id.* (emphasis supplied).

Kistel pled guilty to felony secret peeping under the statute containing the language above, and was sentenced under the felony secret peeping statute. The trial court could have exercised its discretion to require Kistel to register as a sex offender. Kistel is a convicted sex offender.

Defendant argues only those individuals convicted of offenses, which statutorily require them to actually register as sex offenders, or whose sentence imposed by the court requires them to register as sex offenders, are in fact convicted sex offenders. Defendant asserts "convicted sex offender" is synonymous with "registered sex offender." Defendant's argument is misplaced. If Defendant's assertion is correct, there would be no need for the General Assembly to set forth which convicted sex offenders are required to enroll in the state's sex offender registry, those which are not, and those offenses for which enrollment is within the trial court's discretion. *See generally* N.C. Gen. Stat. § 14-202(l).

This Court has recognized not all convicted sex offenders, such as Kistel, are required to enroll in the sex offender registry. *See* N.C. Gen. Stat. § 14-208.5 (2013). In *State v. Pell*, this Court analyzed the requirement that an individual convicted of a sex offense pose a "danger to

the community" in order to compel sex offender registration. We held "[w]hen examining the purposes of the sex offender registration statute, it is clear that 'danger to the community' refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment." 211 N.C. App. 376, 379, 712 S.E.2d 189, 191 (2011). A finding of "danger to the community" by the sentencing court would be unnecessary and redundant were we to accept Defendant's contention. *Id.*

Kistel's guilty plea to felony secret peeping stemmed from behavior in which he hid a camera in his shoe and intentionally positioned his shoe in an area to allow him to film up and underneath women's skirts and dresses, without their knowledge or consent. The inherent sexual nature of Kistel's conduct is apparent. Kistel's behavior was motivated by "the purpose of arousing or gratifying [his] sexual desire" and is a sexual crime. N.C. Gen. Stat. § 14-202(d). Kistel pled guilty to a sex offense, and after judgment was entered thereon, became a "convicted sex offender" under North Carolina law, regardless of whether the sentencing court required him to enroll in the sex offender registry.

2. "Convicted Sex Offender" as Intended in the Consent Order

[2] Kistel is a "convicted sex offender" within the meaning of the Consent Order, to support Defendant's criminal contempt.

On appeal to the superior court, the parties stipulated to "the findings and the underlying basis of the District Court Order." The district court's findings of fact provided, in pertinent part:

> 5. That [Defendant] willfully and voluntarily allowed Mr. Kistel to be in the presence of the minor children on New Year's Eve 2013, where Mr. Kistel was at the house of [Defendant], ate food with the minor children and stayed with [Defendant] and the minor children until after the ball dropped.
>
> 6. That [Jason] has proved beyond a reasonable doubt that Carl J. Kistel, III is a convicted sex offender.

"[S]tipulations duly made during the course of a trial constitute judicial admissions on the parties and [dispense] with the necessity of proof." *State v. Simon*, 185 N.C. App. 247, 255, 648 S.E.2d 853, 858 (2007) (citation and quotation marks omitted). The district court found as fact and beyond a reasonable doubt that Kistel was a "convicted sex offender," as that term was agreed to by the parties and included in the Consent Order. The parties stipulated to this finding of fact on appeal to

the superior court. Defendant is bound by this stipulation. *See Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 679, 599 S.E.2d 581, 585 (2004) (holding stipulation signed by parties prior to trial was binding as a judicial admission).

The circumstances surrounding the Consent Order also indicate Jason's concern that Kistel might become a "convicted sex offender," for purposes of that order. Jason's answer to Plaintiff's original complaint made numerous references to Kistel's status as an "alleged sex offender" while the indictment was pending, and his concern for the well-being and safety of his children, if they were allowed to be in Kistel's presence. The record clearly shows the inclusion of the "convicted sex offender" provision in the Consent Order was specifically targeted at Defendant's relationship with Kistel. Kistel's felony secret peeping charges, which Jason knew of, were pending at this time, and became final upon Kistel's guilty plea.

Defendant's "stipulat[ion] to the findings and the underlying basis of the District Court Order" also shows Kistel is a "convicted sex offender," both under North Carolina law and within the meaning of the Consent Order, regardless of whether he was required by the sentencing judge to enroll in the sex offender registry. This argument is overruled.

B. Impermissible Vagueness

[3] Defendant argues she cannot be held in criminal contempt for violating the Consent Order because the term "sex offender" is unconstitutionally vague. Defendant makes this argument for the first time, on appeal.

"A constitutional issue not raised at trial will generally not be considered for the first time on appeal." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation and quotation marks omitted). Here, Defendant did not raise or argue any constitutional vagueness objections, before either the district or superior courts. Defendant has failed to preserve this issue for appellate review. We decline to review Defendant's constitutional argument for the first time on appeal. This argument is dismissed.

C. "Willfullness"

[4] Defendant argues she cannot be held in criminal contempt for violating the Consent Order because she did not do so willfully.

A party "may be held in contempt for failure to comply with the terms of an agreement, *only if [her] failure is willful*." *Cavenaugh*

v. Cavenaugh, 317 N.C. 652, 660, 347 S.E.2d 19, 25 (1986) (emphasis in original) (citation omitted).

Defendant's argument is based on her primary contention, discussed *supra*, that the term "convicted sex offender" is ambiguous as it appears in the North Carolina statutes. Defendant argues she did not willfully violate the Consent Order by allowing her children to be in the presence of a "convicted sex offender," because of the ambiguity of the term. We have determined the term "convicted sex offender" is not ambiguous, either under the North Carolina criminal statutes, or the Consent Order.

