No. 15-1229 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff-Appellee, v. THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION, Defendants-Appellants.	)	From Wake County

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RESPONSE OF DEFENDANT-APPELLANT NORTH CAROLINA RULES REVIEW COMMISSION IN OPPOSITION TO MOTION TO DISMISS OF PLAINTIFF-APPELLEE

****

Defendant-Appellant North Carolina Rules Review Commission ("RRC") respectfully submits this response in opposition to the motion to dismiss filed by Plaintiff-Appellee North Carolina State Board of Education ("SBOE"). The RRC shows the Court the following:

BACKGROUND AND PROCEDURAL HISTORY

In an effort to avoid having this case assigned to a three-judge panel, the SBOE voluntarily dismissed five of its seven claims. R pp 29, 34. Once it

appeared that the SBOE had dismissed its allegation that the statutes creating the RRC were invalid on their face, the RRC agreed to have this case assigned to the Honorable Paul G. Gessner.

At the summary judgment hearing before Judge Gessner, the SBOE informed the Court that it had voluntarily dismissed its claims challenging the constitutionality of the RRC's enabling legislation. See Tr. 63-64. Throughout the summary judgment hearing, the SBOE asserted that it was only challenging the actions and decisions of the RRC, rather than facially attacking a state statute as unconstitutional. The SBOE, however, argued that the General Assembly's delegation of authority to the RRC failed to provide adequate guiding standards – even though the SBOE had previously dismissed this count of its complaint. R pp 19-20, 29, 138-42.

Judge Gessner's order granting summary judgment in favor of the SBOE and against the RRC simply reads:

> Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

R p 156. As set forth in the RRC's brief, RRC Br. at 30-36, it is impossible to discern from this one sentence whether the Superior Court intended to declare as facially unconstitutional N.C. Gen. Stat. § 115C-2, 115C-106.3(19), 115C-150.13

and 115C-218.1(c) – statutes that expressly direct the RRC to review certain rules promulgated by the SBOE.

ARGUMENT

Each of the SBOE's arguments that a portion of this appeal should be dismissed lacks merit. The judgment at issue on this appeal is ambiguous. As set out in the RRC's brief, when a substantial risk exists that a decision of a single Superior Court judge could be read as rendering legislative enactments facially invalid, a remand is appropriate to obtain clarification of that order. Neither the Appellants nor their Notice of Appeal should be faulted for an ambiguity created by the Superior Court in its judgment.

I. The RRC did not Waive its Ability to Seek a Remand as a Result of the Ambiguities that Plague the Judgment Given that the RRC Argued Against Entry of that Judgment.

As set out in the RRC's brief, at a minimum, this Court should remand to the Superior Court for clarification as to whether the trial court's order renders facially invalid North Carolina General Statutes Sections 115C-2, 115C-106.3(19), 115C-150.13 and 115C-218.1(c). RRC Br. at 30-36. The SBOE, however, asserts that the RRC has waived its ability to challenge the ambiguities set out in the Superior Court's judgment, because the RRC jointly moved to designate Judge Gessner to preside over this case. At the time the RRC consented to that motion, the SBOE

had already dismissed its claims challenging the relevant state statutes as unconstitutional. R p 29.

In its brief and at the hearing, the RRC vehemently argued that summary judgment should not be granted in favor of the SBOE. At the summary judgment hearing, counsel for the RRC argued that although "the complaint is framed as if it's questioning the actions of the Rules Review Commission," Judge Gessner must reject the SBOE's challenges, particularly to the extent the SBOE is "questioning the constitutionality of the state statute." T p 39. Over the RRC's objection, Judge Gessner entered summary judgment against the RRC. Regrettably, the order entered by the Superior Court is ambiguous as to whether it effectively strikes down several state statutes.

Both Judge Gessner and the SBOE clearly understood that the RRC opposed and objected to the granting of any relief for the SBOE. The SBOE, however, asserts that the RRC is somehow pursuing a new theory and is attempting to mount a new horse on appeal. The SBOE fails to appreciate the fact that the ambiguity that needs fixing did not occur until the judgment was signed and entered by Judge Gessner. The "better mount" that the SBOE accuses the RRC of riding (with respect to the RRC's alternative argument), Motion at 9, did not even come into existence until after all of the briefing and arguments had been made to Judge Gessner. No waiver has occurred.

The SBOE's motion discusses at length how this is not an issue of subject matter jurisdiction. Motion at 3-6. Citing *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004), the SBOE argues that subject matter jurisdiction is not implicated when a single Superior Court judge strikes down a state statute as facially invalid. The *Bartlett* decision is inapposite. The *Bartlett* case involved an argument that a three-judge panel of the Superior Court properly constituted to hear redistricting claims was not a court within the "Superior Court Division," as that term is used by N.C. Const. art. IV, § 2, and that the General Assembly had thereby unconstitutionally created a new court not provided for in the Constitution. The Supreme Court readily rejected that argument.

The *Bartlett* decision does not speak to whether subject matter jurisdiction is implicated when a Superior Court judge strikes down a state statute on its face as unconstitutional without convening a properly constituted three-judge panel.[1] Moreover, the SBOE's argument that "[s]ubject-matter jurisdiction refers to the power of a <u>particular</u> *court* to decide a particular type of *case*" is an over-simplification of the concept of subject matter jurisdiction. Motion at 5 (underlining added). This Court has repeatedly recognized that failure to comply with a mandatory statutory provision can destroy subject matter jurisdiction. *See,*

[1] The *Bartlett* decision was rendered a decade before the enactment of N.C. Gen. Stat. § 1-267.1(b1) – the subsection mandating that a single Superior Court judge may not enter an order striking down a state statute as facially invalid in the absence of the Superior Court sitting as a properly constituted three-judge panel.

e.g., Inspection Station No. 31327 v. N.C. DMV, No. 15-436, 2015 N.C. App. LEXIS 1040 (N.C. Ct. App. 2015) (no subject matter jurisdiction as a result of failure to comply with mandatory notice requirements of the applicable statute).

The issue set out in the RRC's alternative argument arose for the first time when Judge Gessner entered an ambiguous order. The RRC has properly preserved its appeal of this issue and expressly set out this alternative argument in its Proposed Issues on Appeal. R p 172 (Issue 6). The discussion of subject matter jurisdiction in the SBOE's motion is irrelevant.

II. The SBOE's Assertion that this Court Should Deny the RRC's Alternative Argument as Untimely Lacks Merit.

Although the judgment at issue in this appeal does not declare any specific state statute to be facially invalid, that would appear to be the practical effect of the summary judgment order. The SBOE asserts that this alternative argument is time barred. The SBOE's argument is in error.

The SBOE builds its argument around Rule 52(b) of the North Carolina Rules of Civil Procedure. Rule 52(b) states:

> Amendment. – Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

N.C. R. Civ. P. 52(b). The language of this section is virtually identical to Fed. R. Civ. P. 52(b).[2] Consequently, this Court has turned to "the federal court's interpretations of this rule for guidance." *Harris v. N.C. Farm Bureau*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988).

The SBOE fails to recognize that Rule 52(b) has no applicability to a summary judgment order. As one of the leading treatises on North Carolina Civil Procedure states:

> The purpose of Rule 52(b) is to provide a method for amplifying and expanding the findings of fact and is not intended as a vehicle for securing a rehearing of the merits. *The Rule relates specifically to findings of fact and does not authorize the amendment of conclusions of law*.

Shuford North Carolina Civil Practice & Procedure § 52:4, at 846 (2015) (emphasis added). The treatise's statement regarding N.C. R. Civ. P. 52(b) is supported by countless state and federal appellate cases. *See, e.g.*, 9C C. Wright & A. Miller, Federal Practice & Procedure § 2582, at 352-35 (2d ed. 2008); *Stachlowski v. Stach*, 328 N.C. 276, 286, 401 S.E.2d 638, 644 (1991) ("Rule 52 provides for amendments to findings or additional findings after entry of judgment."); *Ennis v. Munn*, 229 N.C. App. 681, 750 S.E.2d 920 (2013) (unpublished) (Rule 52(b) concerns "amendments to findings of fact"); *BB&T v. Home Fed. Savings*, 85 N.C. App. 187, 198, 354 S.E.2d 541, 548 (1987) (purpose

[2] The federal rule was amended in 2009 to change the time period for filing a Rule 52(b) motion from 10 days to 28 days.

of Rule 52(b) is to "enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court"). Because factual findings are not to be made by the trial court when considering a summary judgment motion, Rule 52(b) has no applicability to summary judgment orders. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1237 (10th Cir. 2007) (Rule 52(b) "applies only to cases in which a district court issues factual findings following a trial on the merits").

Moreover, contrary to the SBOE's statements in its motion, Motion at 11, "[t]he making of a motion under Rule 52(b) is not a prerequisite to appellate review of a judgment." Shuford, § 52:4, at 846-47; *accord* 9 Bender's Federal Practice Forms at 52-20 (2008) (filing a Rule 52(b) motion is <u>not</u> a "precondition to appeal the judgment"). In fact, scores of North Carolina appellate decisions exist where this Court remanded with directions that the Superior Court conform its judgment to the requirements of Rule 52, even though no Rule 52(b) motion was filed by the Appellant. *See, e.g.*, *In re Foreclosure*, 2015 N.C. App. LEXIS 452 (N.C. Ct. App. 2015) (unpublished) (remand in that Superior Court order contained insufficient findings of fact to comply with Rule 52); *In re Foreclosure*, No. 14-570, Br. of Appellant at 2-4 (Statement of the Case) (filed 28 July 2014); *In re Foreclosure*, No. 14-570, Record on Appeal at i-iii (filed 22 May 2014).

