IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1293

Filed: 3 October 2017

Wilson County, No. 14 CR 054745

STATE OF NORTH CAROLINA,

v.

RICKY LEE HINNANT, Defendant,

and

TERRENCE C. RUSHING, Bail Agent,

and

AGENT ASSOCIATES INSURANCE, L.L.C., Surety.

Appeal by Wilson County Board of Education from order entered 12 September 2016 by Judge John J. Covolo in District Court, Wilson County. Heard in the Court of Appeals 7 August 2017.

Schwartz & Shaw, P.L.L.C., by Kristopher L. Caudle and Rebecca M. Williams, for Wilson County Board of Education, Plaintiff-Appellant.

No brief for Ricky Lee Hinnant, Defendant-Appellee.

No brief for Terrence C. Rushing, Bail Agent.

No brief for Agent Associates Insurance, L.L.C., Defendant-Appellee Surety.

McGEE, Chief Judge.

The Wilson County Board of Education ("the Board of Education")[1] appeals from an order allowing a motion to set aside a bond forfeiture filed by Terrence C. Rushing ("Bail Agent") on behalf of Agent Associates Insurance, L.L.C. ("Surety"). Because the record on appeal indicates that, at the time Surety posted the bond, it had actual notice that defendant Ricky Lee Hinnant ("Defendant") had failed to appear in the same matter on at least two prior occasions, the trial court was prohibited by statute from setting aside the bond forfeiture. Accordingly, we reverse.

I. Background

Defendant failed to appear in Wilson County Criminal District Court on 23 October 2015 on charges of driving while impaired. As a result of Defendant's failure to appear, an order was issued for his arrest on 26 October 2015. On the order for arrest, a box was checked indicating "[t]his [was] [] [D]efendant's second or subsequent failure to appear on these charges." Defendant was served with the order for arrest on 6 January 2016 and released the same day on a secured bond posted by Bail Agent in the amount of $16,000.00. Defendant's 6 January 2016 release order also explicitly indicated "[t]his was [] [D]efendant's second or subsequent failure to appear in this case."

[1] "The Board's status as appellant in the instant case is due to its status as the ultimate recipient of the 'clear proceeds' of the forfeited appearance bond at issue herein, pursuant to Article IX, § 7 of the North Carolina Constitution." *State v. Dunn*, 200 N.C. App. 606, 607 n.1, 685 S.E.2d 526, 527 n.1 (2009) (citation omitted).

When Defendant again failed to appear in the same case on 15 April 2016, the trial court ordered the bond forfeited, with a final judgment date of 15 September 2016. Notice of the forfeiture was given to Bail Agent and Surety on 18 April 2016.[2]

Bail Agent filed a motion to set aside the forfeiture ("the motion to set aside") on 15 August 2016, on the basis that "[D]efendant ha[d] been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540[.]" At a 12 September 2016 hearing on the motion to set aside, Bail Agent presented a letter from Deputy J.D. McLaughlin ("Deputy McLaughlin") of the Wilson County Sheriff's Office, in which Deputy McLaughlin stated:

> On [26 April 2016] Terrance [sic] Rushing[,] a Bondsmen [sic] for Wilson County brought [Defendant] to [the] magistrate's office on case 14cr054745 to surrender. As I took [Defendant] to the jail I saw [Bail Agent] taking the surrender form to the Wilson County Jail Control Room to drop off.

The trial court found "that the moving party ha[d] established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture" and allowed the motion to set aside. The Board of Education appeals.

II. Motion to Set Aside Bond Forfeiture

[2] Notice of a bond forfeiture is effective when the notice is mailed. N.C. Gen. Stat. § 15A-544.4(d) (2015). "A forfeiture becomes a final judgment of forfeiture on the 150th day after notice of forfeiture is given, unless a motion to set aside the forfeiture is either entered on or before or is pending on that date." *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 48-49, 612 S.E.2d 148, 151 (2005) (citing N.C. Gen. Stat. § 15A-544.6).

The Board of Education contends the trial court was statutorily barred from setting aside the bond forfeiture in the present case and that no competent evidence supported the trial court's decision to set aside the bond forfeiture. We agree.