The district and superior courts found Defendant "willfully and voluntarily allowed Mr. Kistel to be in the presence of the minor children[.]" While Defendant may have believed or hoped the terms "convicted sex offender" and "registered sex offender" were synonymous, the unchallenged findings of fact from the district court, to which the parties stipulated, and competent evidence in the record and from the contempt hearing support this finding. This argument is overruled.

V. Conclusion

The district court found and determined, beyond a reasonable doubt, Kistel was a "convicted sex offender," as provided in the Consent Order. Kistel pled guilty to felony secret peeping. North Carolina law and the Consent Order support the district court's determination. The parties' stipulated, before the superior court, to the district court's finding of fact that Kistel was a "convicted sex offender." Defendant is bound by this determination.

Defendant failed to raise her constitutional vagueness argument before either trial court. Defendant has failed to preserve this argument for appellate review.

The superior court's finding of fact that Defendant willfully allowed her children to be in the presence of a "convicted sex offender" is supported by the stipulated findings of fact and competent evidence. The superior court's findings of fact support its determination that Defendant was in indirect criminal contempt of the Consent Order. The superior court's order is affirmed.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE v. McLAMB

[243 N.C. App. 486 (2015)]

STATE OF NORTH CAROLINA
V.
JIMMIE RODGERS McLAMB

No. COA15-39

Filed 6 October 2015

Indictment and Information—sexual offender registration—failure to report change of address in writing

There was no error in a prosecution for failure to register as a sex offender where defendant contended that the indictment was required to allege that he failed to report his change of address in writing and within three business days. Defendant had notice of the requirements of the statute, had complied on prior occasions, and did not argue that his trial preparation was prejudiced. The indictment in this case was couched in the language of the statute and sufficiently alleged this element of the offense.

Appeal by defendant from judgment entered 21 July 2014 by Judge Phyllis M. Gorham in Sampson County Superior Court. Heard in the Court of Appeals 13 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Hal F. Askins, for the State.

Guy J. Loranger for defendant-appellant.

McCULLOUGH, Judge.

Jimmie Rodgers McLamb ("defendant") appeals from judgment entered upon his conviction for failure to register as a sex offender. On appeal, defendant contends that the indictment was insufficient to confer subject matter jurisdiction upon the trial court. For the following reasons, we find no error.

I. Background

On 13 June 2007, defendant pleaded guilty to sexual battery in violation of N.C. Gen. Stat. § 14-27.5A(a) in Duplin County Superior Court. As a result of this conviction, defendant was required to register as a sex offender under N.C. Gen. Stat. § 14-208.7 *et seq.* Defendant was later arrested on 21 May 2013 by Captain Julian Carr of the Sampson County Sheriff's Office during "Operation Southern Watch," an initiative under

the Sampson County Sheriff's Office Registering Verification Campaign. On 16 October 2013, a Sampson County Grand Jury indicted defendant for failure to register as a sex offender in violation of N.C. Gen. Stat. § 14-208.11. Defendant pleaded not guilty and his case was called for trial in Sampson County Superior Court before the Honorable Phyllis M. Gorham on 21 July 2014.

At trial, the State presented evidence tending to establish the following facts: On 21 May 2013, defendant was discovered residing at 206 Smith Key Lane in Clinton. Defendant had previously been evicted in December 2012 from the address where he last registered, 1134 Renfrow Road in Clinton. After a period of homelessness, defendant moved to 206 Smith Key Lane sometime in January 2013, where he had taken residence for approximately four months.

Before his 21 May 2013 arrest, defendant was first registered with the Duplin County Sheriff's Office on 20 June 2007. On 1 May 2009, defendant moved to Sampson County and updated his address with the Sampson County Sheriff's Office. On 1 April 2011, defendant acknowledged his duty to register and initialed his understanding for each of the registration requirements on State Bureau of Investigation (S.B.I.) Form CIIS – 65, Sex Offender Duty to Register Offender Acknowledgement. This acknowledgement was completed and signed by defendant at the Sampson County Sheriff's Office. On 21 September 2012, defendant moved within Sampson County to 1134 Renfrow Road and again updated his address with the Sampson County Sheriff's Office. This was the last address defendant registered before his arrest. On 12 March 2013, the S.B.I. mailed a Verification of Information letter to defendant. On 18 March 2013, defendant brought the letter to the Sampson County Sheriff's Office and signed the document to certify that his address information and all information provided on file was true and complete. Daomi Strickland, Supervisor of Sampson County Sheriff's Office clerical staff, testified at trial that when defendant verified his address on 18 March 2013, he affirmed that he still lived at 1134 Renfrow Road and did not change his address.

At the close of the State's evidence, defendant moved to dismiss the charges, and the motion was denied by the trial court. Defendant testified on his own behalf and disputed the dates and locations to where he moved after his December 2012 eviction and his understanding of his ongoing duty to register as a sex offender. Defendant acknowledged in his testimony that he no longer lived at his last registered address and that he did not update the Sampson County Sheriff's Office after his eviction. Defendant also testified that he did not provide an updated address

on 18 March 2013 when he reported to the Sheriff's Office to verify his information. After the completion of his testimony, defendant did not present additional evidence. Defendant instead renewed his motion to dismiss the charges. The trial court denied defendant's motion and gave the case to the jury.

After a period of deliberation, the jury returned a verdict finding defendant guilty of failure to register as a sex offender. The trial court then entered judgment sentencing defendant in the mitigated range to a term of 17 to 30 months imprisonment, awarding credit for 254 days of pre-trial confinement. Defendant gave oral notice of appeal in open court.