The SBOE cites no authority for the proposition that the filing of a Rule 52(b) motion is a prerequisite to challenging on appeal an ambiguity in a summary

judgment order. The overwhelming authority is against the SBOE on this point. Moreover, had the General Assembly intended to shorten the time for challenging an ambiguous order from 30 days, N.C. R. App. P. 3(c), to 10 days, N.C. R. Civ. P. 52(b), it would have done so expressly. North Carolina Rule of Civil Procedure 52(b) contains no statement or mandate that an appellant's opportunity to challenge an ambiguous order will be lost if a motion is not made under Rule 52(b) within 10 days of the order. The Rule of Civil Procedure, N.C. R. Civ. P. 52(b), relied on by the SBOE is simply not applicable here.[3]

III. The SBOE's Assertion that the Entire Appeal Should be Dismissed as a Result of an Ambiguity in an Order Entered by the Superior Court Should be Rejected.

In its final argument, the SBOE asserts that if this Court "were to reach Defendants' unpreserved procedural argument," the RRC's notice of appeal would be defective. Motion at 13. For the reasons set forth above, the SBOE's claim that the RRC's arguments are "unpreserved" has no merit. Moreover, the SBOE's motion to dismiss is premised on an erroneous belief that the RRC is asserting that Judge Gessner's order violates N.C. Gen. Stat. § 1-267.1(a). The RRC is not

[3] Remarkably, the SBOE argues that remand for clarification should be rejected because Judge Gessner retired subsequent to the filing of the RRC's brief in this appeal. Motion at 12. The RRC (or any other appellant) should not suffer because a Superior Court judge issues an ambiguous order and then retires while that order is on appeal. This Court frequently remands for further action by the Superior Court after the original Superior Court judge has retired. In such circumstances, the case is simply assigned to a different Superior Court judge on remand. N.C. R. Civ. P. 63; *see, e.g., Springs v. City of Charlotte,* 222 N.C. App. 132, 134, 730 S.E.2d 803, 805 (2012).

asserting that Judge Gessner struck down the state statutes at issue as unconstitutional. Rather, the RRC is concerned that it is not possible to tell from the one-sentence judgment whether he did or did not intend to do so. *Timmons v. N.C. Dep't of Transp.,* 123 N.C. App. 456, 461, 473 S.E.2d 356, 360 (1996), *aff'd per curiam,* 346 N.C. 173, 484 S.E.2d 551 (1997) ("Because we are unable to discern the Commission's intent with respect to [the scope of the order under review,] we remand . . . for clarification . . . ."); *Plummer v. Plummer*, 198 N.C. App. 538, 549, 680 S.E.2d 746, 754 (2009) (remanding for clarification of trial court's order). Judge Gessner erred by issuing an ambiguous order. The people of North Carolina (who, through their elected representatives, provided that the SBOE must comply with the rulemaking provisions of the North Carolina Administrative Procedure Act) should not suffer as a result of that error by the Superior Court. Justice demands that, at a minimum, the case be remanded for clarification by the Superior Court.

CONCLUSION

The SBOE's motion to dismiss is devoid of merit. That motion should be denied by this Court.

Respectfully submitted, this the 8th day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney for Defendant-Appellant North Carolina Rules Review Commission hereby certifies that on this day the foregoing Brief of Defendant-Appellant North Carolina Rules Review Commission was served upon counsel for all parties in this action by depositing a copy thereof in the United States mail, First Class, postage pre-paid, and addressed as follows:

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This the 8th day of February, 2016.

Electronically submitted
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Addendum

(Unpublished cases and cases pending publication)

Inspection Station No. 31327 v. N.C. DMV

Court of Appeals of North Carolina

October 6, 2015, Heard in the Court of Appeals; December 15, 2015, Filed

No. COA15-436

Reporter
2015 N.C. App. LEXIS 1040

INSPECTION STATION NO. 31327 d/b/a JIFFY LUBE NO. 2736, Petitioner, v. THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES and THE HONORABLE ERIC BOYETTE, INTERIM COMMISSIONER OF MOTOR VEHICLES, Respondents.

Notice: PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.

Prior History: **[*1]** Wake County, No. 12-CVS-17233.

Disposition: REVERSED AND REMANDED.

Core Terms

inspection, mandatory, license, notice, window, trial court, directory, tint, respondent-DMV, notice requirements, mechanic, station, subject matter jurisdiction, suspension, substantial evidence, charges, agency's decision, license holder, days, notice provision, fail to comply, whole record, revocation, trial court's finding, place of business, pass the vehicle, motor vehicle, requirements, soliciting, deletion

Case Summary

Overview

HOLDINGS: [1]-The plain language of former *N.C. Gen. Stat. § 20-183.8F(a)* (repealed 2011), setting forth the penal nature of the proceeding it involved, and the recent deletion of *§ 20-183.8F(a)*, supported the determination that the timing and notice requirements of *§ 20-183.8F(a)* were mandatory, not directory; [2]-Because the notice requirements of *§ 20-183.8F(a)* provided the basis for the DMV's subject matter jurisdiction, and because those requirements were mandatory had to be strictly followed, the failure to comply with mandatory notice requirements was grounds for dismissal and for the agency's order to be vacated; [3]-The motor vehicle emissions inspection station had not waived its argument regarding the statutory violation as subject matter jurisdiction could not be waived and could be presented at any time.

Outcome

Judgment reversed; case remanded with instructions to vacate agency decision.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review

HN1 See *N.C. Gen. Stat. § 150B-51(b)* (2013).

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN2 In cases appealed from administrative tribunals, the Court of Appeals of North Carolina reviews questions of law de novo and questions of fact under the whole record test.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN3 When determining whether an agency decision is arbitrary or capricious, or whether the agency decision is unsupported by substantial evidence in view of the entire record as submitted, the Court of Appeals of North Carolina's standard of review is the whole record test. When utilizing the whole record test, the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN4 When a petitioner alleges that an agency violated his constitutional rights, acted in excess of the statutory authority or jurisdiction of the agency, or the agency decision is affected by other error of law, de novo review is the appropriate standard of review.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN5 When the issue on appeal is whether a state agency erred in the interpretation of a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ de novo review.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN6 A reviewing court (the trial court, when sitting as an appellate court), may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence.

Governments > State & Territorial Governments > Licenses

HN7 See former *N.C. Gen. Stat. § 20-183.8F(a)* (repealed 2011).

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN8 The trial court, when sitting as an appellate court, may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN9 When the issue is whether a state agency erred in the interpretation of a statutory term, a court may freely substitute its judgment for that of the agency and employ de novo review.

Governments > Legislation > Interpretation

HN10 In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory. While, ordinarily, the word must and the word shall, in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

Governments > Legislation > Interpretation

HN11 As used in statutes, the word shall is generally imperative or mandatory.

Governments > Legislation > Interpretation

HN12 Mandatory provisions are jurisdictional, while directory provisions are not. Whether the time provision is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. Generally, statutory time periods are considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period.

Governments > Legislation > Interpretation

Administrative Law > Agency Adjudication > Prehearing Activity

Governments > State & Territorial Governments > Licenses

HN13 The Court of Appeals of North Carolina has previously found that deadlines placed upon an administrative body subject to the Administrative Procedures Act are mandatory where the statute involves an administrative proceeding that is penal in nature. A statute which empowers a board or licensing agency to revoke a license is penal in nature.

Governments > State & Territorial Governments > Licenses

Governments > Legislation > Interpretation

Administrative Law > Agency Adjudication > Prehearing Activity

HN14 The Court of Appeals of North Carolina recognized that where a statute contains language like shall and involves a proceeding that is penal in nature, statutory procedures are mandatory and must be strictly followed.

Administrative Law > Agency Adjudication > Prehearing Activity

Governments > State & Territorial Governments > Licenses

HN15 N.C. Gen. Stat. § 20-183.8F(c) explicitly mentions that a license issued to an inspection station is a substantial property interest.

Governments > Legislation > Interpretation

HN16 It is well established that the word shall is generally imperative or mandatory, and likewise, the word must, like the word shall, has generally been held to be mandatory as well: The word shall is defined as must or used in laws, regulations, or directives to express what is mandatory.

Governments > Legislation > Interpretation

HN17 It is true that the North Carolina Supreme Court has held that the words must or shall are not dispositive in the determination of whether or not a particular provision is mandatory rather than directory; legislative intent is to be derived from a consideration of the entire statute.

Governments > State & Territorial Governments > Licenses

Administrative Law > Agency Adjudication > Prehearing Activity

HN18 The plain language of former N.C. Gen. Stat. § 20-183.8F(a) (repealed 2011), setting forth the penal nature of the proceeding it involves, and the recent deletion of § 20-183.8F(a) from the statute by the North Carolina legislature, support the Court of Appeals of North Carolina's determination that the timing and notice requirements of § 20-183.8F(a) are mandatory, not directory.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN19 Subject matter jurisdiction cannot be waived and may be presented at any time.

Counsel: Vandeventer Black LLP, by David P. Ferrell and Ashley P. Holmes, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for respondents.

Judges: BRYANT, Judge. Judges CALABRIA and ZACHARY concur.

Opinion by: BRYANT

Opinion

Appeal by petitioner from orders entered 23 January 2015 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 October 2015.

BRYANT, Judge.

Where the trial court lacked subject matter jurisdiction to hear an administrative appeal because the agency failed to comply with mandatory notice requirements of the applicable statute, we reverse the judgment of the trial court with instructions to vacate the final agency decision.

Petitioner Jiffy Lube ("petitioner") is a motor vehicle emissions inspection station licensed by the North Carolina Department of Motor Vehicles ("DMV") pursuant to N.C. Gen. Stat. § 20-183.4A and is located at 1200 Laura Village Drive, Apex, North Carolina 27502. Petitioner employed Jesse Glenn Jernigan, Jr. ("Jernigan") as an inspection mechanic, and DMV approved and licensed Jernigan as an inspection mechanic.

On 18 March 2011, Brenton Land ("Land") of Cary, North Carolina **[*2]** went to Fast Lube Plus on Kildaire Farm Road in Cary to have the annual State inspection performed on his vehicle. At approximately 4:35 PM on that day, Land's vehicle, a 2006 Lexus, was failed for State inspection based on the window tint of the vehicle.