A. *Standard of Review*

In an appeal from an order setting aside a bond forfeiture, "the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted); *see also* N.C. Gen. Stat. § 15A-544.5(h) (2017) (providing in part that "[a]n order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."). Questions of law, including matters of statutory construction, are reviewed *de novo*. *See In re Hall*, 238 N.C. App. 322, 324, 768 S.E.2d 39, 41 (2014) (citation omitted) ("Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]").

B. *Analysis*

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [N.C. Gen. Stat.]

§ 15A-544.5." *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-544.5(a) (2017) (stating in part that "[t]here shall be no relief from a forfeiture except as provided in this section."). In addition to enumerating the circumstances in which a bond forfeiture must be set aside, including where "[t]he defendant has been surrendered by a surety on the bail bond as provided by [N.C.G.S. §] 15A-540," *see* N.C. Gen. Stat. § 15A-544.5(b)(3) (2017), the statute explicitly prohibits a court from setting aside a bond forfeiture "*for any reason in any case* in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f) (2017) (emphasis added). N.C.G.S. § 15A-544.5(f) further provides:

> Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated *on the defendant's release order* by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

Id. (emphasis added).

In *State v. Adams*, 220 N.C. App. 406, 725 S.E.2d 94 (2012), a surety challenged the trial court's finding that, pursuant to N.C.G.S. § 15A-544.5(f), the surety had actual notice that the defendant had failed to appear on two or more prior occasions before executing a bail bond. In that case, the surety "[did] not dispute that [the]

defendant's release order contain[ed] an explicit finding that [the] 'defendant was arrested or surrendered after failing to appear in a prior release order . . . two or more times in this case.'" *Id.* at 410, 725 S.E.2d at 96. The surety instead contended that it had conducted its own independent investigation and "determined that [the] defendant had only forfeited a bond once previously[.]" *Id.* The surety argued that because the court system's computerized database did not contain information about one of the defendant's prior failures to appear, "its agent should have been free to disregard the finding on the [defendant's] release order." *Id.*

This Court held that the "surety's reasoning [was] inconsistent with the plain language of N.C. Gen. Stat. § 15A-544.5(f)[,]" because under the statute, "it is only a defendant's failure to appear in court that is relevant to the judicial official who is entering a release order[,]" not the number of bond forfeitures or orders for arrest. *Id.* We concluded that, "[s]ince [the] defendant's release order included a finding . . . which reflected that he had previously failed to appear on two or more occasions, the trial court properly found that [the] surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f)." *Id.* at 410, 725 S.E.2d at 97.

Similarly, in the present case, both the 26 October 2015 order for Defendant's arrest and the 6 January 2016 release order explicitly indicated that "[t]his [was] [] [D]efendant's second or subsequent failure to appear" on these charges. Thus, applying the plain language found in N.C.G.S. § 15A-544.5(f), Bail Agent "had actual

notice before executing [the] bail bond that [] [D]efendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." Accordingly, the trial court lacked authority to set aside the forfeiture "for any reason." The evidence presented by Bail Agent at the hearing on the motion to set aside – Deputy McLaughlin's letter stating that Bail Agent had surrendered Defendant – was immaterial, because the language found in N.C.G.S. § 15A-544.5(f) is unequivocal. *See*, *e.g.*, *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) ("Courts must give an unambiguous statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (citation, quotation marks, and brackets omitted)).

According to the dissenting opinion, *Adams* is distinguishable from the present case because, in *Adams*, "no issue was asserted [before the trial court as to] whether the surety had seen, read, or had 'actual notice' of the [defendant's] release order[,]" because the surety "acknowledged that [it] had conducted an independent investigation to determine the veracity of the notation on the [defendant's] release order [indicating two or more prior failures to appear][.]" However, in *Adams*, this Court explicitly held that the efforts undertaken by the surety were inapposite with respect to the "actual notice" requirement in N.C.G.S. § 15A-544.5(f). The singular fact that "[the] defendant's prior failures to appear were noted on his release order

. . . supported the trial court's finding that [the] surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f)."[3] *Adams*, 220 N.C. App. at 411, 725 S.E.2d at 97.