II. Discussion

Now on appeal, defendant argues that the trial court lacked subject matter jurisdiction where the indictment charging him with failure to register as a sex offender lacked allegations that he failed to provide "written notice" of his address change "within three business days" of the change. Consequently, defendant argues that his indictment was fatally flawed and his conviction must be vacated. We disagree.

Our Court reviews the sufficiency of an indictment under the *de novo* standard. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). N.C. Gen. Stat. § 15A–924(a)(5) requires an indictment to contain

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

N.C. Gen. Stat. § 15A–924(a)(5) (2013). Our Supreme Court has stated that an indictment "is sufficient if it charges the offense in a plain, intelligible and explicit manner." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). The purposes of the indictment are "to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). "An indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *State v. Singleton*, 85 N.C. App. 123, 126, 354 S.E.2d 259, 262 (1987) (citing *State v. Palmer*,

293 N.C. 633, 239 S.E.2d 406 (1977)). It is also generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense. *Id.* Further, "[o]ur courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012).

The three essential elements of the offense described in N.C. Gen. Stat. § 14-208.9 are: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. Barnett*, 223 N.C. App. 65, 69, 733 S.E.2d 95, 98 (2012). In this case, defendant's argument on appeal only challenges the sufficiency of the indictment relating to the third element. It is clear the first two elements are sufficiently alleged.

Although an unpublished opinion of this Court does not constitute controlling legal authority, *see* N.C. R. App. P. 30(e)(3) (2015), on appeal, defendant primarily relies on this Court's unpublished decision in *State v. Osborne*, No. COA 13-1372, 2014 N.C. App. LEXIS 700, 2014 WL 2993855 (N.C. App. July 1, 2014). In *Osborne*, this Court determined an indictment for failure to register was fatally defective because "(1) it [did] not allege that [the defendant] failed to notify the [sheriff's office] in *writing*, and (2) it [did] not specify the time requirement as within three *business* days of [the defendant's] move to a new address." *Id.* 2014 N.C. App. LEXIS 700, at *8, 2014 WL 2993855, at *3 (emphasis in original). As this Court has recognized, "[i]n effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14–208.9(a)—the 'written notice' requirement and the 'three business days' requirement." *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 798 (emphasis omitted), *disc. review denied*, __ N.C. __, __ S.E.2d __ (2015).

Similar to *Osborne*, defendant contends the indictment in the present case was insufficient because it lacked allegations that he failed to provide "written notice" of his address change "within three business days." We are not persuaded.

Since *Osborne*, this Court has issued separate opinions rejecting the notions that the 'written notice' requirement and the 'three business days' requirement are essential to the validity of an indictment. *See Leaks*, __ N.C. App. at __, 771 S.E.2d at 799 (holding the failure to provide in the indictment that notice of a change of address must be made

in "writing" did not constitute a fatal defect), *State v. James*, __ N.C. App. __, __ S.E.2d __ (July 7, 2015) (holding the failure to provide in the indictment that notice of a change of address must be made within three "business" days did not constitute a fatal defect). In both cases, this Court emphasized that *Osborne* was not binding and held the essential elements of the offense of failure to report a change of address as a sex offender were sufficiently alleged in the indictments to put the defendants on notice of the charge against them.[1]

In line with this Court's recent published cases, we hold the indictment in this case, which alleged "defendant . . . did, as a person required by Article 27A of Chapter 14 of the General Statutes to register, failed to notify the last registering sheriff of a change of address in that he moved from 1134 Renfrow Road in Clinton, North Carolina, on or about December 18, 2012 to 206 Smith Key Lane in Clinton, North Carolina without notifying the Sampson County Sheriff[,]" was couched in the language of the statute and sufficiently alleged the third element of the offense. To hold otherwise would be to subject the indictment to hyper technical scrutiny where in this case, over a period of months, defendant failed to give any notice to the sheriff of his change of address.

As stated earlier, the purpose of the indictment is to provide notice so that a proper defense can be prepared. *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731. Defendant did not argue at trial, nor has he convinced this Court on appeal, that his trial preparation was in any way prejudiced. We take notice from the record that defendant had actual notice of the requirements of the statute and that he acknowledged those requirements on prior occasions. Furthermore, the record shows that following prior changes of address, defendant notified the Sheriff's Office in accordance with the statutory requirements. After a careful review of the record and the issues presented, this Court sees no valid basis to hold that the indictment was fatally flawed.

III. Conclusion

While we note that the better practice would have been for the indictment to have alleged that defendant failed to report his change of

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1. Despite the fact that *Osborne* is unpublished and not binding, we further note that it is easily distinguished from the present case because the statutory reference in the indictment in *Osborne*, which alleged a violation of N.C. Gen. Stat. § 14-208.11A(2), did not correspond to the charging language, which clearly attempted to allege a violation of N.C. Gen. Stat. § 14-208.11(a)(2). *Osborne*, 2014 N.C. App. LEXIS 700, at *8, 2014 WL 2993855, at *3.

address "in writing" and "within three business days," for the reasons discussed above, we hold that the indictment was sufficient to confer subject matter jurisdiction upon the trial court.

NO ERROR.

Judges STROUD and INMAN concur.