Land then drove his vehicle to petitioner's place of business to have his car inspected again for its annual State inspection. Land believed there to be a person at this location who would pass his vehicle even with the window tint.

When Land arrived at petitioner's place of business, he spoke with an employee about passing the vehicle on the State inspection despite the window tint. Land was told that one of the employees at that location would do so, but that he would not be back in until Monday. The employee then told Land to wait for a minute. While he waited, another employee, Jernigan, approached Land and asked if Land needed a passing inspection on a vehicle with a window tint. Land affirmed that that was what he needed and that the vehicle had failed inspection at another location. Between the two of them, it was agreed that Land would pay $50.00 for

Jernigan to pass the vehicle for annual State inspection despite its window **[*3]** tint.

Following his conversation with Jernigan, Land left petitioner's place of business and went to an ATM in an adjoining parking lot. Land took out money from the ATM to pay Jernigan to pass his vehicle. Jernigan then inspected Land's vehicle for State inspection and passed the vehicle despite its window tint. Following the improper inspection, completed around 5:11 PM, Jernigan accepted the $50.00 from Land. Land then paid $30.00 to petitioner for the improper State inspection.

Following these transactions, Inspector Richard M. Ashley ("Inspector Ashley") of the North Carolina Division of Motor Vehicles License and Theft Bureau was assigned an investigation concerning State inspections of a motor vehicle in Wake County. Inspector Ashley received reports showing that a vehicle failed inspection at one location and approximately thirty minutes later passed inspection at a different location. Based on this fact, Inspector Ashley went to speak with Land, the registered owner of the vehicle, and the technician, Jernigan, who performed the passing inspection.

Land informed Inspector Ashley that he had removed the window tint after the failed inspection at Fast Lube. Land was questioned **[*4]** regarding how he got from Cary, where the first inspection took place, to Apex for the second inspection at petitioner's place of business and removed the window tint all in approximately thirty minutes. Land reiterated that he had removed the window tint before the second inspection.

Next, Inspector Ashley went to petitioner's place of business. Upon his arrival, Inspector Ashley spoke with the manager and advised him of why he was there. He then spoke with Jernigan, who told Inspector Ashley that he remembered the inspection in question and that all of the windows had been down on the vehicle when it pulled up, but that there was no window tint on the back window. Jernigan informed Inspector Ashley that the window tint meter was not working and that he went ahead and passed the vehicle on its State inspection. Jernigan also claimed that no money had exchanged hands for this improper inspection.

Inspector Ashley returned to speak with Land, told Land that he had talked with Jernigan about what happened, and that Land should now tell the truth. Land then admitted that he paid Jernigan $50.00 to pass his car on the State inspection despite the window tint. On 23 March 2011, Land gave **[*5]** a written statement to Inspector Ashley regarding what occurred, admitted to the improper inspection, and stated that he would have his window tint removed from his vehicle. On 24 March 2011, respondent-DMV, through Inspector Ashley, charged both Land and Jernigan criminally, specifically charging Jernigan with felony soliciting for accepting $50.00 from inspection customer Land to pass his 2006 Lexus despite having the windows tinted beyond legally approved levels.

On 25 March 2011, Jernigan gave a written statement to Inspector Ashley, wherein Jernigan admitted that he had accepted $50.00 to pass Land's vehicle for State inspection. As a result of the incident on 18 March 2011, Inspector Ashley initiated a civil license action against petitioner under *N.C. Gen. Stat. § 20-183.7B(a)(9)*, which prohibits the solicitation or acceptance of "anything of value to pass a vehicle . . . ." On 2 June 2011, respondent-DMV served a Finding of Violation pursuant to *N.C. Gen. Stat. 20-183.8F(a)* on petitioner-Jiffy Lube.

On 28 June 2011, a Notice of Charge for petitioner-Jiffy Lube was served on petitioner by the Director of the DMV for a Type I violation, which occurred 18 March 2011. The Notice of Charge proposed to suspend petitioner's license for 180 days. **[*6]** In addition, the Notice of Charge imposed a $250.00 civil penalty against petitioner. Jernigan was terminated and is no longer employed by petitioner.

After receiving notice of the Type I violation, petitioner requested a hearing to appeal the violation to a DMV Hearing Officer. The matter was heard before DMV Hearing Officer Larry B. Greene, Jr. on 6 September 2012. The DMV Hearing Officer found Jernigan solicited money to pass the 2006 Lexus owned by Land when it would not have passed inspection if the window tint had been properly tested. The DMV Hearing Officer found that Jernigan's actions constituted a Type I violation. The DMV Hearing Officer then imputed the violation separately to petitioner, as the employer of Jernigan, pursuant to *N.C. Gen. Stat. § 20-183.7A(c)*: "A violation by a safety inspection mechanic is considered a violation by the station or self-inspector for whom the mechanic is employed." *N.C.G.S. § 20-183.7A(c)* (2013).

The Official Hearing Decision and Order for the violation suspended petitioner's license for 180 days and

assessed a $250.00 penalty against petitioner. Petitioner appealed this decision to respondent-DMV Commissioner pursuant to N.C. Gen. Stat. § 20-183.8G(e). On 4 December 2012, respondent-DMV Commissioner denied petitioner's **[*7]** appeal and upheld the DMV Hearing Officer's decision.

Petitioner timely filed a Petition for Judicial Review, and a hearing was held in the Superior Court of Wake County. On 7 April 2014, the trial court issued a written memorandum containing the trial court's ruling, which was to deny the petition and uphold the DMV suspension and fine. On 17 April 2014, petitioner timely filed a Motion to Reconsider. The trial court upheld its prior ruling and the order affirming the DMV suspension and fine was signed, filed, and served on 23 January 2015.

Despite upholding its prior ruling, in that same order, the trial court found that respondents did not timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a). However, the trial court found that the requirement to serve the Finding of Violation within five days of completion of an investigation was a directory requirement rather than a mandatory one. The trial court also upheld its prior ruling that the violation of service requirements in N.C.G.S. § 20-183.8F(a) did not deprive the trial court of subject matter jurisdiction as petitioner waived this argument by not bringing it up below. Therefore, the trial court denied petitioner's Motion to Reconsider. Petitioner **[*8]** appeals.

On appeal, petitioner argues that DMV's failure to comply with the statutory notice requirements of N.C. Gen. Stat. § 20-183.8F(a) are grounds for dismissal of the administrative action against Jiffy Lube. We agree.

Article 4 of Chapter 150B defines the judicial review process, and, within that, N.C. Gen. Stat. § 150B-51(b) establishes the scope of review as follows:

> ***HN1*** The court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by the substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2013).

HN2 "In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." Diaz v. Div. of Soc. Servs., 360 N.C. 384, 386, 628 SE.2d 1, 2-3 (2006) (citation omitted).

HN3 When determining whether an agency decision **[*9]** is arbitrary or capricious, or whether the agency decision is unsupported by substantial evidence in view of the entire record as submitted, this Court's standard of review is the "whole record test." *See* Cromwell Constructors, Inc. v. N.C. Dep't of Env't, Health, & Natural Res., 107 N.C. App. 716, 719, 421 S.E.2d 612, 613-14 (1992). "When utilizing the whole record test . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (citation and quotation marks omitted).

HN4 When a petitioner alleges that an agency violated his constitutional rights, acted in excess of the statutory authority or jurisdiction of the agency, or the agency decision is affected by other error of law, *de novo* review is the appropriate standard of review. *See* Brooks v. Rebarco, Inc., 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). ***HN5*** "When the issue on appeal is whether a state agency erred in the interpretation of a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* (quoting Brooks v. Grading Co., 303 N.C. 573, 580-81, 281 S.E.2d 24, 29 (1981) (internal quotation marks omitted). Additionally, ***HN6*** a reviewing court (the trial court, when sitting as an appellate court), may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence. **[*10]** Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991) (citation omitted).

Under the version of N.C. Gen. Stat. § 20-183.8F(a) applicable to this case,

> ***HN7*** [w]hen an auditor of the Division finds that a violation has occurred that could result in the suspension or revocation of an inspection station license, a self-inspector license, a mechanic license, or the registration of a person engaged in the business of replacing windshields, the auditor must give the affected license holder written notice of the finding. *The notice must be given within five business days after completion of the investigation that resulted in the discovery of the violation*. The notice must state the period of suspension or revocation that could apply to the violation and any monetary penalty that could apply to the violation. The notice must also inform the license holder of the right to a hearing if the Division charges the license holder with the violation.

N.C. Gen. Stat. § 20-183.8F(a) (2009) (emphasis added) (repealed by S.L. 2011-145, § 28.23B(a), eff. July 1, 2011).

In order to resolve the ultimate issue raised by petitioner on appeal, this Court must first address three sub-issues: (1) whether the trial court's finding of fact regarding respondent's failure to timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a) is supported **[*11]** by substantial evidence and should stand; (2) if indeed the trial court's finding of fact regarding respondent's failure to timely serve petitioner with a Finding of Violation is supported by substantial evidence, whether the language in N.C. Gen. Stat § 20-183.8F(a) regarding the time restrictions for notice is mandatory or directory; and (3) if the language in N.C. Gen. Stat. § 20-183.8F(a) is in fact mandatory, whether respondent's failure to comply with the notice requirement of the statute results in a lack of respondent-DMV's subject matter jurisdiction over this matter, and independently is grounds for dismissal of the charges and administrative action against petitioner.

First, we agree with petitioner that respondents did not timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a). Applying the "whole record test" to petitioner's claim, we find that the trial court's finding as to that issue is supported by substantial evidence.

As stated above, ***HN8*** the trial court, when sitting as an appellate court, may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence. Scroggs, 101 N.C. App. at 702-03, 400 S.E.2d at 745. In the Official Hearing Decision and Order, the Hearing Officer found that "[p]ursuant to N.C. Gen. Stat. § 20-183.8F, written **[*12]** notice of the complaint made was furnished to the licensee within the statutory timeline . . . ."