The dissenting opinion also submits that the Board of Education did not meet its burden of showing that Surety or Bail Agent had *actually seen* Defendant's release order such that they were aware that a box was checked indicating Defendant's prior failures to appear. However, that is not what the statute requires and is unsupported by its legislative history. The version of N.C.G.S. § 15A-544.5(f) in effect prior to 1 January 2010 provided:

> In any case in which *the State proves* that the surety or the bail agent had *notice or actual knowledge*, before executing the bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

---

[3] This Court recently reached a similar conclusion in an unpublished decision, *State v. Daniel*, ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 968457 (2016). In *Daniel*, a surety "attached to its motion to set aside [documentation showing that the defendant] had been served with an order of arrest for failure to appear, thus establishing a basis for set aside under [N.C.G.S. §] 15A-544.5(b)(4)." *Id.*, 2016 WL 968457 at *2.

> However, also before the district court at the hearing [on the motion to set aside] was the [defendant's] second release order, indicating that [the defendant's] 22 October 2014 failure to appear was "a second or subsequent failure to appear" in the same matter. Under the plain language of subsection (f), this notation on the second release order constituted actual notice to the [s]urety that [the defendant] had previously failed to appear at least twice in the same matter, and, accordingly, deprived the district court of authority to set aside the bond forfeiture "*for any reason*[.]"

Id. (quoting N.C.G.S. § 15A-544.5(f)) (emphasis in original). While *Daniel* is not controlling precedent, we find its reasoning persuasive. *See, e.g.*, *State v. Foster*, 222 N.C. App. 199, 204, 729 S.E.2d 116, 120 (2012).

See N.C. Session Law 2009-437 (eff. 1 January 2010) (emphases added); *see also State v. Poteat*, 163 N.C. App. 741, 746-47, 594 S.E.2d 253, 256 (2004) (construing the term "notice," in version of N.C.G.S. § 15A-544.5(f) then in effect, "to include constructive, as well as actual notice[,]" and concluding professional bondsman "through the exercise of proper diligence could have readily discovered the earlier bond forfeiture notices, arrest warrants, and orders for [the defendant's] arrest, any of which would have indicated that [the defendant] had a second prior failure to appear.").

During the 2009-2010 legislative session, our General Assembly amended N.C.G.S. § 15A-544.5(f) in several ways that inform our holding in the present case. Significantly, the General Assembly eliminated the "burden of proof" previously imposed upon the State to show notice by a surety or bail agent. It also replaced the phrase "notice or actual knowledge" with the current requirement of "actual notice," and *expressly defined* "actual notice" *for purposes of the statute*. *See Pelham Realty Corp. v. Bd. of Transportation*, 303 N.C. 424, 434, 279 S.E.2d 826, 832 (1981) ("It is within the power of the [L]egislature to define a word used in a statute, and that statutory definition controls the interpretation of that statute." (citations omitted)). We do not, as the dissenting opinion contends, read the requirement of "actual notice" in N.C.G.S. § 15A-544.5(f) as encompassing "constructive" or "record" notice. We instead follow the exact wording of the statute as amended, under which a properly marked release order is *per se* sufficient evidence of "actual notice." The State is not

required to produce any additional evidence – including evidence that the surety or bail agent actually saw the release order before executing the bail bond. We stress that the question of whether a trial court, in applying N.C.G.S. § 15A-544.5(f), may consider evidence that, *notwithstanding a properly marked release order*, a surety or bail agent was prevented in some way from discovering a defendant's prior failures to appear is not presently before us.

We disagree with the dissenting opinion that "[n]othing in the record indicates whether the parties presented evidence at the hearing . . . of whether Surety or Bail Agent had 'actual notice' of the notation on the release order indicating Defendant's prior failures to appear." As discussed above, the Board of Education was not required to present any evidence of "actual notice" beyond the properly marked release order itself, which was contained in Defendant's case file. *See Adams*, 220 N.C. App. at 411, 725 S.E.2d at 97 ("The trial court's finding . . . that [the] defendant had failed to appear on two prior occasions was supported by competent evidence, because *[the] defendant's shuck demonstrated* that he had failed to appear [on two prior dates]." (emphasis added)). Moreover, the narration of the trial court proceedings submitted by the Board of Education – which Surety did not challenge – indicates that, during the hearing on the motion to set aside the forfeiture, Surety did not argue Bail Agent lacked notice of Defendant's prior failures to appear before executing the bond, and "[n]either the Board [of Education] nor Surety submitted any

sworn testimony, affidavits or additional documents to the court[.]"[4] Thus, the record on appeal shows that the *only* evidence before the trial court related to the issue of notice was the *exact* evidence required to show "actual notice" under N.C.G.S. § 15A-544.5(f).[5]