JOHNNIE WILKES, Employee, Plaintiff
v.
CITY OF GREENVILLE, Employer, SELF-INSURED (PMA MANAGEMENT GROUP, Third-Party Administrator), Defendant

No. COA14-1193

Filed 6 October 2015

1. Workers' Compensation—additional treatment—anxiety and depression—Parsons presumption not applied—remanded

The Industrial Commission erred in a workers' compensation case by failing to apply the presumption from *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, to plaintiff's request for additional medical treatment and compensation for anxiety and depression. The *Parsons* presumption says that an employer must provide medical compensation for the treatment of compensable injuries, which includes additional medical treatment. It was evident from the Commission's opinion that the Commission did not apply the rebuttable *Parsons* presumption to plaintiff's psychological symptoms, and the matter was remanded for application of that presumption and a new determination.

2. Workers' Compensation—temporary total disability benefits—futility of job search

The Industrial Commission in a workers' compensation case erred by concluding that plaintiff was no longer entitled to temporary total disability benefits. Plaintiff demonstrated the futility of engaging in a job search and defendant made no attempt to show that suitable jobs were available to plaintiff.

Appeal by plaintiff from opinion and award entered 9 April 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 April 2015.

The Hunt Law Firm, PLLC, by Anita B. Hunt, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Matthew P. Blake, for defendant-appellee.

DAVIS, Judge.

Johnnie Wilkes ("Plaintiff") appeals from the Opinion and Award of the North Carolina Industrial Commission ("the Commission") determining that he (1) failed to demonstrate that his anxiety and depression were causally related to his work-related accident; and (2) was no longer entitled to temporary total disability benefits. After careful review, we reverse in part, vacate in part, and remand for further proceedings.

Factual Background

Plaintiff is a 62-year-old man who, at the time of his accident, had been employed by the City of Greenville ("Defendant") for approximately nine years. On 21 April 2010, Plaintiff was driving one of Defendant's trucks when a third party ran a red light and collided into the truck. The force of the accident caused the truck to collide with a tree, breaking the windshield and deploying the airbags. Plaintiff was transported to Pitt County Memorial Hospital, where he was treated for an abrasion on his head, broken ribs, and various injuries to his neck, back, pelvis, and left hip. At the hospital, Plaintiff underwent a brain MRI, which appeared "negative for acute infarction but . . . showed mild paranasal sinus disease resulting from a concussion." Plaintiff was discharged from the hospital the next day.

On 22 April 2010, Defendant filed a Form 19, reporting to the Commission that Plaintiff had in the course of performing his duties as a landscaper for the Recreation and Parks Department sustained injuries in a multi-vehicle accident. One week later, on 29 April 2010, Defendant filed a Form 60, admitting Plaintiff's entitlement to compensation for his injury by accident.

In January 2011, both parties filed a Form 33 requesting that the claim be assigned for hearing. Defendant's Form 33 stated that the "[p]arties disagree about the totality of plaintiff's complaints related to his compensable injury and need for additional medical evaluations." Plaintiff's Form 33 alleged that Plaintiff "is in need of additional medical treatment . . . specifically an evaluation by a neurosurgeon." On 4 February 2011, Deputy Commissioner Theresa B. Stephenson entered an order requiring Defendant to "send Plaintiff for a one time evaluation

to a neurosurgeon of their choosing. If that neurosurgeon recommends additional neurological or neuropsychological treatment, Defendant shall provide this and direct treatment."

On 21 September 2011, a hearing was held before Deputy Commissioner Mary C. Vilas on Defendant's Form 33 Request for Hearing. The record was closed on 18 July 2012 and then reopened by order on 10 January 2013 to allow the parties to submit three additional stipulated exhibits. Deputy Commissioner Vilas entered an opinion and award on 1 February 2013 determining that Plaintiff's low back and knee pain, anxiety, depression, sleep disorder, tinnitus (ringing in one's ears), headaches, and temporomandibular joint pain were causally related to his 21 April 2010 compensable injury and ordering Defendant to pay all of Plaintiff's medical expenses incurred or to be incurred with regard to treatment of these conditions. Deputy Commissioner Vilas also concluded that Plaintiff demonstrated "that he is capable of some work but that it would be futile to seek work at this time because of preexisting conditions of his age, full-scale IQ of 65, education level and reading capacity at grade level 2.6, previous work history of manual labor jobs, and his physical conditions resulting from his April 21, 2010 compensable injury" such that he was entitled to temporary total disability compensation.

Defendants appealed to the Full Commission, and the Commission heard the matter on 4 November 2013. On 9 April 2014, the Commission entered its Opinion and Award reversing Deputy Commissioner Vilas' decision. Specifically, the Commission concluded that (1) Plaintiff failed to meet his burden of demonstrating that his anxiety and depression were caused by his work-related accident; and (2) Plaintiff was no longer entitled to total temporary disability benefits because he "presented insufficient evidence that a job search would be futile." The Commission found that Plaintiff's tinnitus, however, was causally related to his 21 April 2010 accident and therefore ordered Defendant to pay all of Plaintiff's past and future medical expenses "that are reasonably required to effect a cure, provide relief or lessen any disability" related to his tinnitus. Plaintiff filed a timely appeal to this Court.

Analysis

Appellate 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." *Philbeck v. Univ. of Mich.*, ___ N.C. App. ___, ___, 761 S.E.2d 668, 671 (2014) (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. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, ___ N.C. App. ___, ___, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, ___ N.C. ___, 772 S.E.2d 238 (2015).

Here, Plaintiff makes two primary arguments on appeal. First, he contends that the Commission misapplied the law when considering whether he was entitled to medical compensation for his anxiety and depression. Second, he argues that the Commission erred in concluding that he was not entitled to disability benefits because he "has not presented evidence of a reasonable job search and has presented insufficient evidence that a job search would be futile." We address each of these arguments in turn.