In reviewing the whole record, however, the trial court found that there was not competent or substantial evidence to support a finding by the Hearing Officer that DMV complied with N.C. Gen. Stat. § 20-183.8F(a). Specifically, Inspector Ashley's own testimony before the DMV Hearing Officer provided no evidence of any further investigative action pertaining to either the mechanic (Jernigan), or the station (petitioner Jiffy Lube), that took place after 25 March 2011. Therefore, it appears the investigation was completed as of 25 March 2011. Consequently, respondent-DMV's service on 2 June 2011 of the Finding of Violation was outside the five-day period required by statute.

When asked to recount the events that led him to file the complaint against the station and the mechanic, Inspector Ashley recounted investigation attempts that occurred prior to and on the date of 25 March 2011. On 23 March 2011, Brenton Land, the individual who paid for the illegal inspection, made a voluntary statement, written by Land on a North Carolina Division of Motor Vehicles License and Theft Bureau official form. On 24 March 2011, Inspector **[*13]** Ashley charged Jernigan with felony soliciting in Wake County. On 25 March 2011, Jernigan made a voluntary statement from the Wake County Jail using the same NCDMV form that Land used.

When asked what documents Inspector Ashley wanted to offer as evidence, Inspector Ashley presented only the statements of Land and Jernigan, taken on 24 and 25 March 2011, respectively. Inspector Ashley did not testify as to any separate investigation of Jiffy Lube, nor did respondent-DMV offer any evidence that the investigation went beyond the initiation of the civil license action on 18 March 2011, the filing of criminal charges on 24 March 2011, or the taking of Jernigan's statement on 25 March 2011.

The Hearing Officer's Finding of Fact that DMV had satisfied the requirements of N.C. Gen. Stat. § 20-183.8F(a) was not supported by evidence in the record before it. The trial court's finding of fact that

respondent-DMV did not timely serve the Finding of Violation, on the other hand, is based on competent evidence. From the record, it appears the investigation into this matter was completed as of 25 March 2011, once Jernigan was charged by DMV with felony soliciting. Once Jernigan, the safety-inspection manager employed by petitioner, **[*14]** was determined to have committed a violation, such violation was imputed to petitioner. *See* N.C.G.S. § 20-183.7A(c) (2013) ("A violation by a safety inspection mechanic is considered a violation by the station or self-inspector for whom the mechanic is employed."). There is no indication based on statutory requirements or evidence in the record that any additional investigation of petitioner was necessary or performed. Accordingly, we agree with the trial court's finding that respondents failed to timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a).

In determining whether the trial court correctly found that the requirement to serve a Finding of Violation within five days of the completion of an investigation under N.C. Gen. Stat. § 20-183.8F(a) is a directory requirement rather than a mandatory one, we review this issue *de novo*: ***HN9*** When the issue is whether a state agency erred in the interpretation of a statutory term, a court may freely substitute its judgment for that of the agency and employ *de novo* review. Brooks, 91 N.C. App. at 463, 372 S.E.2d at 344.

The North Carolina Supreme Court has explained that:

> ***HN10*** [i]n determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions **[*15]** which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory. . . . While, *ordinarily, the word "must" and the word "shall," in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action*, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

State v. House, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978) (emphasis added) (citations omitted) (internal quotation marks omitted). ***HN11*** "As used in statutes, the word 'shall' is generally imperative or mandatory." State v. Johnson, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citing *Black's Law Dictionary* 1541 (4th rev. ed. 1968)).

Additionally, this Court has stated that

> ***HN12*** Mandatory provisions are jurisdictional, while directory provisions are not. . . . Whether the time provision . . . is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. . . . Generally, statutory time periods are . . . considered to be directory rather than mandatory **[*16]** unless the legislature expresses a consequence for failure to comply within the time period.

In re B.M., M.M., An.M., & Al.M., 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005) (internal citations and quotation marks omitted). Here, respondent argues that because the legislature provided no consequence for failing to timely serve a Finding of Violation in N.C.G.S. § 20-183.8F(a), the statute is "clearly" directory. We disagree.

HN13 This Court has previously found that deadlines placed upon an administrative body subject to the Administrative Procedures Act ("APA") are mandatory where the statute involves an administrative proceeding that is penal in nature. In re Trulove, 54 N.C. App. 218, 222, 282 S.E.2d 544, 547 (1981). A statute which empowers a board or licensing agency to revoke a license is penal in nature. *See* Parrish v. N.C. Real Estate Licensing Bd., 41 N.C. App. 102, 105, 254 S.E.2d 268, 270 (1979).

In *Trulove*, this Court reversed a license suspension issued by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors where the licensing board failed to conduct its hearing within the time period required by statute. Trulove, 54 N.C. App. at 220, 224, 282 S.E.2d at 546, 548 (involving N.C. Gen. Stat. § 89C-22(b) (1975), which required that "[a]ll charges, unless dismissed by the Board as unfounded or trivial, *shall* be heard by the Board within three months after the date on which they shall have been *referred*" (emphasis added)).

The licensing board and process at issue in *Trulove*, like the **[*17]** DMV and process here, were governed by the fairness and notice provisions of the APA, N.C. Gen. Stat. § 150B, *et seq.* Furthermore, the statute at issue in *Trulove*, like the statute at issue here, did not contain

any consequences for the Board's failure to conduct the hearing within the three month timeline. *See* Trulove, 54 N.C. App. at 220, 282 S.E.2d at 546. Although the statute at issue in *Trulove* contained no explicit consequences for the board's failure to hear cases within the three month timeframe, ***HN14*** this Court recognized that where a statute contains language like "shall" and involves a proceeding that is penal in nature, statutory procedures are "mandatory [and] must be strictly followed." *Id. at 220, 222, 282 S.E.2d at 546-47*.

Just as in *Trulove*, the statute at issue here is penal in nature. *See* N.C.G.S. § 20-183.8F(a) ("When an auditor of the Division finds that a violation has occurred that could result in the *suspension or revocation of an inspection station license* . . . ." (emphasis added)). Furthermore, ***HN15*** the same statute at issue here explicitly mentions that "[a] license issued to an inspection station . . . is a substantial property interest . . . ." N.C. Gen. Stat. § 20-183.8F(c).

Here, as in *Trulove*, at issue is the potential loss of a substantial property interest—a license. *See* Trulove, 54 N.C. App. at 219, 282 S.E.2d at 545. As noted above, this Court also did not require that **[*18]** any "dismissal" consequences be stated in the statute. Instead, because the *Trulove* case involved an administrative proceeding—specifically involving notice requirements for discipline against an occupational license holder—this Court recognized that the procedural requirements in the statute must be strictly followed and held that the Board acted without subject matter jurisdiction in hearing and ruling on the claim. *Id. at 222, 282 S.E.2d at 547*; *cf.* N.C. State Bd. of Educ. v. N.C. Learns, Inc., N.C. App. , , 751 S.E.2d 625, 630 (2013) (involving an agency's review period for an application submitted where the Board did not act on the application by the deadline, but concluding that "where a statute lacks specific language requiring an agency to take express action during a statutory review period, our Court has held that such statutory language is merely directory, rather than mandatory" (citation omitted)).

Here, the statute contains the following language, in pertinent part: "the auditor *must* give the affected license holder written notice of the finding. The notice *must* be given within five business days after the completion of the investigation that resulted in the discovery of the violation." N.C.G.S. § 20-183.8F(a) (emphasis added). ***HN16*** "It is well established that the word 'shall' is generally imperative or mandatory," **[*19]** and likewise, the word "must," like the word "shall," has generally been held to be mandatory as well: "The word 'shall' is defined as 'must' or used in laws, regulations, or directives to express what is mandatory." *Internet E., Inc. v. Duro Commc'ns, Inc., 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001)* (quoting *Webster's Collegiate Dictionary* 1081 (9th ed. 1991)).

HN17 It is true that the N.C. Supreme Court has held that the words "must" or "shall" are not dispositive in the determination of whether or not a particular provision is mandatory rather than directory; "legislative intent is to be derived from a consideration of the entire statute." *House, 295 N.C. at 203, 244 S.E.2d at 662*. In looking to the legislative intent behind N.C.G.S. § 20-183.8F, in the version of the statute that immediately preceded the version at issue in this case, the DMV was required to issue a Finding of Violation "within five business days *after the violation occurred*." N.C. Gen. Stat. § 20-183.8F(a), 2001 N.C. Sess. Laws 2001-504, s. 17 (emphasis added). The statute was amended so that the start of the five day notice window would begin at the end of the DMV's investigation, rather than beginning when the violation occurred. *See id.* Notably, our legislature kept the mandatory notice process and the mandatory language ("must") regarding the five-day notice window. *See* N.C. Gen. Stat. § 20-183.8F(b).

By moving the start **[*20]** of the five-day notice window to the end of the DMV's investigation rather than leaving it at the date of the discovery of a violation, it appears that our legislature intended to give the DMV adequate time to complete its investigations in order to comply with this mandatory notice requirement. Such a change would not be necessary if the notice provision were not mandatory, or could be disregarded, as respondents contend. Additionally, the retention of the word "must" along with the five-day notice requirement further evidences our legislature's desire to continue the mandatory notice requirement that affects "a substantial property interest."