---

[4] No transcript of the trial court hearing on Surety's motion to set aside the forfeiture appears in the record before us. However, after filing the record on appeal and its appellate brief, the Board of Education filed a motion to amend the record on appeal to add a narration of the hearing, which is permitted by our Appellate Rules and encouraged when, as in the present case, an electronic transcript of the trial court proceedings is unavailable. *See In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) ("Where a verbatim transcript of the [trial court] proceedings is unavailable, there are means . . . available for [a party] to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing." (citation and internal quotation marks omitted)); *see also* N.C. R. App. P. 9(c)(1) (providing for narration of the evidence in record on appeal and, if necessary, settlement of record by the trial court on form of narration of the testimony). No objection was filed to the Board's motion to amend the record on appeal, and this Court allowed the motion on 7 August 2017.

[5] In *Daniel*, *see supra* n.3, the appellant school board asserted on appeal that, at the hearing on the motion to set aside, the surety "[had] argued that the bail agent had not actually seen the second release order in [the defendant's] file when [the bail agent] posted the bond and thus lacked actual notice that [the defendant] had twice previously failed to appear in the same matter." *Daniel*, 2016 WL 968457 at *3. However, the record did not include a transcript of the hearing, and the trial court's order did not include any finding of fact on that issue. "Thus, the *only* competent evidence at the motion hearing conclusively established that, pursuant to N.C. Gen. Stat. § 15A-544.5(f), the district court was barred from setting aside the bond forfeiture." *Id.* (emphasis in original). The dissenting opinion reads *Daniel* as suggesting this Court *would have considered* evidence, if included in the record on appeal, that a bail agent did not actually see a defendant's release order in determining whether there was "actual notice" under N.C.G.S. § 15A-544.5(f). However, as the dissenting opinion concedes, we emphasized in *Daniel* that the record on appeal contained no evidence regarding whether the bail agent had in fact seen the relevant release order before posting the bond. The same is true in the present case. No evidence in the record before us reveals any argument by Surety that it lacked "actual notice" because Bail Agent never saw Defendant's release order. Furthermore, the narration of the hearing submitted by the Board of Education – and *unopposed by Surety* – affirmatively indicates that, at the hearing, Surety (1) did not make such an argument and (2) did not offer any evidence to the trial court other than the letter signed by Deputy McLaughlin stating Bail Agent had surrendered Defendant on 26 April 2016.

While not dispositive, we note that Surety has taken no action at any stage of this appeal. The record on appeal was settled by operation of the Rules of Appellate Procedure after Surety took no action within the time allowed for responding to the proposed record compiled by the Board of Education. *See* N.C. R. App. P. 11(b); *see also In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (noting that "[i]f an opposing party contended the record on appeal was inaccurate in any respect, the matter could be resolved by the trial judge in settling the record on appeal." (citation and internal quotation marks omitted)). Thereafter, only the Board of Education filed an appellate brief. Surety also did not object to the motion filed by the Board of Education to amend the record on appeal by adding a narration of the trial court hearing. *See supra* n.4-5; *see also State v. Cobb*, 2017 WL 2945860 at *3 (2017).

III. <u>Conclusion</u>

The record as submitted by the Board of Education "contains documentary evidence which, on its face, does not support the ruling of the trial court." *Cobb*, 2017 WL 2945860 at *3. Accordingly, we vacate the trial court's order allowing the motion to set aside the forfeiture.

VACATED.

Judge INMAN concurs.

Judge TYSON dissents with separate opinion.

Judge TYSON, dissenting.

The majority's opinion correctly states the controlling statute to set aside a forfeiture, but erroneously concludes the substantial evidence presented by the Bail Agent to support his motion to set aside the forfeiture of an appearance bond, and the trial court's findings of fact thereon, "[were] immaterial because the language found in N.C.G.S. § 15A-544.5(f) is unequivocal." As a result, the majority's opinion concludes 'the trial court lacked authority to set aside the forfeiture 'for any reason.'" The Board of Education failed to present any evidence to supports its opposition to the Bail Agent's motion. I disagree with the majority opinion and respectfully dissent.