I. Request for Additional Medical Compensation

[1] Plaintiff first argues that the Commission erred by failing to apply the presumption arising from our decision in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), to his request for additional medical treatment and compensation for his complaints of anxiety and depression. We agree.

Pursuant to N.C. Gen. Stat. § 97-25, an employer must provide medical compensation for the treatment of compensable injuries, which includes "additional medical treatment . . . directly related to the compensable injury" that is designed to effect a cure, provide relief, or lessen the period of disability. *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005), *disc. review improvidently allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006); N.C. Gen. Stat. § 97-25 (2013) (explaining that "[m]edical compensation shall be provided by the employer" for treatment of compensable injuries and employer's responsibility for such compensation includes any changes in treatment so long as "the change is reasonably necessary to effect a cure, provide relief, or lessen the period of disability").

It is well established that an employee seeking compensation for an injury bears the burden of demonstrating that the injury suffered is causally related to the work-related accident. *Hedges v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011). Once the employee meets this initial burden, however, a presumption arises — often referred to as the *Parsons* presumption — that "additional medical treatment is directly related to the compensable injury." *Perez*, 174 N.C. App. at 135,

620 S.E.2d at 292; *see also Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 182, 565 S.E.2d 209, 216-17 (2002) ("When additional medical treatment is required, there is a rebuttable presumption that it is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury.").

In *Parsons*, the plaintiff worked as an assistant manager at one of the defendant's stores and was injured when two men entered the store and assaulted her, striking her in the forehead and shooting her four times with a stun gun. *Parsons*, 126 N.C. App. at 540, 485 S.E.2d at 868. The plaintiff sought workers' compensation benefits, and the Industrial Commission entered an opinion and award determining that she had suffered compensable injuries as a result of this work-related incident and ordering the defendant to pay her medical expenses for these injuries, which consisted primarily of frequent headaches. *Id.* at 540-41, 485 S.E.2d at 868. Neither party appealed from this opinion and award. Eight months later, the plaintiff sought medical compensation for the treatment of her headaches. *Id.* at 541, 485 S.E.2d at 868. The Commission denied the plaintiff's request for medical compensation, ruling that the plaintiff " 'ha[d] not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing' and . . . 'failed to meet her burden of proof for showing the necessity of continued or additional medical treatment.' " *Id.* at 541, 485 S.E.2d at 869.

The plaintiff appealed to this Court, arguing that the Commission had erred in placing the burden on her to prove that her current headaches were caused by the employment-related assault. *Id.* at 541, 485 S.E.2d at 868. We agreed, explaining that

> [a]t the initial hearing, plaintiff's main injury complaint was headaches. At that time, it was her burden to prove the causal relationship between her 30 April 1991 accident and her headaches. Plaintiff met this burden, as evidenced by the Commission's initial opinion and award, from which there was no appeal, granting her medical expenses and future medical treatment. In effect, requiring that plaintiff once again prove a causal relationship between the accident and her headaches in order to get further medical treatment ignores this prior award. Plaintiff met her causation burden; the Industrial Commission ruled that her headaches were causally related to the compensable accident. Logically, defendants now have the responsibility to prove the original finding of compensable injury

> is unrelated to her present discomfort. To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees.

Id. at 542, 485 S.E.2d at 869 (internal citation omitted).

This Court has applied the *Parsons* presumption to additional medical treatment not only when the initial determination of compensability is made by the Commission in an opinion and award, *see id.*, but also when the employer makes an admission of compensability by filing a Form 60, *see Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 ("As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context.").

Plaintiff asserts that because Defendant filed a Form 60, which admitted that he had suffered a compensable injury by accident, he was entitled to the presumption that the additional medical treatment he sought for his symptoms of anxiety and depression was directly related to his compensable injury. Defendant contends that Plaintiff is not entitled to the *Parsons* presumption because it admitted compensability only as to the injuries Plaintiff suffered to his "ribs, neck, legs and entire left side" and not to Plaintiff's complaints relating to anxiety and depression. However, our caselaw since *Perez* has made clear that the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable. *See Carr v. Dep't of Health & Human Servs. (Caswell Ctr.)*, 218 N.C. App. 151, 156, 720 S.E.2d 869, 874 (2012) (rejecting defendant's argument that "the *Parsons* presumption does not apply when plaintiff's injury is a wholly different injury from the one accepted on the Form 60" where plaintiff sought additional medical treatment for a neck injury after defendant had admitted the compensability of her left hand injury).

This Court addressed this same issue in *Perez*. The plaintiff in *Perez* was employed as a flight attendant and slipped and fell while carrying luggage down a stairway. *Perez*, 174 N.C. App. at 129, 620 S.E.2d at 289. The plaintiff immediately felt pain in her leg, hip, and lower back, and the defendant-employer filed a Form 60 shortly after the incident admitting the compensability of her injury, which was described on the Form 60 as a "Sprain, Strain Lower Back." *Id.* at 129, 137 n.1, 620 S.E.2d at 289,

293 n.1. The plaintiff returned to work as a flight attendant for several years before changing careers. *Id.* at 130, 620 S.E.2d at 289.

Approximately four years after the injury, the plaintiff's lower back pain "started to intensify again," and she sought medical treatment for her symptoms. *Id.* The plaintiff sought medical compensation for this treatment from the defendant, which the Commission awarded. *Id.* The defendant-employer appealed, arguing that the plaintiff was not entitled to additional medical compensation because she failed to produce evidence that her current symptoms were causally related to the compensable injury that had occurred four years earlier. *Id.* at 130-31, 620 S.E.2d at 290. Specifically, the defendant-employer contended that the *Parsons* presumption did not apply to the plaintiff because the plaintiff's "herniated disc was a different injury from the injury stated on the Form 60 and, therefore, the admission of compensability does not cover this later and distinct injury." *Id.* at 136 n.1, 620 S.E.2d at 293 n.1. We rejected this argument, explaining that

> [t]he presumption of compensability applies to future symptoms allegedly related to the original compensable injury. We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. *But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.*

Id. at 137 n.1, 620 S.E.2d at 293 n.1 (emphasis added).