In addition, respondents' argument regarding the subsequent deletion of N.C. Gen. Stat. § 20-183.8F(a), effective 1 July 2011, is without merit. Respondents argue that "[i]f this statute was jurisdictional and contained mandatory action, clearly the legislature would not delete this subsection in its entirety. Respondents assert that this action by our General Assembly shows that this statute was "merely a courtesy," which had no effect on future proceedings. We disagree. If, in fact, the statute were directory, a

"mere courtesy," as respondents argue, there would be no need **[*21]** for the legislature to delete it in its entirety. Rather than demonstrating that N.C. Gen. Stat. § 20-183.8F(a) is directory, if any conclusion is to be reached, our legislature's complete deletion of this subsection undercuts respondents' argument and demonstrates that it was more likely intended to be mandatory.[1]

HN18 The plain language of N.C. Gen. Stat. § 20-183.8F(a), setting forth the penal nature of the proceeding it involves, and the recent deletion of subsection (a) from the statute by our legislature, support this Court's determination that the timing and notice requirements of N.C. Gen. Stat. § 20-183.8F(a) are mandatory, not directory.

Based on our conclusion that the language of N.C. Gen. Stat. § 20-183.8F(a) is mandatory and not directory, we finally reach the ultimate question at issue: whether respondents' failure to comply with the statutory notice requirements of N.C.G.S. § 20-183.8F(a) resulted in lack of subject matter jurisdiction and is grounds for dismissal of the administrative action against petitioner. Because the notice requirements of N.C.G.S. § 20-183.8F(a) provide the basis for the DMV's subject matter jurisdiction, and because those requirements are mandatory rather than directory and therefore **[*23]** must be strictly followed, respondents' failure to comply with mandatory notice requirements is grounds for dismissal and for the agency's order to be vacated. *See* Trulove, 54 N.C. App. at 222, 282 S.E.2d at 547.

Respondents argue that petitioner waived its argument regarding the statutory violation because petitioner "improperly raised questions concerning the Finding of Violation for the first time after the fact-finding administrative decision was entered and after . . . [p]etitioner was informed that no new evidence would be considered in the Commissioner's review." *See* N.C. Gen. Stat. § 20-183.8G(e) (2014) ("The procedure set by the Division governs the review by the Commissioner of a decision made by a person designated by the Commissioner."); *id.* § 20-183.8G(f) ("Upon the Commissioner's review of a decision made after a hearing . . . on a Type I, II, or II violation by a license holder, the Commissioner must uphold any monetary penalty, license suspension, license revocation, or warning . . . if the decision is based on evidence presented at the hearing that supports the hearing officer's determination that the . . . license holder committed the act for which the monetary penalty, license suspension, license revocation, or warning was imposed."). However, ***HN19*** subject matter jurisdiction **[*24]** cannot be waived and may be presented at any time. Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956).

Petitioner did not present any new evidence to respondent-DMV Commissioner, but merely raised a legal challenge to the finding and conclusion the DMV Hearing Officer made based on the evidence presented. Specifically, petitioner challenged the Official Hearing Decision and Order from 6 September 2012 which erroneously found that "[p]ursuant to N.C. Gen. Stat. § 20-183.8F, written notice of the complaint made was furnished to the licensee within the statutory timeline . . . ." All evidence relied upon by petitioner in making its legal argument regarding lack of subject matter jurisdiction was namely Inspector Ashley's testimony as to when the investigation was completed and the date of issuance of the Finding of Violation, all of which were included in the record before respondent-DMV Commissioner. These items were not new evidence as respondent-DMV claims.

The trial court erred in finding that petitioner's statutory violation argument was waived as petitioner properly

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[1] Subsection (a), which was titled "Finding of Violation," of N.C.G.S. § 20-183.8F has been repealed in its entirety by S.L. 2011-145, § 28.23B(a), eff. July 1, 2011. By repealing subsection (a) "Finding of Violation," the General Assembly did away with the mandatory provision which required an auditor to give notice that a violation had been found. Subsection (b), which has not been repealed and which is titled "Notice of Charges," states that, instead of requiring notice upon a *finding of a violation*, notice must be given when the Division *decides to charge* an inspection station: "When the Division decides to charge an inspection station, a self-inspector, or a mechanic with a violation that could result in the suspension or revocation of the person's license, the Division *must* deliver a written statement of the charges to the affected license holder." N.C.G.S. § 20-183.8F(b) (2013) (emphasis added). Thus, N.C. Gen. Stat. § 20-183.8F still maintains a mandatory notice provision. All that has changed is what triggers the mandatory **[*22]** notice provision. However, no time frame is provided in subsection (b) of the statute for how long DMV has to deliver a written statement of the notice of charges once it has determined that a violation occurred, but before deciding to charge the violation. *Compare id.* (mandatory notice provision triggered by *decision to charge*), *with* N.C.G.S. § 20-183.8F(a), repealed by 2011 N.C. Sess. Laws 2011-145, § 28.23B(a) (mandatory notice provision triggered by *finding of violation*).

raised this issue (1) in its original petition for judicial review and motion for stay, temporary restraining order, and preliminary injunction, (2) in its brief supporting its appeal from the Hearing Officer's **[*25]** order suspending petitioner's license, (3) before respondent-DMV Commissioner issued the final agency decision, and (4) before the trial court. Regardless, petitioner's argument was central to the issue of whether respondent-DMV had subject matter jurisdiction over the case and could have been raised at any time. Accordingly, we reverse the judgment of the trial court and remand with instructions to vacate the final agency decision of respondent-DMV.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

Ennis v. Munn

Court of Appeals of North Carolina

March 26, 2013, Heard in the Court of Appeals; September 17, 2013, Filed

NO. COA12-1349

Reporter
2013 N.C. App. LEXIS 977; 229 N.C. App. 681; ***750 S.E.2d 920***; 2013 WL 5231998

DAVID ENNIS, Plaintiff, v. JOHN MUNN, Defendant.

Prior History: **[*1]** New Hanover County. Nos. 11 CVM 1575, 11 CVM 1576.

Disposition: Dismissed in part and affirmed in part.

Core Terms

reconsideration motion, trial court, default judgment, trial court's order, judgments, provides, vacate, rent, plaintiff's claim, proper rule, tolled, filing notice of appeal, amend, notice of appeal, district court, claims court, grounds

Counsel: David Paul Ennis, plaintiff-appellant, Pro se.

No brief filed on behalf of defendant-appellee.

Judges: GEER, Judge. Judges McGEE and DAVIS concur.

Opinion by: GEER

Opinion

Appeal by plaintiff from orders entered 13 June 2012 and 24 August 2012 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 26 March 2013.

GEER, Judge.

Plaintiff David Ennis appeals from (1) the trial court's order granting defendant John Munn's motion under *Rule 60(b) of the Rules of Civil Procedure* to set aside default judgments and (2) the trial court's order denying plaintiff's motion to reconsider the *Rule 60(b)* order. In the same order granting the *Rule 60(b)* motion, the trial court also dismissed plaintiff's claims. Plaintiff did not appeal until more than 30 days later, after the trial court denied his motion to reconsider.

Because plaintiff's motion for reconsideration was not a proper motion under *Rule 59 of the Rules of Civil Procedure*, it did not toll plaintiff's time to appeal. As a result, plaintiff did not timely appeal from the trial court's order granting the *Rule 60(b)* motion. We further hold that **[*2]** because plaintiff's motion to reconsider was not a proper motion under *Rule 59 of the Rules of Civil Procedure*, the trial court also did not err in denying the motion to reconsider. We, therefore, dismiss in part and affirm in part.

Facts

This case arises out of a dispute in which plaintiff, an attorney, claimed that defendant, plaintiff's former landlord, failed to return a rent deposit, failed to pay plaintiff for house repairs, and failed to pay plaintiff for legal services rendered by plaintiff to defendant. Defendant, in turn, claimed plaintiff failed to pay defendant rent and failed to pay for damages to defendant's property.

On or about 13 April 2011, plaintiff filed a small claims court action against defendant for $3,180.00. Defendant appeared at the scheduled hearing on the claim, but plaintiff failed to appear and the matter was dismissed. On 4 May 2011, plaintiff filed two more small claims court actions against defendant for $3,180.00 and $4,991.87, respectively. The complaint for the $3,180.00

claim stated it was for "[f]ailure to return rent deposit," "house repairs," and "[a]ttorney's fees." The complaint for the $4,991.87 claim stated it was for "[f]ailure to pay for **[*3]** legal services" and "[a]ttorney's fees."

On 23 May 2011, defendant, acting pro se, filed three small claims court actions against plaintiff seeking $5,000.00, $4,000.00, and $3,600.00, respectively. All three claims alleged they were for past due rent and the $4,000.00 and $3,600.00 claims additionally alleged they were for damage to property.

On 24 May 2011, the magistrate entered default judgments against defendant on both of plaintiff's claims after defendant failed to appear at a hearing on the claims. On 13 June 2011, both parties appeared at a hearing on defendant's claims and the magistrate dismissed defendant's claims with prejudice.

On 7 June 2011, plaintiff filed notices of right to have exemptions designated and, on 6 July 2011, plaintiff filed writs of execution on the default judgments. On 23 January 2012, the New Hanover County District Court entered two orders, one for each of the two default judgments, compelling defendant to comply with interrogatories served on defendant by plaintiff and each imposing an attorney's fees sanction on defendant in the amount of $500.00.

On or about 24 February 2012, plaintiff filed a motion for show cause order seeking an order requiring **[*4]** defendant to appear and show cause as to why defendant should not be held in contempt for failing to respond to plaintiff's interrogatories and for failing to comply with the district court order compelling defendant to respond to the interrogatories. On or about 9 April 2012, defendant, now represented by counsel, filed a motion under *Rules 60(b)(3)* and (6) to have the default judgments set aside on grounds of fraud.

Defendant's *Rule 60(b)* motion was heard by the district court on 24 April 2012 and, at the hearing, defendant testified to the following. Plaintiff rented a house from defendant. The two became acquaintances, and at one point plaintiff offered to help defendant recover on a putative breach of contract claim against defendant's former employer. Plaintiff and defendant never, however, entered into any agreement for defendant to pay plaintiff for plaintiff's legal services. Rather, they agreed that, should plaintiff induce defendant's former employer to settle defendant's breach of contract claim, plaintiff and defendant would split the proceeds of the settlement evenly. The parties never reduced this agreement to writing. Plaintiff was unable to obtain a settlement with **[*5]** defendant's former employer on the putative breach of contract claim, and defendant told plaintiff he did not want to pursue the matter further.