The record establishes Defendant was charged with driving while impaired in Wilson County File No. 14 CRS 54745, and that a secured appearance bond was set at $16,000, for which Bail Agent posted bond. Defendant failed to appear in court on the scheduled trial date of 15 April 2016. The trial court ordered forfeiture of the bond, and Bail Agent and Surety received notice of the forfeiture.

On 15 August 2016, Bail Agent timely moved to have the bond forfeiture set aside on the basis that "[D]efendant ha[d] been surrendered by a surety on the bail bond as provided by [N.C. Gen. Stat. §] 15A-540[.]" The Bail Agent's motion and evidence of his surrender of Defendant to Deputy McLaughlin established a *prima facie* showing under the statute that Defendant had been surrendered and the Surety and Bail Agent were entitled to relief from forfeiture. N.C. Gen. Stat. § 15A-540 (2015).

The Board of Education objected to Bail Agent's motion to set aside the forfeiture of the bond. The Board of Education has appealed from the trial court's order of relief from forfeiture, which was based on the trial court's finding of fact that Bail Agent had established the existence of one or more statutorily-permissible reasons for setting aside the bond forfeiture. The proper issue before this Court, and not addressed by the majority's opinion, is whether the findings of fact and conclusions of law in the trial court's order were supported by evidence adduced at the hearing conducted by the trial court.

I. Standard of Review

"The standard of review on appeal where a trial court sits without a jury is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Lazaro*, 190 N.C. App. 670, 671, 660 S.E.2d 618, 619 (2008) (citation omitted). N.C. Gen. Stat. § 15A-544.5(h) states that an "order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."

The Board of Education is the appellant and "it is generally the *appellant's duty and responsibility* to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to

this Court." *King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) (internal quotation omitted) (emphasis supplied).

It is undisputed that "[i]n North Carolina, forfeiture of an appearance bond is controlled by statute." *State v. Robertson*, 166 N.C. App. 669, 670, 603 S.E.2d 400, 401 (2004). "If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2015). "The exclusive avenue for relief from forfeiture of an appearance bond . . . is provided in G.S. § 15A-544.5. The reasons for setting aside a forfeiture are those specified in subsection (b)[.]" *Robertson*, 166 N.C. App. at 670-71, 603 S.E.2d at 401. N.C. Gen. Stat. § 15A-544.5 "clearly states that 'there shall be no relief from a forfeiture' except as provided in the statute, and that a forfeiture 'shall be set aside for any one of the [reasons set forth in Section (b)(1-6)], and none other.' " *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

II. N.C. Gen. Stat. § 15A-544

N.C. Gen. Stat. § 15A-544.5 provides in relevant part that the procedure governing a surety's request to have a bond forfeiture set aside is as follows:

> (1) . . . [A]ny of the following parties on a bail bond may make a written motion that the forfeiture be set aside: . . .

> Any surety. . . . a bail agent acting on behalf of an insurance company. The written motion shall state the reason for the motion and attach to the motion the evidence specified in subsection (b) of this section.
>
> (2) The motion shall be filed in the office of the clerk of superior court[.] . . . The moving party shall, under G.S. 1A-1, Rule 5, serve a copy of the motion on the district attorney for that county and on the attorney for the county board of education.
>
> (3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.
>
> (4) If neither the district attorney nor the attorney for the board of education has filed a written objection to the motion by the twentieth day after a copy of the motion is served by the moving party . . . the clerk shall enter an order setting aside the forfeiture, regardless of the basis for relief asserted in the motion, the evidence attached, or the absence of either.
>
> (5) If either the district attorney or the county board of education files a written objection to the motion, then . . . a hearing on the motion and objection shall be held in the county, in the trial division in which the defendant was bonded to appear.
>
> (6) If at the hearing the court allows the motion, the court shall enter an order setting aside the forfeiture.
>
> (7) If at the hearing the court does not enter an order setting aside the forfeiture, the forfeiture shall become a final judgment of forfeiture[.]

> (8) If at the hearing the court determines that the motion to set aside was not signed or that the documentation required to be attached pursuant to subdivision (1) of this subsection is fraudulent or was not attached to the motion at the time the motion was filed, the court may order monetary sanctions against the surety filing the motion, unless the court also finds that the failure to sign the motion or attach the required documentation was unintentional. . . .