In the present case, Plaintiff requested additional medical treatment for his anxiety and depression, which he alleged was the result of the 21 April 2010 accident. Plaintiff has been evaluated by several medical and psychological professionals, who expressed differing opinions both as to Plaintiff's veracity in reporting these symptoms and as to whether the psychological complaints were, in fact, causally linked to the 21 April 2010 accident. In its Opinion and Award, the Commission denied Plaintiff additional medical compensation for his anxiety and depression, stating that based on the conflicting testimony of the physicians and psychologists who evaluated him, "Plaintiff has not met his burden of showing that his alleged depression and anxiety is a result of the 21 April 2010 work-related accident."

Thus, it is evident from the Opinion and Award that the Commission did not apply the rebuttable presumption under *Parsons* to Plaintiff's psychological symptoms and instead kept the burden on Plaintiff to demonstrate causation despite Defendant's prior admission of

compensability in the Form 60. Based on our Court's decisions in *Parsons*, *Perez*, and *Carr*, we hold that doing so was a misapplication of the law. Consequently, we remand this matter to the Commission so that it may apply the *Parsons* presumption and then make a new determination as to whether Plaintiff's psychological symptoms are causally related to the 21 April 2010 injury. *See Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 260, 523 S.E.2d 720, 723-24 (1999) (remanding "this case to the Commission for a new determination of causation" where the Commission's findings indicated that it "failed to give Plaintiff the benefit of the presumption that his medical treatment now sought was causally related to his 1995 compensable injury"); *see also Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." (citation and quotation marks omitted)).

We express no opinion on the question of whether the evidence of record is sufficient to rebut the presumption that Plaintiff's current complaints are directly related to his initial compensable injury. On remand, it is the role of the Commission to make this determination by evaluating the applicable evidence in order to determine whether the presumption has, in fact, been rebutted. *See Miller v. Mission Hosp., Inc.*, ___ N.C. App. ___, ___ , 760 S.E.2d. 31, 35 (2014) ("The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury. If the defendant rebuts the *Parsons* presumption, the burden of proof shifts back to the plaintiff." (internal citations and quotation marks omitted)).

II. Disability Benefits

[2] Plaintiff next argues that the Commission erred in concluding that he was no longer entitled to temporary total disability benefits. We agree.

" 'Disability,' within the meaning of the North Carolina Workers' Compensation Act, is defined as 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." *Demery v. Perdue Farms, Inc.*, 143 N.C. App. 259, 264, 545 S.E.2d 485, 489 (citation and quotation marks omitted), *aff'd per curiam*, 354 N.C. 355, 554 S.E.2d 337 (2001). Thus, in order for the Commission to conclude that a plaintiff is entitled to disability benefits to compensate him for the loss in wage-earning capacity, it 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).

A plaintiff seeking to demonstrate disability may prove these first two elements of disability through several methods, including

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted); *see Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014) ("[The plaintiff] may prove the first two elements [under *Hilliard*] through any of the four methods articulated in *Russell*, but these methods are neither statutory nor exhaustive. In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury.").

Once an employee meets his initial burden of production under *Russell*, the burden shifts to the employer to rebut the evidence of disability by demonstrating "not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Johnson v. S. Tire & Serv.*, 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004) (citation and quotation marks omitted); *see also Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 360, 734 S.E.2d 125, 129 (2012). Our Supreme Court has explained that a suitable job is "one that is available to the employee and that the employee is capable of performing considering, among other things, his physical limitations" and that an employee is capable of obtaining a suitable job "when there exists a reasonable likelihood that he would be

hired if he diligently sought the job." *Johnson*, 358 N.C. at 708-09, 599 S.E.2d at 514 (citations, quotation marks, and ellipses omitted).

Here, the Commission concluded as a matter of law that Plaintiff, who was receiving total disability benefits from Defendant since the date of the 21 April 2010 accident, was no longer entitled to such benefits as of 18 January 2011, the date Defendant filed its Form 33 challenging the totality of Plaintiff's physical complaints related to his compensable injury. The Commission concluded that Plaintiff had failed to prove disability because he did not demonstrate that he had engaged in a reasonable job search and "presented insufficient evidence that a job search would be futile."

It is well established that "[t]he determination of whether a disability exists is a conclusion of law that must be based upon findings of fact supported by competent evidence." *Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 212, 576 S.E.2d 112, 113 (2003). In its Opinion and Award, the Commission cited the testimony of Dr. Kurt Voos ("Dr. Voos"), an orthopedic surgeon who examined Plaintiff and — after several follow-up appointments — "authorized Plaintiff to return to work at sedentary duty with permanent restrictions including lifting up to 10 lbs with occasional walking and standing" and then made a factual finding that Plaintiff was "incapable of returning to his previous job but is capable of working in sedentary employment."

However, the Commission also took note of several of Plaintiff's personal characteristics that relate to his employability. Specifically, the Commission found that Plaintiff (1) was 60 years old at the time of the hearing; (2) had been employed as a landscaper with Defendant since 2001; (3) had been employed in medium and heavy labor positions throughout his entire adult life; (4) attended school until the tenth grade; (5) was physically incapable of performing his former job as a landscaper/laborer; (6) has "difficulty reading and comprehending" written material as evidenced during his evaluation with Dr. Peter Schulz; and (7) has "an IQ of 65, putting him in the impaired range."