Plaintiff then fell behind paying defendant rent, and when defendant asked for rent payments, plaintiff contended that he had incurred legal expenses in his representation of defendant on the contract claim. Defendant, however, told plaintiff he had not intended to comingle the rent payments and any legal representation by plaintiff. According to defendant, when he threatened to evict plaintiff, plaintiff informed defendant he would make defendant's life miserable. Defendant testified that prior to receiving the default judgments, plaintiff had never suggested that defendant owed plaintiff roughly $8,000.00.

At the hearing, the trial court rendered an order granting defendant's *Rule 60(b)* motion and vacating the default judgments. The court also announced that it was dismissing plaintiff's claims without prejudice. The court stated that it granted the *Rule 60(b)* motion because the two default judgments entered in small claims court should have been consolidated into a single claim and, had they been consolidated, the amount in controversy would **[*6]** have exceeded the $5,000.00 limit for small claims court jurisdiction.

The next day, on 25 April 2012, plaintiff filed a "MOTION TO RECONSIDER" the trial court's order granting defendant's *Rule 60(b)* motion. The motion did not identify the Rule of Civil Procedure under which plaintiff was proceeding. It also did not address the portion of the trial court's oral order dismissing plaintiff's claims without prejudice. Instead, plaintiff's motion for reconsideration requested that the trial court, in light of *N.C. Gen. Stat. § 7A-212* and *N.C. Gen. Stat. § 7A-228(a)*, "reconsider" its order granting defendant's *Rule 60(b)* motion and "modify" the order to provide that defendant's *Rule 60(b)* motion was denied "as a matter of law."

On 13 June 2012, the trial court entered a written order granting defendant's *Rule 60(b)* motion, vacating the default judgments, and dismissing plaintiff's claims without prejudice. The 13 June 2012 order provides:

> THIS CAUSE came on to be heard and being heard by the undersigned on Motion of Defendant, John Munn, pursuant to *Rule 60 of the North Carolina*

> Rules of Civil Procedure, to vacate the two monetary judgments entered on May 24, 2011 by the Magistrate of New **[*7]** Hanover County in the above-captioned matters, for $3,180.00 and $4,991.87, respectively; and it appearing such relief should be granted as Plaintiff's claims should have been consolidated and therefore were outside the jurisdiction of the Magistrate's Court;
>
> THEREFORE, IT IS ORDERED that the Defendant's Motion to vacate the two monetary judgments on the above grounds is hereby GRANTED. Judgments entered for Plaintiff's Motion to Compel and Attorney Fees shall be vacated, and these actions are dismissed without prejudice.

On 24 August 2012, the court entered an order denying plaintiff's motion to reconsider, stating: "This matter is heard by the court in chambers upon the filing of a Motion to Reconsider filed by the Plaintiff. The court has considered the Motion, all attachments, and is not inclined to modify the prior ruling." On 4 September 2012, plaintiff filed notice of appeal "from the Order entered on July 13, 2012 in the District Court of New Hanover County, in which Judge J.H. Corpening allowed Defendant's Order Granting his 60(b) Motion, thereby vacating two monetary judgments in the above-captioned matters against the same Defendant and subsequently denying Plaintiff's Motion **[*8]** for Reconsideration."

Discussion

We must first address whether plaintiff timely filed his notice of appeal. Rule 3(c)(1) of the Rules of Appellate Procedure provides that notice of appeal is timely if filed "within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure . . . ." Rule 58 of the Rules of Civil Procedure provides: "The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered."

Here, plaintiff was served by mail on the same day the order granting defendant's Rule 60(b) motion was entered, 13 June 2012. [1] Thus, plaintiff had until 13 July 2012 to file notice of appeal from the order granting the Rule 60(b) motion and dismissing plaintiff's claims. However, plaintiff did not file notice of appeal from that order until 4 September 2012, outside of the 30-day window. Unless the time for filing notice of appeal was tolled, plaintiff's appeal from the Rule 60(b) order was not timely.

Rule 3(c)(3) of the North Carolina Rules of Appellate Procedure provides regarding tolling: "[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order . . . ." We note that plaintiff did not specify the rule upon which he was relying in filing his motion for reconsideration.

There is no question that neither Rule 50(b), which pertains to judgments notwithstanding the verdict, nor Rule 52(b), regarding amendments to findings of fact, applies in this case. Plaintiff's motion does not address factual findings and, accordingly, was not a Rule 52(b) motion. The question remains whether plaintiff's motion for reconsideration was a proper Rule 59 **[*10]** motion.

Rule 59 provides for motions for a new trial under Rule 59(a) and for motions to alter or amend a judgment under Rule 59(e). Because there was no trial, plaintiff's motion to reconsider tolled the time for filing notice of appeal only if the motion constituted a motion to alter or amend the judgment under Rule 59(e). Rule 59(e) provides: "A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment."

We first address whether the trial court's order granting defendant's Rule 60(b) motion constituted a "judgment" for the purposes of Rule 59(e). In Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 207, 450 S.E.2d 554, 555 (1994), the trial court entered a default judgment against the defendant establishing the defendant's paternity to a child and ordering the defendant to pay child support. The defendant filed a Rule 60(b) motion requesting that the court suspend the judgment pending a blood test to determine paternity and the court denied the motion. Garrison, 117 N.C.

[1] We note that plaintiff's **[*9]** notice of appeal states that it is appealing the order granting the Rule 60(b) motion, but does not mention the portion of the order dismissing his claims without prejudice. Because of our disposition of this appeal, we have not addressed the effect, if any, of plaintiff's failure to challenge on appeal the dismissal.

App. at 208-09, 450 S.E.2d at 555-56. The defendant then filed, among other motions, a Rule 59(e) motion requesting that the court "'amend **[*11]** or alter the judgment [denying the Rule 60(b) motion] so as to vacate the [judgment establishing the defendant's paternity and ordering the defendant to pay child support] and allow him relief therefrom and a blood test . . . .'" Garrison, 117 N.C. App. at 209, 450 S.E.2d at 556.

The trial court in *Garrison* denied the defendant's Rule 59(e) motion, and the defendant appealed that ruling. Garrison, 117 N.C. App. at 209, 210, 450 S.E.2d at 556, 557. This Court held:

> [B]ecause Rule 59 is an inappropriate vehicle to challenge the denial of a Rule 60 motion, [the trial court] did not abuse [it]s discretion in denying defendant's motion to amend the . . . denial of his Rule 60(b)(6) motion. N.C.G.S. § 1A-1, Rule 59 (1990); W. Brian Howell, *Shuford North Carolina Civil Practice & Procedure* § 59, at 625 (4th ed. 1992) (Rule 59 provides relief from judgments in jury or nonjury trials resulting from errors occurring during trial).

Id. at 211, 450 S.E.2d at 557.

While Garrison addressed the denial of a Rule 60 motion, the Court appeared to be reasoning that Rule 59 applies only to judgments resulting from trials. That reasoning would apply equally to an order granting a Rule 60 motion, as occurred **[*12]** here. *See also* Bodie Island Beach Club Ass'n v. Wray, 215 N.C. App. 283, 294, 295, 716 S.E.2d 67, 77 (2011) ("Because both Rule 59(a)(8) and (9) are post-trial motions and because the instant case concluded at the summary judgment stage, the court did not err by concluding that 'it [was] not proper to set aside default against Defendant SRS and vacate the summary judgment pursuant to Rule 59(a)(8) and (9).'"). Under *Garrison*, therefore, plaintiff's motion to reconsider was not a proper Rule 59(e) motion.

Even if Rule 59(e) did apply in this context, it is established that "[t]o qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must 'state the grounds therefor' and the grounds stated must be among those listed in Rule 59(a)." Smith v. Johnson, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (quoting N.C.R. Civ. P. 7(b)(1) (1990)). Plaintiff's motion to reconsider did not, however, comply with the requirement that the grounds for his motion fall within the scope of Rule 59(a).

In this case, plaintiff's motion makes a purely legal argument and requests that the trial court "modify" its ruling to state that defendant's Rule 60 motion "is **[*13]** hereby DENIED as a matter of law." Our Supreme Court has explained that "'[t]he appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8).'" Davis v. Davis, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting Hagwood v. Odom, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988)). Thus, of the nine grounds for a new trial recognized in Rule 59(a), the only ground potentially applicable to defendant's motion for reconsideration is Rule 59(a)(8).

Rule 59(a)(8) provides that a trial court may grant a new trial based upon an "[e]rror in law occurring at the trial *and objected to by the party making the motion* . . . ." (Emphasis added.) Accordingly, "[i]n order to obtain relief under Rule 59(a)(8), a [party] must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion." Davis, 360 N.C. at 522, 631 S.E.2d at 118.

There was, of course, no trial in this case. Assuming, without deciding, that Rule 59(a)(8) applies to the Rule 60(b) hearing, plaintiff did not, in that hearing, make the argument that he included in his motion for reconsideration. He did not **[*14]** object, therefore, at the hearing, to the error of law that was the basis for his motion for reconsideration. Consequently, plaintiff's motion for reconsideration does not meet the requirements under Rule 59(a)(8). *See* Davis, 360 N.C. at 522-23, 631 S.E.2d at 118 ("Neither defendant's post-trial motion nor the remaining record before us shows a proper objection at trial to any of the rulings at issue. Nothing else appearing, from the record before us, defendant failed to preserve his right to pursue a Rule 59(a)(8) motion."). Since plaintiff's motion was not based on a ground enumerated in Rule 59(a), it was not a proper Rule 59(e) motion for that reason as well.