N.C. Gen. Stat. § 15A-544.5 prohibits a court from setting aside a bond forfeiture "for any reason in any case in which the surety or the *bail agent had actual notice before executing a bail bond* that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f) (emphasis supplied). N.C. Gen. Stat. § 15A-544.5(f) further provides:

> Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

The Board of Education, as appellant, failed to include any audio recordings or transcripts of testimony presented at the hearing in the record on appeal. The Board of Education tendered a *post hoc* narrative summarizing the events of the bond forfeiture hearing. Addressing whether the trial court was statutorily prohibited by

N.C. Gen. Stat. § 15A-544.5(f) from granting the motion to set aside the forfeiture, the narrative asserts:

> [Board's attorney] further stated that the bond at issue was a Bond C and that Surety had actual notice that the criminal defendant had failed to appear on two or more previous occasions in the case. [Board's attorney] stated that, based on these facts, notwithstanding any grounds to set aside under § 15A-544.5(b)(3), the court was statutorily prohibited from granting the motion to set aside for any reason pursuant to N.C. Gen. Stat. § 15A-544.5(f).

Statements of counsel to the court are not competent evidence to support or reverse the trial court's order. *See State v. Crouch,* 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) (holding "counsel's statements were not competent evidence[.]"). The majority opinion characterizes N.C. Gen. Stat. § 15A-544.5(f) as being "unambiguous" regarding when a surety or bail agent has actual notice of the release order. I disagree.

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").

Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health & Human Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

"[T]he language of a statute will be interpreted so as to avoid an absurd consequence. A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms." *Hobbs v. County of Moore*, 267 N.C. 665, 671, 149 S.E.2d 1, 5 (1966) (citations and quotation marks omitted).

The majority opinion interprets the statutory language of "[a]ctual notice . . . shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official" in the statute to conclude a bail agent has received "actual notice" a defendant has failed to appear on two or more prior occasions, if the box checked on the release order so indicates, regardless of whether the bail agent actually saw the release order. Interpreting "actual notice," as the majority opinion does, would change "actual notice" to mean "constructive" or "record" notice. N.C. Gen. Stat. § 15A-544.5(f). "Actual" is defined as "existing in fact or reality[.]" *The American Heritage College Dictionary* 77 (2d ed. 1982). The phrase "actual notice" has been defined as "the actual awareness or direct notification of a specific fact or proceeding to a person." USLegal, *Definitions*, "Actual Notice Law and Legal Definition," http://definitions.uslegal.com/a/actual-notice/ (last visited Sept. 11,

2017).

"[T]o charge one with notice, the activating information known to the party sought to be charged must ordinarily be such as may reasonably be said to excite inquiry respecting the particular fact or facts necessary to be disclosed in order to fix the party charged with notice." *Perkins v. Langdon*, 237 N.C. 159, 168, 74 S.E.2d 634, 642 (1953) (citations omitted). "[I]mplicit in the principles that underlie the doctrine of constructive notice is the concept that before one is affected with notice of whatever reasonable inquiry would disclose, the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry." *Id.* at 168, 74 S.E.2d at 642 (citations omitted).

The General Assembly's specific choice of "actual notice," and not "constructive" or "record" notice, in N.C. Gen. Stat. § 15A-544.5(f) is evident from the legislative history. Before 1 January 2010, N.C. Gen. Stat. § 15A-544.5(f) read as follows:

> (f) No More Than Two Forfeitures May Be Set Aside Per Case. -- In any case in which the State proves that the surety or the bail agent had *notice or actual knowledge*, before executing a bail bond, that the defendant had already failed to appear on two or more prior occasions, no forfeiture of that bond may be set aside for any reason.

N.C. Gen. Stat. § 15A-544.5(f) (2009) (emphasis added), *amended by* 2009 N.C. Sess. Laws 2009-437.

This Court had interpreted "notice" in the prior statute to encompass "constructive," as well as "actual," notice to comply with the former version of N.C. Gen. Stat. § 15A-544.5(f). *See State v. Poteat,* 163 N.C. App. 741, 746, 594 S.E.2d 253, 256 (2004) ("We conclude that construing the term 'notice' in N.C. Gen. Stat. § 15A-544.5(f) to include constructive, as well as actual, notice is in harmony with this statute's purpose.")