Plaintiff asserts that this uncontroverted evidence, which the Commission found as fact, was sufficient to meet his initial burden of showing that he was incapable of earning his pre-injury wages because his preexisting personal characteristics made it futile for him to seek sedentary employment — the only type of employment within his physical restrictions. We agree.

As our Supreme Court explained in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986),

> [i]f preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience.
>
> It follows where occupational . . . disease [or injury by accident] incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability.

Id. at 441, 342 S.E.2d at 808.

We find our decision in *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 656 S.E.2d 608, *aff'd per curiam*, 362 N.C. 676, 669 S.E.2d 319 (2008), instructive on this issue. In *Johnson*, the plaintiff was a 38-year-old high school graduate who worked for the defendant as a custodian for approximately 15 years before his physician excused him from work after diagnosing him with bilateral carpal tunnel syndrome. *Id.* at 384-85, 656 S.E.2d at 611. In its opinion and award, the Commission concluded that the plaintiff had suffered a compensable injury and demonstrated disability under the first prong of *Russell* by showing he was physically incapable of work in any employment. *Id.* at 389, 656 S.E.2d at 613. The defendant appealed to this Court, and "[w]hile we agree[d] with the Full Commission's ultimate conclusion that [p]laintiff [was] totally disabled and entitled to temporary total disability benefits," we concluded that the plaintiff had met his burden of proving disability under the *third* — rather than the *first* — prong of *Russell*. *Id.* That is, we concluded that although the plaintiff was capable of performing some work, his preexisting personal characteristics made a job search futile.

While the defendant argued that the plaintiff had failed to prove that engaging in a job search would be futile, we disagreed, first noting that "the fact that [p]laintiff can perform light-duty work does not in itself preclude the Full Commission from making an award of total disability if the evidence shows that, because of preexisting limitations, [p]laintiff is not qualified to perform the kind of light-duty jobs that might be available in the marketplace" and then explaining that

> the uncontradicted evidence established that [p]laintiff has only a high school education, had been working as a custodian for [d]efendant for almost his entire adult working life, and has a litany of medical problems . . . . There was no evidence that [p]laintiff was offered or received any kind of vocational rehabilitation services. Given [p]laintiff's limited education, limited work experience, and limited training, in addition to his poor health, his compensable injury causes him a greater degree of incapacity than the same injury would cause some other person with superior education or work experience, or who is in better health. Thus, all the evidence tends to show that any current effort by [p]laintiff to obtain sedentary light-duty employment, the only employment Dr. DeFranzo testified that [p]laintiff is physically capable of performing, would have been futile.

Id. at 391-92, 656 S.E.2d at 615.

The circumstances of the present case — specifically the fact that Plaintiff has an IQ in the "impaired range" coupled with limited education and training and has been employed for his entire working life in a line of work he is no longer physically capable of performing — are analogous to those in *Johnson*. As we clarified in that case, when determining whether disability exists, "the relevant inquiry is whether *Plaintiff himself* is capable of working and earning wages, not whether all or some persons with Plaintiff's degree of injury have such capacity." *Id.* at 391, 656 S.E.2d at 614 (emphasis added). Thus, the question before the Commission was whether *Plaintiff* — who is in his sixties and has intellectual limitations, difficulties with reading, and no other job experience outside of physical labor — would be able to obtain a position in sedentary employment.

We conclude that by introducing evidence of these preexisting facts, Plaintiff offered sufficient evidence that engaging in such a job search would be futile so as to shift the burden to his employer "to show that suitable jobs are available and that [he was] capable of obtaining a suitable job taking into account both physical and vocational limitations." *Thompson*, 223 N.C. App. at 360, 734 S.E.2d at 129 (holding that plaintiff met initial burden concerning futility by producing evidence that he had only completed high school, his work experience was limited to heavy labor jobs, he still suffered substantial pain from his injury, and his work restrictions foreclosed the possibility of performing manual

labor); *see also Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (concluding that plaintiff established futility based on evidence that he was 61, had worked all of his life in maintenance positions, had only a GED, and was restricted from repetitive bending, stooping or walking for more than a few minutes at a time).

Thus, because Plaintiff demonstrated the futility of engaging in a job search and Defendant made no attempt to show that suitable jobs were available to Plaintiff, the Commission erred in ruling that Plaintiff was not temporarily totally disabled. The Commission's conclusions of law reaching the opposite result were not supported by the findings of fact contained within its Opinion and Award. *See White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 670, 606 S.E.2d 389, 398 (2005) (explaining that conclusions concerning existence and extent of disability "must be based upon findings of fact supported by competent evidence").

Defendant attempts to rely on our recent decision in *Fields v. H & E Equip. Servs., LLC*, ___ N.C. App. ___, 771 S.E.2d 791 (2015), in arguing for a contrary result on this issue. In *Fields*, the plaintiff was employed as a mechanic for the defendant for 11 years when he sustained a back injury at work. *Id.* at ___, 771 S.E.2d at 792. The Commission concluded the plaintiff was temporarily totally disabled because "it has been and continues to be futile for him to seek competitive employment that comports with the work restrictions [his doctor] has placed on him." *Id.* at ___, 771 S.E.2d at 794. This Court reversed, holding that the plaintiff did not demonstrate that engaging in a job search would be futile because he "failed to provide competent evidence *through expert testimony* of his inability to find any other work as a result of his work-related injury . . . ." *Id.* at ___, 771 S.E.2d at 792 (emphasis added).