Because the motion for reconsideration was not a proper Rule 59(e) motion, it did not toll the time for filing notice of appeal, and plaintiff's notice of appeal from the order granting defendant's Rule 60(b) motion was untimely. We must, therefore, dismiss plaintiff's appeal from that order. *See* N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp., 183 N.C. App. 466, 470, 645 S.E.2d 105, 108-09 (2007) ("[S]ince the time for filing an appeal was not tolled by the improper Rule 59 motion, petitioners' notice of appeal **[*15]** on 6 January 2006

was not a timely appeal of the 27 September 2005 order and petitioners' remaining appeal from that order is dismissed.").

Plaintiff's appeal from the trial court's order denying his motion to reconsider is, however, properly before this Court. Nevertheless, since plaintiff's motion to reconsider was not a proper *Rule 59* motion, the trial court did not abuse its discretion in denying it. *See N.C. Alliance for Transp. Reform, 183 N.C. App. at 470, 645 S.E.2d at 108* (holding trial court properly denied *Rule 59(e)* motion when motion did not specify grounds for motion as required under *Rule 7(b)(1) of Rules of Civil Procedure* and motion was not proper *Rule 59(e)* motion).

In sum, we dismiss plaintiff's appeal from the trial court's order granting defendant's *Rule 60(b)* motion as untimely. Further, since plaintiff's motion to reconsider the order granting defendant's *Rule 60(b)* motion was not a proper *Rule 59* motion, we affirm the trial court's order denying plaintiff's motion to reconsider.

Dismissed in part and affirmed in part.

Judges McGEE and DAVIS concur.

Report per Rule 30(e).

In re Foreclosure of a Deed of Trust Executed by Garvey

Court of Appeals of North Carolina

November 6, 2014, Heard in the Court of Appeals; June 2, 2015, Filed

No. COA14-570

Reporter
772 S.E.2d 747; ***2015 N.C. App. LEXIS 452***

IN THE MATTER OF THE FORECLOSURE of a Deed of Trust executed by Michael James Garvey and Jane Holzer Godbrey a/k/a Emily J. Holzer a/k/a Jane Holzer and Jacqueline Holzer dated March 9, 2004, and recorded on April 14, 2004, in Book 311 at Page 347, Ashe County Registry; Substitute Trustee Services, Inc., Substitute Trustee.

Notice: PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.

Prior History: **[**1]** Ashe County, No. 12 SP 98.

Disposition: REVERSED AND REMANDED.

Core Terms

superior court, foreclosure, notice, foreclose, de novo hearing, power of sale, fact finding, conclusions of law, home loan, substitute trustee, mortgage, superior court's order, special proceeding, requirements, trust deed, default

Case Summary

Overview

HOLDINGS: [1]-A superior court's order allowing a foreclosure to proceed was reversed where N.C. Gen. Stat. § 45-21.16(d1) (2013) required it to conduct a de novo hearing and not just a de novo review, as a result N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 52(a), required it to make its own findings of fact as to each of the statutorily-required factors set forth in N.C. Gen. Stat. § 45-21.16(d), and the superior court had not done so; [2]-On remand, the superior court had to apply the correct standard by conducting a de novo hearing followed by entry of an order setting out its own findings of fact regarding the criteria set forth in § 45-21.16(d) and based on those findings of fact, making its own conclusions of law deciding whether to authorize a substitute trustee to proceed to foreclose on the property at issue.

Outcome

Order reversed and remanded.

LexisNexis® Headnotes

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN1 Upon the filing and service of a notice of hearing on a mortgagee's or trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court in the county where the land or any portion of it is situated shall conduct a hearing at which the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. The statute further provides: If the clerk finds the existence of (1) valid debt of which the party seeking to foreclose is the holder, (2) default, (3) right to foreclose under the instrument, (4) notice to those entitled to such under N.C. Gen. Stat. § 45-21.16(b), (5) that the underlying mortgage debt is not a home loan as defined in N.C. Gen. Stat. § 45-101(1b), or if the loan is a home loan under § 45-101(1b), that the pre-foreclosure notice under N.C. Gen. Stat. § 45-102 was provided in all material respects, and that the periods of time established by article 11 of this Chapter have elapsed, and (6) that the sale is not barred by N.C. Gen. Stat. § 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this article.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 The order of the clerk following the hearing set out in N.C. Gen. Stat. § 45-21.16(d) may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. N.C. Gen. Stat. § 45-21.16(d1) (2013). In reviewing the superior court's order under § 45-21.16(d1), the Court of Appeals of North Carolina first determines whether the superior court applied the proper scope of review. If so, then the Court of Appeals decides only whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.

Civil Procedure > General Overview

Governments > Courts > Rule Application & Interpretation

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN3 The Court of Appeals of North Carolina has previously held that a foreclosure under power of sale is a type of special proceeding, to which the North Carolina Rules of Civil Procedure apply.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

Governments > Courts > Rule Application & Interpretation

Civil Procedure > General Overview

HN4 Case law does not hold that the North Carolina Rules of Civil Procedure are inapplicable to foreclosures by power of sale initiated under N.C. Gen. Stat. § 45-21.16(d) and (d1).

Civil Procedure > Trials > Bench Trials

HN5 N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 52(a)(1), provides that in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment. It is well established that the purpose for requiring findings of fact and conclusions of law under N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 52, is to allow meaningful appellate review. According to the Supreme Court of North Carolina, N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 52(a), requires the trial judge to do the following three things in writing: '(1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly. Further, the Court of Appeals of North Carolina has explained that Rule 52(a) requires the findings to be specific findings of the ultimate facts established by the evidence, admissions and stipulations.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN6 Under N.C. Gen. Stat. § 45-21.16(d1) (2013), the superior court is required to make findings regarding whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied. In other words, the superior court must make specific findings of fact relating to (1) the existence of a valid debt of which the party seeking to foreclose is the holder, (2) the occurrence of a default, (3) the existence of a right to foreclose under the instrument at issue, (4) the giving of notice to those entitled to receive notice, (5) whether the mortgage debt is a home loan under N.C. Gen. Stat. § 45-101(1b) (2013), and (6) whether the sale is barred by N.C. Gen. Stat. § 45-21.12A (2013).

Governments > Courts > Judicial Precedent

HN7 While an unpublished opinion from a prior panel of the Court of Appeals of North Carolina with substantially similar facts may be persuasive to the case on appeal, it nonetheless carries no binding precedential weight.

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

Katherine S. Parker-Lowe for respondent-appellant.

Judges: GEER, Judge. Judges STEELMAN and STEPHENS concur.

Opinion by: GEER

Opinion

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

[*748] GEER, Judge.

Respondent Michael J. Garvey appeals from an order allowing petitioner, Substitute Trustee Services, Inc., to

proceed with foreclosure on certain real property that Mr. Garvey owned. On appeal, Mr. Garvey primarily argues that the superior court failed to conduct a de novo hearing as required by *N.C. Gen. Stat. § 45-21.16(d1)* (2013) and failed to make specific findings of ultimate fact and conclusions of law as required by *Rule 52(a)(1) of the Rules of Civil Procedure.* We agree that the superior court's order lacked sufficient findings of fact to comply with *Rule 52(a)(1)*. Moreover, we cannot determine from the order or the transcript whether the superior court conducted a de novo hearing as required by statute, as opposed to essentially engaging in an appellate review of the order of the clerk of superior court. We, therefore, reverse and remand for a de novo hearing and **[**2]** entry of an order compliant with *Rule 52(a)(1)*.

Facts

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

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

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

> have the right to appear at the hearing and contest the evidence that the clerk is to consider under *G.S. 45-21.16(d)*. To authorize the foreclosure the clerk **[**3]** must find the existence of (i) a valid debt of which the party seeking to foreclose is the holder, (ii) a default, (iii) a right to foreclose under the instrument, (iv) notice to those entitled to notice, and (v) that the underlying mortgage debt is not a home loan as defined in *G.S. 45-101(1b)*, or if the loan is a home loan under *G.S. 45-101(1b)*, that the pre-foreclosure notice under *G.S. 45-102* **[*749]** was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by *G.S. 45-21.12A*.

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

On 8 January **[**4]** 2013, Pam W. Barlow, Clerk of Superior Court for Ashe County, held a hearing on whether the substitute trustee was entitled to foreclose by power of sale. That same day, Ms. Barlow entered an order denying Mr. Garvey's motion to compel and motion for sanctions and granting Bank of America's motion for protective order. She also entered an order that day "find[ing] that the Substitute Trustee can proceed to foreclose under the terms of the . . . Deed of Trust and give notice of and conduct a foreclosure sale as by statute provided." On 15 January 2013, Mr. Garvey and Ms. Holzer filed a notice of appeal from the clerk's order authorizing the foreclosure. In addition, on 2 August 2013, respondents filed a second request for admissions and a second request for production of documents.

On 12 August 2013, a hearing was held as a result of respondents' notice of appeal in Ashe County Superior Court. At that hearing, Mr. Garvey appeared pro se. Petitioners submitted to the court a copy of the mortgage and what was represented to be the original ARN, as well as a "MILITARY AFFIDAVIT," an "AFFIDAVIT OF DEFAULT," and an "AFFIDAVIT OF PAYMENT HISTORY." Although Mr. Garvey appears to have prepared evidence **[**5]** to introduce to the superior court, he ultimately introduced no evidence other than

his own statement that Ms. Holzer did not receive written notice of the hearing.[1]

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

> It appear[s] to the Court that the Appeal is properly before this Court, that all parties have been given adequate and timely notice of the hearing on this matter, that Andrew Cogbill appeared and represented Bank of America, N.A. and Substitute Trustee Services, Inc., and that Michael J. Garvey appeared *pro se*.
>
> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:
>
> 1. That Bank of America, N.A. has satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and the Substitute Trustee is entitled to proceed with the foreclosure sale; and
>
> 2. That the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed.

On 21 August 2013, Mr. Garvey filed a pro se notice of appeal. Subsequently, Katherine S. Parker-Lowe gave notice of appearance on behalf of Mr. Garvey and filed an amended notice of appeal **[**6]** to reflect her representation.