To construe "actual notice" in the current version of N.C. Gen. Stat. § 15A-544.5(f) to encompass "constructive" or "record" notice would create an "absurd consequence" in light of the plain language of the statute and the legislative history showing the statute was amended to specifically require the bail agent to have received "actual notice" versus the more general "notice or actual knowledge." *See* 2009 N.C. Sess. Laws 2009-437 (amending "notice" in § 15A-544.5(f) to "actual notice"); *Hobbs*, 267 N.C. at 671, 149 S.E.2d at 5 ("[T]he language of a statute will be interpreted so as to avoid an absurd consequence.").

The majority opinion cites two cases to support its interpretation of N.C. Gen. Stat. § 15A-544.5(f), *State v. Adams* and *State v. Daniel*, an unpublished case. Neither case controls the issues before us.

This Court held in *State v. Adams*, 220 N.C. App. 406, 410-11, 725 S.E.2d 94, 97 (2012), competent evidence was presented and supported the trial court's finding

that the surety had received "actual notice," as defined by N.C. Gen. Stat. § 15A-544.5(f), because the defendant's prior failures to appear were noted on his release order. However, the majority opinion's use of *Adams* to read "actual notice" as encompassing "constructive" or "implied" notice in N.C. Gen. Stat. § 15A-544.5(f) to vacate the trial court's order before us is inapposite.

In *Adams*, no issue was asserted whether the surety had seen, read, or had "actual notice" of the release order. *See Adams* at 410, 725 S.E.2d at 96. The surety acknowledged that its bail agent had conducted an independent investigation to determine the veracity of the notation on the release order that "defendant had already failed to appear on two or more occasions" before the surety executed the defendant's surety bond. *Id.* at 409, 725 S.E.2d at 96. *Adams* does not support the conclusion to vacate here.

This Court in *State v. Daniel,* ___ N.C. App. ___, 784 S.E.2d 237, 2016 WL 968457 (2016) (unpublished) held the district court was deprived of authority to set aside a bond forfeiture, where the defendant's release order indicated the defendant had failed to appear on two or more occasions. *Daniel*, 2016 WL 968457 at *2. However, in *Daniel*, this Court implied it would have considered evidence that the surety's bail agent did not see the defendant's release order before the bail agent posted bond as pertinent to the issue of whether the surety had "actual notice". *Id.*

This Court in *Daniel* noted that competent evidence indicating the bail agent had not seen the release order was not included in the record and declined to address whether the surety had received actual notice on that basis. *Id.* *3. *Daniel* is also an unpublished case and does not constitute binding precedent upon this Court. N.C. R. App. P. 30(e)(3).

The Board of Education has not met its statutory burden to produce evidence to show Surety or Bail Agent had received "actual notice" of the release order so that they were apprised that one of the boxes on it was checked to indicate, this was "defendant's second or subsequent failure to appear in this case." *See* N.C. Gen. Stat. § 15A-544.5(f) ("Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official").

Given the total absence of anything in the record, other than counsel's statements, of the evidence presented to the trial court showing whether the Surety or Bail Agent had received "actual notice" of the release order, any conclusion reached by this Court regarding the merits of the trial court's order will, of necessity, be based upon implication, assumption, or speculation. The majority opinion's holding is based upon the presumption that the trial court erred by not finding Bail Agent had actual

notice in the absence of any evidence of proof. This is an intolerable burden for an appellee to meet and is wholly inconsistent with our standard of review.

The long-standing rule of our appellate courts demands we not presume error upon a silent record. "[W]here the record is silent on a particular point, it will be presumed that the trial court acted correctly." *State v. Thomas*, 344 N.C. 639, 646, 477 S.E.2d 450, 453 (1996) (citations omitted).

On 17 August 2016, the Board of Education filed its objection to the Bail Agent's motion, and a hearing was scheduled for 12 September 2016. Following the hearing, Judge Covolo entered an order allowing Surety's motion and setting aside the bond forfeiture, based upon a finding of fact and conclusion of law that:

> Upon due notice, a hearing was held on the above Objection to the Motion To Set Aside Forfeiture. The Court finds that on the "Date of Bond" shown on the reverse the moving party named above executed a bond for the defendant's appearance in the case(s) identified[.] . . . On the "Failure to Appear" date shown on the reverse, the defendant failed to appear to answer the charges in the case(s), and forfeiture of the bond was entered on that date. Notice of forfeiture was mailed to the moving party
>
> . . . .
>
> The Court finds . . . that the moving party has established one or more of the reasons specified in [N.C. Gen. Stat. §] 15A-544.5 for setting aside that forfeiture
>
> . . . .