Specifically, we stated that the plaintiff

> offered no testimony from a vocational expert that his pre-existing condition made it futile to seek any other employment opportunities in his job market. There was no evidence presented of any labor market statistics stating that his pre-existing condition made him incapable of re-entering the labor market. Plaintiff's medical expert did not state that it was impossible for him to work, only that he should not continue in his current role. Without any expert testimony establishing that [p]laintiff's job with [d]efendant is the only job obtainable, or any evidence demonstrating that no other man of his age, education, experience, and physical capabilities is currently working

> anywhere, [p]laintiff did not meet his burden of proof of disability under *Russell* prong three.

Id. at ___, 771 S.E.2d at 795.

While we believe *Fields* is distinguishable from the present case on its facts — given that Plaintiff here lacks transferable skills such as computer proficiency and offered evidence from medical, psychological, and neuropsychological professionals that he is intellectually impaired with a full-scale IQ of 65, a 2.6 grade reading level, borderline nonverbal reasoning skills, and impaired verbal comprehension and processing speed — we take this opportunity to note that our prior caselaw has made clear that "a plaintiff is *not required* to present medical evidence or the testimony of a vocational expert on the issue of futility." *Thompson*, 223 N.C. App. at 358, 734 S.E.2d at 129 (emphasis added). Therefore, to the extent that the above-quoted language in *Fields* can be read to conflict with our Court's opinions in *Johnson*, *Thompson*, and *Weatherford* concerning futility, we are obligated to follow these earlier cases. *See Respess v. Respess*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 701 (2014) ("[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." (citation and quotation marks omitted)).

Accordingly, we conclude that the evidence establishing Plaintiff's cognitive limitations, in combination with his age and lack of any other training, adequately demonstrates that searching for employment within his physical restrictions would be futile. *See Peoples*, 316 N.C. at 444, 342 S.E.2d at 809 ("Where . . . an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.").

Conclusion

For the reasons stated above, we reverse the Commission's termination of Plaintiff's total temporary disability benefits, vacate the portion of the Opinion and Award concerning Plaintiff's request for additional treatment for anxiety and depression, and remand for further proceedings consistent with this opinion.

REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 6 October 2015)

ABELLS v. ABELLS No. 15-88	Wilson (09CVD2139)	Affirmed in Part; Remanded in Part
CASTRO v. THOMAS No. 14-1177	Guilford (13CVS5900)	New Trial
DELGADO v. PETRUK No. 15-34	Mecklenburg (13CVS10624)	Dismissed
FAIRCLOTH v. FAIRCLOTH No. 15-179	Rockingham (12CVD1455)	Vacated and Remanded
HARDIN v. HARDIN No. 14-1124	Cumberland (12CVD7133)	Reversed and Remanded in Part
IN RE A.D.B. No. 15-400	Greene (13JT17) (13JT19)	Affirmed
IN RE A.K.L.N. No. 15-429	Caldwell (13JA5)	Affirmed
IN RE C.M.G. No. 15-609	Moore (14JA67)	Affirmed in Part and Reversed in Part
IN RE C.T.M. No. 15-494	Rockingham (10JT147) (13JT41)	Affirmed
IN RE D.L.B. No. 15-531	New Hanover (14JT100)	Affirmed
IN RE J.H. No. 15-398	Harnett (14JA48)	Affirmed
IN RE K.A. No. 15-262	Mecklenburg (13JA253) (13JA254)	Affirmed in Part and Reversed in Part
IN RE M.D. No. 15-432	Cumberland (12JA624) (12JA625) (12JA626)	Affirmed

IN RE M.L.N. No. 15-301	Chatham (12JA41-42)	Vacated and Remanded in Part; Dismissed in Part.
IN RE P.E.B. No. 14-1364	Wake (12JT299-302)	Affirmed
IN RE R.D. No. 15-330	Mecklenburg (12JA150)	Affirmed
IN RE S.V.C. No. 15-359	Forsyth (09JT274-275) (12JT37-38) (13JT141)	Affirmed
IN RE T.F.L. No. 15-114-2	Wilkes (12JT154-156)	Affirmed
IN RE WILL OF FULLER No. 15-125	Guilford (11E1739)	Reversed
IZYDORE v. CITY OF DURHAM No. 14-1378	Durham (09CVS7031)	Affirmed
MORRISON v. WAL-MART No. 15-274	N.C. Industrial Commission (Y13108)	Affirmed
STATE v. ALLEY No. 15-43	Person (09CRS1009) (09CRS52132)	No Error
STATE v. BLACK No. 15-107	Lincoln (08CRS52876-78) (11CRS290) (11CRS292-94)	No error in part; dismissed in part.
STATE v. DAVIS No. 15-220	Rowan (13CRS2645) (13CRS54764)	No Error
STATE v. HACKNEY No. 15-82	Wake (13CRS226535)	No Error
STATE v. KERSEY No. 15-240	Mecklenburg (12CRS217536) (12CRS33966)	No error in part, Vacated and Remanded in Part

STATE v. LAYNE No. 15-98	Wilkes (12CRS53547) (13CRS592)	No Error in Part, Dismissed in Part.
STATE v. McCULLOUGH No. 15-221	Forsyth (13CRS52447) (13CRS5891)	No Error
STATE v. O'NEAL No. 14-1403	Brunswick (12CRS55699)	Affirmed
STATE v. SANCHEZ No. 14-1381	Gaston (13CRS59025)	No Error
STATE v. WILSON No. 15-234	Henderson (11CRS97)	No Error

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