Discussion

HN1 Upon the filing and service of a notice of hearing on a mortgagee's or trustee's request to foreclose pursuant to a power of sale, N.C. Gen. Stat. § 45-21.16(d) provides that the clerk of court in the county where the land or any portion of it is situated shall conduct a hearing at which "the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents." The statute further provides:

> If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose **[*750]** is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant **[**7]** to the provisions of this Article.

Id.

HN2 The order of the clerk following the hearing set out in N.C. Gen. Stat. § 45-21.16(d) "may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. *Appeals from said act of the clerk shall be heard de novo*." N.C. Gen. Stat. § 45-21.16(d1) (emphasis added). In reviewing the superior court's order under § 45-21.16(d1), this Court first determines whether the superior court applied the proper scope of review. *In re Watts, 38 N.C. App. 90, 94-95, 247 S.E.2d 427, 430 (1978)*. If so, then this Court decides only "'whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.'" *In re Foreclosure by David A. Simpson, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011)* (quoting *In re Adams, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010)*).

Mr. Garvey first argues on appeal that the superior court, in its order, failed to make adequate findings of fact and conclusions of law in violation of Rule 52(a)(1). The parties in this appeal all assume that Rule 52(a)(1) applies to proceedings under N.C. Gen. Stat. § 45-21.16(d1), and ***HN3*** this Court has previously held that "[a] foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply." *Lifestore Bank v. Mingo Tribal Pres. Trust, N.C. App. , , 763 S.E.2d 6, 9 (2014), disc. review denied,__N.C. __, 771 S.E.2d 306, 2015 N.C. LEXIS 297, 2015 WL 1809347 (Apr. 9, 2015)*. *See also* N.C. Gen. Stat. § 1-393 (2013) ("The Rules of Civil Procedure . . . are applicable to special proceedings, except as otherwise provided.").

Nonetheless, a recent **[**8]** unpublished opinion cited *Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641*

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

(1976), as establishing that "our Rules of Civil Procedure generally do not apply in the context of a foreclosure proceeding brought under N.C. Gen. Stat. § 45-21.16 . . . ." In re Foreclosure by Cornish, N.C. App. , 753 S.E.2d 743, 2013 N.C. App. LEXIS 1327, at *7, 2013 WL 6669278, at *3 (2013) (unpublished). *Furst* did in fact "reject plaintiffs' contention and the trial court's conclusion that the foreclosure of the deed of trust under the power of sale contained therein [was] an action or proceeding subject to the Rules of Civil Procedure." 29 N.C. App. at 255, 224 S.E.2d at 645. However, *Furst* did not address whether the action before it -- an "action to have defendants restrained and enjoined" from foreclosing by power of sale, id. at 250, 224 S.E.2d at 642 -- was a "special proceeding" to which the Rules of Civil Procedure would have applied under N.C. Gen. Stat. § 1-393. Significantly, after holding that the action before it was not subject to the Rules of Civil Procedure, the Court specifically "noted that the foreclosure in this case antedated the 1975 amendments to Article 2A of G.S. Chapter 45[,]" which enacted N.C. Gen. Stat. § 45-21.16(d).[2] Furst, 29 N.C. App. at 255, 224 S.E.2d at 645. Moreover, N.C. Gen. Stat. § 45-21.16(d1), governing the hearing before the superior court, was not enacted until 1993, 17 years after *Furst. See* 1993 N.C. Sess. Laws ch. 305, § 8. Thus, ***HN4*** Furst did not hold that the Rules of Civil Procedure are inapplicable to foreclosures by power of sale initiated under N.C. Gen. Stat. § 45-21.16(d) and (d1).

Lifestore Bank, therefore, controls, and the proceeding below was a special proceeding to which Rule 52(a)(1) applied. *See also* In re Cooke, 37 N.C. App. 575, 576, 246 S.E.2d 801, 803 (1978) ("[Petitioner] commenced this special proceeding . . . before **[*751]** the Clerk . . . seeking an order, *pursuant to* G.S. 45-21.16, allowing him to proceed to sell the property under the power of sale contained in the deed of trust." (emphasis added)). *Cf.* In re Foreclosure of Vogler Realty, Inc., 365 N.C. 389, 400, 722 S.E.2d 459, 467 (2012) ("Indisputably, a foreclosure by power of sale is a special proceeding." (Newby, J., dissenting)).

HN5 Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment." It is well established that "the purpose for requiring findings of fact and conclusions of law under Rule 52 [is] to allow meaningful appellate review[.]" N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 370-71, 649 S.E.2d 14, 24 (2007). According to our Supreme Court, Rule 52(a) "require[s] the trial judge to do the following three things *in writing*: '(1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly.'" Hinson v. Jefferson, 287 N.C. 422, 428, 215 S.E.2d 102, 106 (1975) (emphasis added) (quoting Coggins v. City of Asheville, 278 N.C. 428, 434, 180 S.E.2d 149, 153 (1971)). Further, this Court has explained that Rule 52(a) requires the findings to be **[**10]** "'*specific findings* of the ultimate facts established by the evidence, admissions and stipulations . . . .'" Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 708, 635 S.E.2d 442, 449 (2006) (quoting Quick v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982)).

HN6 Under N.C. Gen. Stat. § 45-21.16(d1), the superior court is required to make findings regarding whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied. In re Foreclosure of Carter, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). In other words, the superior court must make specific findings of fact relating to (1) the existence of a valid debt of which the party seeking to foreclose is the holder, (2) the occurrence of a default, (3) the existence of a right to foreclose under the instrument at issue, (4) the giving of notice to those entitled to receive notice, (5) whether the mortgage debt is a home loan under N.C. Gen. Stat. § 45-101(1b) (2013), and (6) whether the sale is barred by N.C. Gen. Stat. § 45-21.12A (2013). 219 N.C. App. at 372, 725 S.E.2d at 24.

Here, the only specific findings in the superior court's order were that "the Appeal is properly before this Court, [and] that all parties have been given adequate and timely notice of the hearing on this matter . . . ." After that single recitation of fact -- which was not even labeled as a finding of fact -- the superior court made no express conclusions of law, but rather moved directly to the decretal portion of the order. As part of the decree, the superior court concluded that "Bank of America, N.A. has **[**11]** satisfied the requirements set forth in N.C. Gen. Stat. § 45-21.16 and the Substitute Trustee is entitled to proceed with the foreclosure sale[.]" The superior court then ordered that "the Clerk of Superior Court's January 8, 2013 Order be and the same herewith is affirmed." In sum, the superior court only found one of the six criteria: that proper notice was given.

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[2] *See* 1975 N.C. Sess. Laws **[**9]** ch. 492, § 2 (enacting N.C. Gen. Stat. § 45-21.16(d)).

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

The sole case relied upon by Bank of America -- *In re Gilmore*, 206 N.C. App. 596, 698 S.E.2d 768, 2010 N.C. App. LEXIS 1582, 2010 WL 3220675 (2010) (unpublished) -- does not support its position.[3] In *Gilmore*, this **[*752]** Court reversed an order allowing foreclosure, noting that "the superior court's order lacks the requisite fifth finding required by revised N.C.G.S. § 45-21.16(d)." *Id.*, 2010 N.C. App. LEXIS 1582, at *8, 2010 WL 3220675, at *3. This Court **[**12]** pointed out that although the clerk's order contained a finding on that issue, "[i]n an appeal of a foreclosure order, a *de novo* hearing occurs, not just a *de novo* review of the Clerk's order. Therefore, the superior court's order does not merely 'affirm' the clerk's order, but replaces it as the order of foreclosure. As such, it must contain all the statutorily required findings, and the fifth finding is absent from the superior court's order." *Id.* (internal citation omitted).

In short, under N.C. Gen. Stat. § 45-21.16(d1), because the superior court was required to conduct a de novo hearing and not just a de novo review, the superior court, in this case, was required -- **[**13]** like the superior court in *Gilmore* -- to make its own findings of fact as to each of the statutorily-required factors set forth in N.C. Gen. Stat. § 45-21.16(d). Because the superior court did not do so, we must reverse and remand.

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

The superior court stated that Mr. Garvey was "entitled to a de novo *review* of the clerk's order," identified the proceeding as an "appeal," and explained that the court's "review is to review [the clerk's] findings and to determine whether or not there is sufficient evidence of each and every one of those." (Emphasis added.) These quotes suggest that the superior court was reviewing the clerk's order to determine whether **[**14]** it was supported by the evidence. Bank of America, however, points to the superior court's statement that its duty was "to review those findings [made by the clerk] in this proceeding, de novo. And if I find that all those things exist, then I'm *required to uphold her findings*." (Emphasis added.) Far from clarifying how the superior court viewed its role, the quote relied upon by Bank of America is itself unclear -- it contains indications both that the superior court understood that it was to make its own findings of fact and that the superior court believed it was reviewing the clerk's findings of fact.

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

Because of our disposition of this appeal, remanding for a de novo hearing before the superior court, we need not address Mr. Garvey's remaining arguments. Those **[**15]** arguments either address the hearing before the clerk, involve issues that should be addressed in the first instance by the superior court, or argue alleged errors that may not recur on remand.

REVERSED AND REMANDED.

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[3] We note that Bank of America contends that because the panel in *Gilmore* was presented with "a similar situation" as the one here, *Gilmore* "has precedential value to the material issue before this Court." To the contrary, ***HN7*** while an unpublished opinion from a prior panel of this Court with substantially similar facts may be persuasive to the case on appeal, it nonetheless carries no binding precedential weight. *See* Espinosa v. Tradesource, Inc., N.C. App. , n.9, 752 S.E.2d 153, 165 n.9 (2013) ("Unpublished opinions lack any precedential value and are not controlling on subsequent panels of this Court. N.C.R. App. P. 30(e)."), *disc. review denied*, ***N.C. , 763 S.E.2d 391 (2014)***.

Judges STEELMAN and STEPHENS concur.