The above Motion is allowed and the forfeiture is set aside.

"[I]t is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King*, 146 N.C. App. at 445-46, 552 S.E.2d at 265 (internal quotation omitted). Instead, "[w]here the record is silent on a particular point, we presume that the trial court acted correctly." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488-89, 586 S.E.2d 791, 795 (2003); *see also Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (noting "the well established [sic] principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court"). "The rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal." *Hocke v. Hanyane*, 118 N.C. App. 630, 635, 456 S.E.2d 858, 861 (1995) (citation, alteration, and quotation marks omitted).

The only relevant issue on appeal before this Court is whether the trial court's findings of fact and conclusions of law in the order were properly entered in light of the competent evidence adduced at the hearing. The Board of Education produced no evidence, to contradict the Bail Agent's competent and substantive evidence at the hearing, only statements of counsel.

The Board's *post hoc* narrative summarizing the events of the hearing contains nothing to show the Board of Education presented any evidence of the Bail Agent or Surety having received "actual notice" or seeing the release order before executing the bail bond. In the course of settling the record on appeal, pursuant to N.C. R. App. P. 11, the Board of Education could have submitted an affidavit from the appellant's trial counsel regarding the evidence the Board and Surety submitted at the hearing, or if the parties agreed on the evidentiary history of this matter, they might have stipulated to the identity of the documents or testimony offered at the hearing. Alternatively, the appellant could have filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b) (2015), asking the court to "amend its findings or make additional findings[.]"

Nothing in the record indicates whether Surety or Bail Agent had received "actual notice" of the notation on the release order indicating Defendant's prior failures to appear. "'The longstanding rule is that there is a presumption in favor of regularity and correctness in proceedings in the trial court, with the burden on the appellant to show error.' Unless the record reveals otherwise, we presume 'that judicial acts and duties have been duly and regularly performed.'" *In re A.R.H.B.*, 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007) (quoting *L. Harvey & Son Co. v.*

Jarman, 76 N.C. App. 191, 195-96, 333 S.E.2d 47, 50 (1985), and *Lovett v. Stone*, 239 N.C. 206, 212, 79 S.E.2d 479, 483 (1954)). It was the Board's duty as the appellant,

> and not the duty of this Court, to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to "create an appeal for" [Appellant]. . . . . "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. Th[ese] [arguments are] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6)."

Sanchez v. Cobblestone Homeowners Ass'n., __ N.C. App. __, __, 791 S.E.2d 238, 245-46 (2016) (citations omitted).

We should not reach a contrary conclusion on the validity of the trial court's order, and vacate that order, without a record of what evidence the parties presented at the hearing regarding the Bail Agent or Surety's "actual notice."

III. Conclusion

In the absence of any record of the proceedings before the trial court showing what evidence was, or was not, presented, the Board has failed to meet its burden to show error in the trial court's order. This Court has, until now, consistently followed the well-established rule and has not presumed that the trial court has erred and vacated its order in the absence of a showing of any error by the appellant. *Granville*, 160 N.C. App. at 488-89, 586 S.E.2d at 795.

The Board of Education has failed to meet its burden on appeal to show error, or to rebut the Bail Agent's *prima facie* showing of entitlement to relief under the statute based upon competent evidence. The record contains no evidence upon which we can undermine the validity of the trial court's ruling. The majority's opinion avoids any analysis of the Board's burden on appeal.

Our consistent precedents require us to presume the trial court's findings of fact and conclusions of law are properly supported and correct, and to affirm the trial court's order. *See id.*; *see also In re A.R.H.B.*, 186 N.C. App. at 219, 651 S.E.2d at 253; *King*, 146 N.C. App. at 445-46, 552 S.E.2d at 265; *Hocke,* 118 N.C. App. at 635, 456 S.E.2d at 861. For these reasons, I vote to affirm the trial court's order and respectfully dissent.